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The ‘importance of staying put’: third country nationals’ limited intra-EU mobility rights

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ABSTRACT
The cautious approach of European Legislators towards the integration of non-EU third country nationals (TCNs), mirrored in the provisions of Long-Term Residence Directive 2003/109/EC, has brought about the creation of ‘spatial temporal waiting zones’. Migrants are confined in both place and time before being able to access the (as of yet, very limited) mobility rights conferred upon them by the Directive. Restricted mobility rights for TCNs can seriously impinge on the economic growth of the EU. This paper reveals three ‘faults’ of the current system. First, we show how TCNs already evade ‘temporal borders’ by moving across geographical ones to take up employment before being entitled to do so under the provisions of the Directive. Next, we show how formal integration in one member state (MS), paradoxically, opens the door to another MS and, third, how a second MS fights off these near-EU citizens. Finally, we observe the importance of taking the phenomenon of spatial and temporal waiting zones into account, not only when structuring intra-EU mobility policies for TCNs but also when addressing the issue of the (labour market) integration of recent arrivals: soon they too will become European long-term residents.

1. Introduction
If a Syrian biochemist with refugee status in Germany qualified for a suitable position in neighbouring country France, he could, under EU law, not apply for the job without losing his protective status. This legal status in Germany does not allow him to work in France. Although the EU labour market is a common market for EU nationals and labour market integration of newly arrived refugees is central to many policy debates today (Poptcheva and Stuchlik 2015; Papademetriou, Benton, and Banulescu-Bogdan 2017), yet the borders between the labour markets of the EU member states (MSs) are tightly locked for most non-EU citizens. Only after a five-year wait, and upon completing national integration programmes, can the refugee apply for a long-term residence (LTR) permit under Directive 2003/109/EC and acquire an, albeit still very limited, intra-EU mobility right.

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This intra-EU mobility right for third country nationals (TCNs) is at centre stage in this article. At the time of writing, the right to pursue economic activities in another EU MS, to cross over into the EU’s internal market, is a ‘reward’ for staying put for five years and integrating oneself into a single MS. In so far as TCNs have the ambition to migrate on, following one’s ambitions into another MS is, as of yet, not a means to integration in the EU: refugees, as well as persons receiving subsidiary protection (in accordance with the Qualification Directive 2011/95/EU), are ‘trapped’ in one particular MS (Den Heijer, Rijpma, and Spijkerboer 2016). Under the LTR Directive, this is no different for family migrants or ‘regularised’ labour migrants. Today, the LTR Directive conflates all categories of TCNs to form a homogeneous group of people who have the same set of rights, irrespective of their personal migratory goals. If it is up to the European Commission, this will soon change.

The article contributes to various legal and political science debates on the integration of LTRs, and presents new data on the current use of the mobility right under the LTR directive. Our findings challenge the concept of integration as proposed by the LTR directive. We show how the Directive creates a ‘spatial–temporal waiting zone’ that criminalises migrants’ cross-border economic activity within the EU, increases migrants’ vulnerability, and may even be counterproductive to the aim of integration. We observe, thus, a gap between the current focus on the short- and medium-term integration of new arrivals into national labour markets, and the neglect of (policy dealing with) the integration of Europe’s long-term residents. Soon the new arrivals will be long-term residents.

We start with our data and methods (Section 2) and theoretical concepts of space and time (Section 3) followed by a discussion of the EU integration policy debate and LTRs’ mobility rights (Section 4). The European Commission’s future plans with respect changes to mobility rights are discussed (Section 5) in the light of their current use, mapped in a case-study of Italian LTRs (Section 6) who move to the Netherlands (Section 7). In the concluding section (Section 8) we discuss our findings.

2. Data and methods

Our socio-legal research started out as an ‘intellectual puzzle’ (Manson 2002), empirically studying the intra-EU mobility scheme under the LTR Directive to illuminate an interesting and unexpected phenomenon (Massoud 2014). Our study is a follow-up to our investigation into the Dutch immigration authorities’ (INS) decisions on the entry of migrant entrepreneurs from outside the EU (De Lange 2016). This study was conducted in 2015–2016 on 4,674 decisions taken by the Dutch INS between 1 July 2013 and 30 June 2015, and included 82 decisions on LTRs from other EU MSs. The range of study was then extended into the second half of 2016 to include a total of 116 decisions on applications made by LTRs for entry as entrepreneurs. It became clear that LTRs from Italy and Spain made up the majority of migrants using the LTR Directive mobility scheme. A third data set was available to us, taken from research conducted in 2014–2016 at the Dutch Inspection of Social and Employment affairs on unauthorised migration and labour in the Netherlands, which showed that some migrants working without authorisation in the Netherlands were legally resident in Italy and Spain, but not (yet) eligible for an LTR permit (Berntsen, De Lange, and Rijken forthcoming). Telephone interviews and email contact between September 2014 and January 2017 with four Dutch immigration
lawyers, of whom two are frequently involved in advising LTRs, provided a fourth source of data by laying bare the social networks through which some migrants moved. The lawyers, unable to arrange contact with the migrants for purposes of this research, responded that their clients, both TCNs and those awaiting LTR-status in the Netherlands, worked long hours running their businesses and were not inclined to (make time to) talk to us. Our experience researching LTR mobility can thus be compared to researching unauthorised migration (Düvell, Triandafyllidou, and Vollmer 2010). Our investigation was then expanded to include a fifth source – the migratory framework and regulations in one of the countries of first residence, Italy – in order to uncover, inasmuch as possible, various push factors. On the Italian side, enquiry was carried out between July and October 2016, by interviewing both migrants (5 in total) and lawyers (4 in total). Of those migrants we were able to talk to, four had arrived in Italy very recently, by boat. All of them had asked for international protection, and were awaiting either a first decision on their cases, or for a decision on their appeals. One migrant was a long-time resident of Italy who had an ‘irregular’ status. These five individuals, all males, were between 19 and 30 years of age. All the semi-structured interviews were carried out in person. Amongst the lawyers, one worked in the central part of Italy. She dealt mainly with new arrivals and their initial applications for international protection. The other three, practising in or around Milan, had access to a more stable and well-integrated portion of the migrant population, and mainly helped their clients to apply for renewals of working permits. Two lawyers were interviewed in person and two were interviewed over the phone. The anecdotal findings were backed up by desk research on Italian migration legislation.

We uncovered what would appear to be a small, but significant and under-researched path of (semi)regular movement of TCNs within the Schengen area. An analysis of the LTR Directive, EU Court of Justice case law and other relevant EU policy documents complements the empirical sources.

The very nature of the migratory path discussed in this paper explains the variety of sources relied upon to collect the presented data. Since, according to our findings, the migration flow tends to head north, research at the stream’s source could only account for ‘traces’ of those who had been there but had already left, of those who were still there but had plans to move, and of those who could do no more than observe this phenomenon taking place. On the Italian side, in other words, it is difficult to get access to written records of any kind (case law, case files and so forth) – if indeed any exist – because the people who are their subject aim to move away, possibly outside the law, and thus leave as little trace of their presence as possible. Such records are, instead, easier to find at the other end, i.e. where migrants decide to ‘stay’, in our case the Netherlands.

This contribution is, thus, not a study of regularisation (on the topic of regularisation in general, see Chauvin, Garcés-Mascarañas, and Kraler 2013; Chauvin and Garcés-Mascarañas 2014; De Bruycker 2000; Papademetriou 2005; Triandafyllidou 2010); or regularisation in Italy per se, discussed by others (see for instance Ambrosini 2013; 2017; Barbagli, Colombo, and Sciortino 2004; Bonizzoni 2016; Finotelli and Arango 2001; Finotelli and Sciortino 2009; Ribas Mateos 2004). Nor does this project provide a comparison between the migratory legislation of Italy and the Netherlands. Instead, we are illustrating a migratory path inferred from empirical findings that ‘[is] useful not so much in itself, as because it can provide circumstantial evidence for underlying processes or casual mechanisms which are not explicitly manifest in the empirical patterns themselves’ (Manson
The ‘underlying process’ we aim to provide a new perspective on by mapping the secondary movement of TCNs within the framework of the Directive 2003/109/EC is the integration of migrants, new arrivals and those who stay long-term, irrespective of their reasons for taking up legal residence in the EU, whether as refugees, as persons receiving subsidiary protection, as regularised migrant workers, family migrants or for any other reason.

3. Temporal and spatial waiting

Within the current EU legal framework for TCN, there is no such thing as a linear development of rights, on the contrary, migrants move in and out of rights by changing legal statuses (Ruhs and Anderson 2010; De Lange 2015; Paul 2015). Moving into another legal status with, for instance, full access to a national labour market, means crossing a legal ‘border’ rather than a physical one (Mezzadra and Neilson 2013). Law creates such borders. Being able to cross into another status usually requires waiting time (Anderson 2010) or working time (Mantu 2013). Spatial constraints are usually discussed in relation to restricted (work) permits for geographical areas within a country (like in Spain, Finotelli and Kolb 2017). Anderson then explains how such constraints create migrant precariousness and, finishing the argument, how law creates precariousness. Law created different migration and labour market statuses which produce ‘discrepant temporalities of waiting’ (Mezzadra and Neilson 2013, 132). The LTR and its mobility regime for TCNs impose such a legally constructed temporal and spatial waiting zone within a geopolitical border.

This ensnarement of both economic and asylum migrants alike (Den Heijer, Rijpma, and Spijkerboer 2016) is seldom identified as such in other studies. Others have focused on EU frontiers (Van Houtum and Bueno Lacy 2015) or on the multiple borders migrants must cross to gain full access to an EU MS. (Axelsson, Malmberg, and Zhang 2015; Paul 2015; Axelsson 2017). In our study of the LTR, however, the external EU border is taken out of the equation by the first MS granting admission for whatever reason and this is an ensnarement of both economic and asylum migrants alike (Den Heijer, Rijpma, and Spijkerboer 2016). Counter to the notion of spatial waiting is that the Schengen regime of free movement within the EU for TCNs allows limited movement during three months of a six-month period and is hardly controlled (Guild 2011). Despite being, by definition, long-term presences within national borders, Italy hardly targets these migrants with specific integration or job-placement polices. In the absence of such policies, migrants rely on their own networks and agency and either wait for the mobility right to kick in, or, as we will show, negotiate the limitations posed by the LTR Directives’ scheme – inactively waiting in one MS while simultaneously actively participating, albeit precariously as ‘partially irregular’ labour migrants, in another MS.

4. The EU and its long-term residents

4.1. Integration and directive 2003/109/EC

While the EU established EU citizenship for its nationals, the growing population of TCNs working and residing in Europe remained at the margin. It was only during the late 1990s
and after the adoption of the Treaty of Amsterdam on 1 May 1999 that European Institutions expressly set about to create a specific framework to govern the status and intra-EU mobility of TCNs (Kostakopoulou 2002; Wiesbrock 2012; Acosta Arcarazo 2015).

The Directive on the status of TCN, 2003/109/EC was adopted in November 2003. Under the original Commission proposal (COM (2001) 123 final), the only requirement for a LTR permit was continuous legal residence in the MS for a period of five years, and a sufficiently stable financial situation. Yet, the final version allows States to ‘require TCNs to comply with integration conditions, according to national law’ (article 5.3). In other words, while aimed at the ‘integration of TCNs’, the Directive thus also requires them to meet certain ‘integration conditions before the Long-Term Residency Permit can be granted, in practice reflecting the ambiguity of political debate on the legal Others’ integration within the European space (Iglesias Sanchez 2009; Acosta Arcarazo 2015). Recent developments in jurisprudence (ECJ, C-579/13 Pé-S of 4 June 2015) and practice show that the LTR permit by no means provides unassailable proof of integration in at least one MS.

Perhaps an additional consequence of the fundamental ambiguity running through the Directive is that its impact has been less significant than expected. In its 2011 evaluation of the outcome wrought by the Directive and its implementation, the Commission could only state that ‘the weak impact of the LTR Directive in many Member States is to be deplored’ (COM (2011) 585). The Commission identified one particularly pressing problem as follows: ‘the available data indicates that only small numbers of LTR TCNs have made use of this new avenue for mobility rights within the EU so far (fewer than fifty per Member State)’ ((COM (2011) 585, 10). We will now focus our attention on this issue, use of the intra-mobility rights of TCNs as regulated by article 14 of the Directive.

4.2. TCNs’ intra-mobility rights

As emphasised in the literature (Peers 2004; Boelaert-Suominen 2005; Halleskov 2005; Carrera and Wiesbrock 2010), there is a strong correlation between integration and free movement rights: it was precisely because of freedom of movement that the whole idea of equality of treatment and participation was extended to more and more aspects of nationals’ lives, thus fostering their integration as European citizens within the Schengen area.

Conversely, a weaker posture on the idea of integration found its way into Directive 2003/109/EU. The wording of article 14 of the Directive confirms that TCNs enjoy only limited mobility rights, and mirrors the cautious and ambiguous approach towards their integration into the EU. According to the provision, once TCNs have acquired an LTR permit in their first country of residence, they also acquire the right to move to a second MS for economic activities to be conducted as employed or self-employed workers, as students, or otherwise. Yet, the second MS may have its own ways of limiting a TCN’s access to its labour market: first of all, it may examine its labour market and decide to apply national procedures regarding requirements for filling vacancies or for exercising economic activities; second, it may give preference to EU nationals and other TCNs assimilated to the position of EU nationals; third, if it already had quotas on TCNs’ access to its labour market when the Directive was adopted, it can maintain and apply them to TCNs; and finally, it can restrict access to employed activities other than
those for which they have been granted their residence permit for a period not exceeding 12 months (article 21(2) Dir. 2003/109).

No later than three months after entering the second MS (the period of visa-free circulation in the Schengen area), the long-term resident shall apply for a residence permit in the second MS (article 15 Dir. 2003/109). Applicants may be required to provide evidence that they have sufficiently stable and regular resources to avoid recourse to the social assistance of the MS. Although the second MS may (again) require TCNs to comply with integration measures, this condition shall not apply if they already had to comply with integration conditions in order to be granted long-term resident status in the first place – although they may be required to attend language courses.

Due to the limitations and conditions and the broad discretion enjoyed by the MSs in this field, the mobility of TCNs within the EU is limited (see also: European Migration Network 2013). Compared with labour migration of TCNs from outside the EU (whether or not skilled), MSs pay hardly any policy attention to LTRs as an easily accessible group of (skilled) mobile workers. The TCNs’ mobility restraints represent a significant challenge, both from a political and an economic point of view: as noted, reduced mobility rights for TCNs can seriously diminish the economic opportunities for, and integration of, a large group of migrants stuck within a MS, and this might only serve to encourage their long-term dependency on that MS’s social welfare system. Proposals have therefore been advanced to try and enhance the intra-EU mobility of TCNs. One such suggestion is to ‘open the right to move after […] a period of three years, corresponding to the period after which recognition of qualification is applicable’ (Pascouau 2013; Meijers Committee 2015). This aims to disconnect the amount of time that TCNs need to acquire a LTR Permit in the country of first residence from the period in which they move elsewhere in Europe to find a job.

5. The commissions’ future plans

5.1. The action plan on the integration of TCNs

The ‘Action plan on the integration of third country nationals’ was published by the Commission in the summer of 2016. The Commission remarks that ‘the EU needs to step up gear when it comes to managing migration flows, but also when it comes to its integration policies for third-country nationals’ (COM (2016) 377, 2). While making reference to all migrants who are nationals of non-EU countries and reside legally within the EU, the Action Plan is prompted by, and mostly concerns, ‘new arrivals’, i.e. the migrants who entered Europe during the ‘crisis’ of the summer of 2015.

According to the Commission,

finding a job is fundamental to becoming part of the host country’s economic and social life, ensuring access to decent accommodation and living conditions, as well as economic inclusion. Timely and full labour market integration can also help to meet the growing needs for specific skills in the EU. (COM (2016) 377, 3)

The importance of employment for the speedy integration of new arrivals within European society prompted the Commission to elaborate on possible means of improving their job chances. Yet, the Commission does not mention any possibility – either for asylum seekers or for people already granted some kind of international protection (refugees,
beneficiaries of subsidiary protection, stateless persons as beneficiaries of international protection, beneficiaries of other types of ‘humanitarian’ status granted on the basis of different national legislations) – to move around Europe in search of employment or take up a job. Since 2011, refugees and the beneficiaries of subsidiary protection make up the one category that has a right to intra-EU mobility. Directive 2011/51/EU extended them the same approach as Directive 2003/109/EC – therefore, they must have already spent five years as LTRs in their country of first reception before they can move elsewhere for work.

5.2. Proposal for a recast of the blue card directive

The Blue Card Directive 2009/50/EC facilitates the entry into the EU of highly qualified labour migrants. It also allows for limited mobility rights after 18 months (article 18 Directive 2009/50/EC). In mid-2016, the European Commission presented a recast of this Directive in order to facilitate the integration of highly skilled workers (COM (2016) 378). The recast is of interest to our study for two reasons. For one, since article 3 COM (2016) 378 does not exclude them from the scope of the Directive, beneficiaries of international protection can obtain a Blue Card Residence Permit. The distinction between the original reasons for migration – economic or for protection – thus becomes less relevant when it concerns highly skilled migrants: both are facilitated, this point being our second and main interest. Article 17 of the recast proposes that MSs grants highly skilled migrants a LTR permit after three years in one MS, shortening both temporal and spatial waiting. By fast-tracking the highly skilled, the proposal does however reinforce the divide between highly skilled and less-skilled migrants and internationally protected persons who do not qualify for the Blue Card residence permit, thereby making integration into the EU’s internal labour market a prerogative of the highly skilled. The Commission’s objective here is to make migrants, by providing positive social stimuli, better able to ‘access labour markets in other MSs than the one that granted them protection. This facilitates their labour market participation which favours their integration and their ability to provide for their own livelihood’ (COM (2016) 378, 11). So, while highly qualified, internationally protected persons may one day be facilitated to some extent, until then – and if they do not qualify for the Blue Card – they are left waiting in the MS that granted them protection. Like them, all other non-temporary migrants with legal residence in one MS, be it for family migration, work or after regularisation, have to stay put and wait for five years.

5.3. Proposal for a qualification regulation

The same approach stems from the ‘Proposal for a Qualification Regulation’ (COM (2016) 465 final, 2016/0223 (COD) presented by the Commission in 2016. A TCN found to be present in another MS without the right to stay or reside there in accordance with relevant EU or national law will be punished for doing so (article 29 and article 44 COM (2016) 465 amending Article 4 of the LTR Directive). The proposed sanction highlights the crucial role played by ‘time’ in the migrants’ ‘snakes and ladders’ path leading to secure status, and its deeply symbolic link with ‘space’: the proposal suggests that the five-year period beneficiaries of international protection must sit out before they are eligible for Long-Term Resident Status (and therefore for more mobility within the EU) should start
each time the person is found to be in a MS other than the one that granted international protection.

Again, two elements of this proposal are relevant here. First, the new transgression is ‘space-based’: the provision adds another component to the complex normative structure aimed at limiting, as much as possible, migratory movement within the Schengen area. Second, the punishment for the transgression is ‘time-based’: since the most important good at a migrants disposal is ‘time’ – the currency they can use to buy increased movement rights – this is precisely what is targeted.

While this proposal thus confirms the increasingly sensitive role played by spatial waiting zones and the influence they can have on a TCNs’ migratory horizon (in this case, especially the recipients of international protection), it is interesting to note how the reality of migratory choices and movements, as discussed below in the case-study on TCN’s migration from Italy to the Netherlands, seems to go in another, completely different direction, thus casting doubts on the effectiveness of such provisions and highlighting the urge for a reconsideration of the role that free movement can have on the path towards migrants’ integration.

6. Italy as a first MS under the directive 2003/109/EC

In Italy a LTR permit is granted to TCNs that meet the following requirements: lawful residence in Italy for 5 years; a clean criminal record; sufficient income; adequate accommodation, and a passing grade on an Italian language test (article 9 Testo Unico Immigrazione, 286/98). Notwithstanding the economic crisis that has afflicted Italy since 2008 and the very rigid connection in Italian law between employment and immigration status (Dimitriadis 2017), migrants have been able to find a job (and keep it) long enough to acquire the LTR permit. Data shows a significant increase in the number of LTR permits granted: from 2008 to 2013 up from 46.11% to 52.31% of the total number of awarded permits. In 2015, the number of LTR permits granted reached 2.248.747 (57.2% of the overall permits granted to TCNs in Italy in that year) (ISTAT 2016). So, Italy proves that the scheme works and is widely used by TCNs. A lawyer working with migrants remarked, ‘the LTR permit is the fulfilment of a dream for most of the people I assist’.

Upon closer inspection, though, the data seem to reveal something else entirely. When asked to explain the significant increase in applications between 2013 and 2015, the lawyers interviewed mentioned the regularisation of 2009. This regularisation allowed employers to declare that they employed persons staying in Italy illegally. In exchange for a relatively small sum, the employer was then granted a pardon, and the migrant staying illegally was given a residence permit. Such operations seem to suggest that, behind the scenes and without much ado, the Italian state still resorts to regularisation programmes the Commission in 2008 called ‘useless’ (COM (2008) 0359).

Such programmes have the merit of bringing to the fore migrants’ agendas regarding the spatial and temporal obstacles they meet on their ‘snakes and ladders’ path towards secure migration status. Their resilience in the face of spatial borders embodied for instance by the journey they embark upon to ‘land’ in Italy and make it ‘appear’ to be their ‘starting country’. These efforts are explained by the fact that Italy is indeed a good ‘starting point’ for many: those who, therefore, have not arrived there directly try
to reach it at the beginning of their migratory trajectory, crossing spatial barriers to ‘join
the queue’ where the wait seems to be the most promising. As pointed out by one of the
interviewees, ‘[Italy] it is not like in France, where you can spend 20 years without papers
[...] here they [the migrants] know that you just have to “stay put”: sooner or later, you’ll
be able to regularize yourself’ (Della Puppa and Sredanovic 2016).

Once the LTR permit is acquired, many immediately leave Italy for somewhere else: the
status is sought after not for the value that it could have within Italian society and the
Italian labour market but, rather, for the mobility rights and better job opportunities else-
where. According to one of the lawyers we spoke to: ‘these days, most of the people I assist
move as soon as they get an LTR permit: Bangladeshis move to London, while Algerians,
Moroccans, and Egyptians – they go to Sweden, to Norway, and to the Netherlands’.

This statement also confirms that looking at the case of LTRs in Italy from the perspec-
tive of the ‘spatial–temporal waiting zone’ approach is a fitting choice: migrants first ‘stay
put’ in order to be (or in case they are not) regularised, and afterwards in order to get LTR
permits and to move elsewhere. However, these results in turn strike an undercut blow to a
certain notion of ‘integration’, as proposed for example by Directive 2003/109: no
language test, no cultural exam, no evaluation commission can detect and intercept the
migrant’s ‘mental reservation’ indicating plans to move somewhere else as soon as
status has been granted. The question is, therefore, whether this approach is useful at
all or whether, on the contrary, integration should be evaluated and promoted on the
basis of different criteria and goals.

Another peculiarity of the Italian case that emerged during our – anecdotal – inter-
views, corroborated by the Dutch data presented below, is that, apparently, migrants
that have managed to secure some degree of status in Italy do not wait out the entire
five-year period before moving abroad. Instead, they travel outside the country to work
with their (temporary) Italian work permits, and only come back when they need to try
and get a renewal. Such permits, though, despite allowing visa-free travel in the Schengen
Area, are not valid for work outside of Italy. According to the lawyers we spoke to, not all
of their clients are aware of (or even interested in) the difference. According to one of the
lawyers interviewed: ‘I would say that at least 10–15% of the migrants I assist – who only
have temporary permits – go abroad to work [...] Iraqi nationals, for instance, move to
Germany.’ An Albanian national, who still only had a temporary work permit in spite
of being in Italy for a very long time, told us that he was ‘fed up’ with the economic situ-
ation in Italy and that he ‘knew’ from ‘his contacts’ he would earn more if he moved north
to France, Germany or the Netherlands. He was therefore ‘planning to do so, in the next
months’. Asked whether, in his opinion, he could work abroad with only a temporary
Italian work permit, he said that he ‘would not know’ but that ‘he would go anyway –
there is no future for me here [in Italy]’.

In Milan, the migrants’ practice of going abroad to work with only a temporary permit
seemed for some time to be ‘tolerated’ by Italian authorities. A lawyer interviewed explains
that migrants who, having worked abroad, were not able to meet the income requirements
necessary for a LTR permit would have their status renewed without further investigation
into the reasons behind their low income. Italian authorities would thus ‘turn a blind eye’
and indirectly allow the irregular movement of economic migrants across borders. This is
common in Italian bureaucracies, known for a high level of discretion and informality of
everyday practices towards migrants (Zincone 1998; Triandafyllidou 2003). While this
could be justified, in their eyes, to take a bit of pressure off the Italian economy, the outcome of such administrative policy bears broader significance in light of our analysis. By ‘softening’ the migrants’ spatial–temporal waiting zone, Italian bureaucracies would in fact be allowing intra-EU mobility before five years of legal residence in Italy had passed, in line with the suggestions made by Pascouau (2013) and the Meijers Committee in 2015: such routine practices have the effect, in our view, of calling the meaning and scope of Directive 2003/109 further into question. On the other hand, lawyers interviewed indicate that, in Milan, this practice has recently undergone some change: Italian authorities have started being more careful when renewing temporary work permits, and now pay attention to conditions such as social contributions and annual net income. The lawyers speculate that the reason behind such a change is that Italian authorities have become aware of the fact that many TCNs only come back to renew their Italian permits after working illegally elsewhere in Europe. Other empirical research on Italian practices related to permit renewals confirms this trend (Dimitriadis 2017).

Our investigation confirms that Italy is a good ‘starting point’ given the general administrative flexibility, the ever-present shadow economy, and its normally welcoming civil society. Migrants may then decide to ‘begin’ their journeys towards economic stability and full migration status from there, after regularisation (see for instance, Ambrosini 2013; 2017; Bonizzoni 2016) or possibly with a refugee or subsidiary protection status. In the course of such journeys, not only do they cross spatial borders – they ‘land’ in Italy and then move elsewhere for work – but they also cross temporal borders, moving through the European area long before being officially allowed to do so. The next section will investigate what happens to them in one of the ‘destination countries’: the Netherlands.

7. The Netherlands as a second MS under the directive 2003/109/EC

In its implementation of Directive 2003/109/EC, the Netherlands has made – nearly – full use of its discretion to restrict the secondary intra-EU mobility of LTRs from other EU MSs (we leave the mobility of students, and non-economic mobility out of the current analysis). For employees, mobility is restricted by a labour market test which looks at the priority work force’s availability for the job. The priority workforce consists of (EU) nationals, or migrants otherwise residing legally in the Netherlands. In practice, this means that priority workers are almost always available, except for certain highly specialised jobs. Because the Directive restricts the discretion to apply labour market tests beyond 12 months (article 21(2) LTR Directive), the test is waived after one year of residence in the Netherlands as a second MS. Interestingly, the mobility of self-employed LTRs faces fewer restrictions. An LTR applying to work as a self-employed person is not subjected to the essential economic interest test applied to other TCN entrepreneurs (De Lange 2016).

From the time of the Directive’s initial implementation until 1 April 2014, Dutch authorities did not register LTR self-employed migrants as a separate group; therefore, the number of applicants was officially unknown. In 2016, extensive case-file research at the Dutch INS allowed some extra insight: between 1 July 2013 and 1 July 2015 a total of 116 applications for self-employed LTR were counted (Mohammadi 2016). The top two nationalities were Egyptians (31, mostly from Italy), Moroccans (32, mostly from Spain), followed by Chinese (16) and Pakistani (10). Only eight applicants were
women. Applicants favour the restaurant, cleaning and agriculture sectors. For instance, 11 out of the 16 Chinese applicants became a business partners in an existing restaurants. One lawyer confirms that most of his clients holding an Italian LTR permit originally came from Egypt and migrated to the Netherlands to join or take over an existing family businesses. If these businesses can sustain another partner, this is a perfectly legitimate use of the LTR directive. During the period under scrutiny, 116 migrants filed 173 applications for entry into the Netherlands as self-employed LTRs, which means that some individuals applied (at least) twice. One hundred and thirty-three (77%) of the applications were rejected, 29 applicants were admitted (17%), and the rest had not yet been decided (or were withdrawn). More than half of the rejected applicants (84) appealed and 20 received a residence permit upon appeal, making a total of 49 out of 116 (42%) successful applicants. Indeed, given the 2,248,747 LTR permits granted to TCNs by Italy alone, the number of migrants using the mobility right to come to the Netherlands is low.

Another interesting aspect of these applicants’ is their migration trajectory: 36% of them had tried to gain legal residence in the Netherlands in the past. We presume that upon rejection, they applied for a residence permit elsewhere in Europe – in Italy, as such a new ‘country of passage’ – possibly in a regularisation. The data available in the Netherlands do not show whether they received legal residence and, eventually, LTR-status through regularisation – either as family migrants, through international protection schemes, or otherwise. Those registered in the Dutch migration system prior to moving to Italy or Spain had thus – retrospectively – chosen for the temporal waiting zone – a five-year wait in Italy or Spain for their LTR – which was also a spatial waiting zone they were compelled to endure before they could legally move to their apparent country of destination, the Netherlands.

If they waited at all. Indeed, the data collected by Berntsen, De Lange, and Rijken (forthcoming) from 2014 labour inspection reports on the illegal employment of migrant workers shows that not all TCNs from Italy and Spain wait to obtain an LTR permit before moving on through the mobility scheme provided by the Directive. Out of 756 TCNs discovered to be employed illegally, 112 (15%) held an Italian or Spanish residence permit (national or long-term residence). There was evidence that 31 of these migrants (28%) had been in the Netherlands for more than three months, thus overstaying their right to remain in another EU MS with a residence permit from another EU country. Information on how long the others had been working in the Netherlands was not available: most of them told the authorities they were (working) in the Netherlands for just a day, so their stay would be considered ‘regular’ under the Schengen regime. In all cases, employers could have been fined for illegally employing TCNs without a Dutch work permit. The TCNs were not fined because being illegally employed is not an offence under Dutch law (De Lange 2011) and were not restrained to travel back to Italy or Spain to renew their temporary work permits there. As discussed above, this practice may be sanctioned in case the migrant is a recipient of international protection in the EU moving before his time, by making him or her wait for yet again five years for the LTR permit.

Like the administration in Italy, the Dutch administration became less lenient towards applicants for LTR coming to the Netherlands as a second MS in recent years. During the first few years following implementation, LTRs from Italy were relatively certain of receiving a positive decision, says a Dutch immigration lawyer: a chamber of commerce registration, a simple business plan and tax statements sufficed.
The application fee, which was initially €1296, was lowered to make it equal to the fees imposed on EU nationals (€159 in 2017) following upon a ruling of the European Court of Justice (ECJ 26 April 2012, C-508/10, Commission v Netherlands). As a second MS, the Netherlands does not require LTRs to take language courses (article 15(3) LTR Directive is discretionary) and in this sense the LTRs are treated like any other TCN self-employed migrant in the Netherlands. Their residence permits just read ‘self-employed’, and do not in any way reflect the level of integration into the EU internal market LTR migrants may have achieved. In 2016, the requirements became stricter for applying for an LTR permit in the Netherlands as a second state. The LTR must now submit a business plan as evidence of regular and sustainable income, to avoid recourse to social welfare (Boeles 2016). An immigration lawyer remarked that now an applicant even needs to submit marketing plans and more extensive business plans. He suspects that the authorities are trying to dissuade LTRs from using this scheme. The immigration lawyers we interviewed often advise against using the migration scheme because of its low rate of success. If they assist an LTR, they prepare their clients for yet another temporal border: a long legal battle.

8. Conclusion

This research project has revealed a gap between the current focus on the national labour market integration of new arrivals, and neglect of (policy dealing with) the integration into the European labour market. This is especially so for Europe’s LTRs. Despite the significant emphasis placed on the topic of integration by all European institutions at all levels, the integration of LTRs still remains underdeveloped throughout the Schengen area. For LTRs, the concept of integration led to the ambiguous normative solutions provided by Directive 2003/109/EC which, while significantly improving the overall status of LTRs, also missed an opportunity to foster an inclusive, dynamic and rights-based approach to their integration.

This weak posture on integration has limited TCNs’ (LTR or not yet LTR) mobility rights due to the wide powers of discretion of the EU MSs. As a result, and as noted by the Commission report of 2011, the use of such mobility rights is extremely patchy and underdeveloped. Most importantly, no mobility rights may be exercised by TCNs before the five-year period for obtaining an LTR permit has elapsed, with some exceptions for highly skilled migrants. We have shown that, generally speaking, if TCNs evade ‘temporal borders’ by moving across geographical ones to take up employment before being entitled to do so under the provisions of the Directive, they may endanger their legal position, and employers who provide work may face penalties. The fact that the employment is ‘illegal’ criminalises the employer and jeopardises the TCN’s legal residency in the first MS. Besides losing their regular status in the first MS, migrants can be prone to exploitation and abuse. The mechanism, which confines migrants to a ‘spatial–temporal waiting zone’, prevents them from improving their chances of integration and success by looking for more suitable jobs elsewhere in Europe. The lack of policy attention to their labour market potential, especially once they hold a LTR permit, is inconsistent with the principle of ‘near-equality’ that should characterise the relationship between EU nationals and LTRs. This gap could hamper the EU’s economic growth and lessen its appeal for talented migrants.
This research demonstrated that the issues related to the ‘spatial–temporal waiting zones’, and TCNs’ confinement within them for several years, are far from being resolved in EU legislation, quite the contrary. By extrapolating from the fragmented data gathered through empirical research on TCNs’ migratory trajectories throughout Europe, it is possible to predict that ‘new arrivals’ will not necessarily integrate into their country of first reception just by ‘staying put’: if they do not find a job, they will either work in the host country’s shadow economy, work elsewhere, or remain dependent on social benefits. And, once they are LTRs, they are not (yet) qualified as members of the priority workforce in the EU, and have a very limited window of opportunity for moving to another MS as entrepreneurs.

The recent Commission Proposal for a Qualification Regulation, which suggests penalising holders of refugee or subsidiary protection status by further increasing their ‘queuing time’, only adds another element of vulnerability to their already difficult situation. The proposal for a recast of the EU Blue Card further widens the gap between skilled and less-skilled (migrant) workers in EU society by allowing skilled migrant workers, refugees and persons receiving subsidiary protection to fast track their queuing time.

In our case-study, with Italy as first MS of legal residence and the Netherlands filling the role of second MS, we investigated how migrants handle, in practice, the spatial and temporal constrictions they meet on the ‘snakes and ladders’ path towards a stable economic condition and full migratory status. We can confirm that the ‘waiting factor’ is especially important: it comes into play long before the acquisition of an LTR permit, and that, at the same time, is subject to significant ‘mental reservation’ on the part of migrants. According to our interviews, and as confirmed by data collected in the Netherlands, some TCNs, possibly soon to be LTRs, move across borders long before they are allowed to do so in search of better working conditions and opportunities. Yet, by doing so in pursuit of their own migratory plan, TCNs violate legal provisions that apply to their status and make themselves vulnerable in the country of destination by exposing themselves to exploitation as well as to less favourable job opportunities, salary treatment and housing conditions.

The situation of ‘new arrivals’, and the attitude of EU MS and the migrants themselves towards intra-EU mobility opportunities are topics deserving of further investigation. Our study not only highlights the weaknesses of Directive 2003/109 from a bottom up perspective by questioning its concept of ‘integration’ and its recourse to ‘spatial–temporal waiting zones’, it also urges reflection on applying the same mechanisms to ‘new arrivals’ on whose behalf the Commission, in 2016, argued the necessity of speedy and efficient integration. The stark reality of TCNs’ economic secondary movement throughout Europe should not be ignored. Rather, it should be seen as an opportunity to learn from the past and build a stronger and more coherent framework for the true welcoming and integration of ‘new’ and ‘old’ arrivals to the European Union.

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References


