

EUROPEAN PARLIAMENT



Directorate General for Research

WORKING DOCUMENT

FREE MOVEMENT OF PERSONS
IN THE EUROPEAN UNION:
SPECIFIC ISSUES

Civil Liberties Series

LIBE 100 EN

05 - 1999



This document is only available in English.

PUBLISHER: EUROPEAN PARLIAMENT
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Manuscript completed in February 1999.



TABLE OF CONTENTS

	Pages
Executive Summary	1
The Treaty of Amsterdam: an Introduction	3
Part One -SCHENGEN AGREEMENTS	5
1. Introduction -The current situation	5
2. The Agreements	7
2.1. The aims of the Schengen Agreements	9
2.2. Abolition of the control of persons at the internal frontiers of the Schengen Area	9
2.3. Compensatory Measures	11
2.4. Strengthening external border controls	11
2.5. Common Visa Policy	14
2.6. The SIS	17
2.7. The Executive Committee	18
3. Comparison between the Schengen Convention and the European Union framework on the rules governing the free movement of people.	18
4. Some further remarks	20
4.1. Priority of Community legal order	20
4.2. Strengthening of external borders	21
4.3. "Democratic deficit"	22
4.4. Transparency in the decision making process	23
5. Opinion of the European Parliament	24
6. Amsterdam Treaty -The Schengen Protocol	25
Part Two - COMMUNITY FRAMEWORK	31
1. General principles of the EC Treaty	31
2. Freedom of movement for workers	31
2.1. The right to take up employment	31
2.2. " Wholly internal situation" and "reverse discrimination"	33
2.3. Job-seekers	34
2.4. Part-time workers	35
2.5. Cross-border workers	35

3. Freedom of Establishment and Freedom to Provide Services for Professional Occupations	36
3.1. Tourists	38
3.2. Measures to encourage freedom of movement	39
3.2.1. Education and tackling unemployment	39
3.2.2. Harmonisation and mutual recognition of qualifications	40
4. Direct Effect	44
5. Right of Residence within the EU	46
5.1. Legalbasis	46
5.2. The right to leave from the Member State	48
5.3. The right to enter the territory of another Member State	48
5.4. Residence permits	48
5.5. Right to work	50
5.5.1. Taking up employment	50
5.5.2. Equal treatment at work	51
5.6. The right to remain in the host country after working there	51
5.7. Right of Residence for categories other than workers	52
6. Socialadvantages	53
7. The EURES Network	54
8. Socialsecurity	55
8.1. Supplementary pensions	57
9. Restrictions on freedom of movement posed by Community law	58
9.1. Restrictions on the right of entry and residence	58
9.2. Restrictions on taking up employment	61
10. The Single European Act and Article 7a EC Treaty	63
10.1. Distinction between Article 7a and Articles 48-66	65
10.2. Commission position on the interpretation of Article 7a of the EC Treaty ..	66
10.3. Position of the European Parliament	66
11. The Treaty on European Union	67
11.1. Opinion of the European Parliament	71
11.2. The Treaty of Amsterdam - Article 8 of the EC Treaty	72
12. The principle of "non-discrimination"	72
12.1 The Treaty of Amsterdam and the principle of non-discrimination	73
13. Cooperation in the fields of Justice and Home Affairs	74
13.1. The Treaty of Amsterdam and the creation of an area of Freedom, Security and Justice	75
13.2. Opinion of the European Parliament	79
Graphics	80

14. Third country nationals	83
14.1. The general position	83
14.2. Residence rights and access to employment for third country nationals	88
14.3. Resolution on limitations on admission of third country nationals to the Member States for employment	90
14.4. Resolution relating to the limitations on the admission of third country nationals to the territory of the Member States for the purpose of pursuing activities as self-employed persons	91
14.4.1. <i>The opinion of the European Parliament</i>	91
14.5. Resolution on the admission of third country nationals to the territory of the Member States of the European Union for study purposes	91
14.5.1. <i>The opinion of the European Parliament</i>	92
14.6. Resolution on the status of third country nationals residing on a long-term basis in the territory of the Member States	92
14.7. Joint Action concerning travel facilities for school pupils from third countries resident in a Member State	92
14.8. Joint Action on a uniform format for residence permits	94
14.9. Recommendation regarding practices followed by Member States on expulsion	94
14.10. Recommendation concerning checks on and expulsion of third country nationals residing or working without authorisation	95
15. CIREFI	96
15.1. The opinion of the European Parliament	97
16. External Frontiers Convention	98
16.1. The contents of the Convention	99
16.2. Substance of the Convention	100
16.3. Accompanying measures	103
16.3.1. <i>Carrier sanctions</i>	103
16.3.2. <i>Illegal crossing of the external frontiers</i>	103
16.3.3. <i>Compensation for financial imbalances</i>	104
16.4. Openquestions	104
16.4.1. <i>Voting arrangements for the adoption of measures implementing the Convention</i>	104
16.4.2. <i>The competence of the ECJ</i>	104
16.4.3. <i>Territorial extent of the Convention</i>	105
16.5. Opinion of the European Parliament	105
17. Visa Policy in the Community	106
17.1. Council Regulation No 2317/95	108
17.1.1. <i>Opinion of the European Parliament</i>	110
17.2. Council Regulation No 1683/95 of May 1995 laying down a uniform format for visas	110
18. Joint Action on airport transit arrangements	111

19. Draft Joint Action concerning a uniform format for forms for affixing visas issued by the member States to persons holding travel documents which are not recognised by the Member States drawing up the form or to persons holding no travel documents	113
20. Dublin Convention	113
21. Family members of Union citizens	114
21.1. Right of entry and residence for family members	114
21.2. Opinion of the European Parliament	119
21.3. Resolution on the harmonisation of national policies on family reunification	119
21.4. Resolution on measures to be adopted on the combatting of marriages of convenience	120
22. Employees of companies established in the EC	121
23. Community Agreements with third countries	121
23.1. Association Agreement on the EEA	123
23.2. EEC - Turkey Association Agreement	124
23.3. Euro-Mediterranean Partnership Agreements	127
23.4. Europe Agreements	127
23.5. Partnerships and Cooperation Agreements	128
23.6. The Fourth ACP/EEC Convention	129
24. The “Monti Proposals”	129
24.1 Proposal for a Council Directive on the right of third country nationals to travel in the Community	131
24.1.1. <i>Opinion of the European Parliament</i>	135
24.1. Proposal for a Council Directive on the elimination of controls on persons crossing internal frontiers	135
24.2.1. <i>Opinion of the European Parliament on the proposal of the Commission for a Council Directive on the elimination of controls on persons crossing internal frontiers</i>	137
24.3 Proposal for a European Parliament and Council Directive amending Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families and Directive 73/148/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and provision of services	138
24.3.1. <i>Opinion of the European Parliament on the suppression of identity controls at internal frontiers</i>	138

25. Recent Commission initiatives	139
25.1. "Veil Report"	139
25.1.3. Recommendations made in the report	140
25.1.2. The Veil Report and third country nationals	140
25.1.3. Recommendations made in the report	142
25.2. Action Plan for the Single Market	143
25.2.1. Opinion of the European Parliament	144
25.3. Proposal for a Convention on rules for the admission of third country nationals to Member States	145
25.4. Action Plan for the free movement of workers	147
25.4.1. The Action Plan's approaches	147
25.4.2. Opinion of the European Parliament	148
25.5. Amendments proposed for Regulation (EEC) 1612/68 and Directive 68/360/EEC	149
25.5.1. Regulation (EEC) 1612/68	149
25.5.2. Directive 68/360/EEC	151
25.6. Proposal for establishing an Advisory Committee on freedom of movement and social security for Community workers	152
Conclusion	153

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EXECUTIVE SUMMARY

Free Movement of Persons in the European Union is a working paper that seeks to contribute to an all-round understanding of the freedom to move and reside within the Union. Its main objective is to be used as a guide, both by EU citizens and third country (commonly known as non-member country) nationals who are already legally resident within the EU or wish to enter and/or work in one of the EU Member States.

It is published in two separate volumes. The first volume, subtitled *an Overview*, is written in a general guide form. The second, subtitled *Specific Issues*, examines the legal and practical aspects of this principle in depth, referring at the same time to landmark cases of the European Court of Justice.

The second volume is divided into two parts. In Part I, the right of free movement of persons is examined within the framework of the Schengen Agreements and the application of their rules. Reference is made **first** to the Schengen Agreements and secondly to the provisions of European Community law. This approach was taken because people are generally aware that Schengen **affects** their right to move **freely** within the different Member States of the Union, the significance and relationship of Schengen to the European Union is often insufficiently understood. Mer a general introduction to the Schengen mechanism, the paper highlights the main issues of concern, i.e. the rules applied in crossing the internal frontiers of the contracting States, the compensatory measures necessary for the strengthening of external border controls and the establishment of a common visa policy. Finally, reference is made to the opinion of the European Parliament on the Schengen Agreements and the application of their provisions.

Part II deals with the implementation of the principle of free movement of persons within the Community framework. It starts by analysing the current situation and a distinction is made between EU citizens and third country citizens. Referring to EU citizens, different categories of persons are examined, i.e. workers, self-employed persons, providers or receivers of services, and their rights to reside and work within a Member State, the social advantages they are granted and their social security rights, which are partly regulated by Community legislation. Exceptions to the right of free movement for EU citizens constitute a separate chapter, as a sign of their importance to the exercise of the right to move within the Union. Moreover, issues that fall within the framework of intergovernmental co-operation between the Member States of the Union are set out, such as co-operation in the field of Justice and Home Affairs and immigration and visa policy of the Union. Particular focus is also given to the Treaty of Amsterdam and the amendments which have introduced, especially to the new title on free movement of persons, immigration and asylum.

Finally, specific mention is made to the "Monti proposals", the Veil Report, the Action Plan for the Single Market, the Action Plan for free movement of workers and the proposal for a Convention on rules for the admission of third country nationals to the Member States.



THE TREATY OF AMSTERDAM: an Introduction

The Treaty of Amsterdam was the result of almost 18 months' work undertaken by the Intergovernmental Conference (IGC) which began in Turin on 29 March 1996¹. A number of Member States considered among their principle objectives to be the reform of judicial and police cooperation between the Member States, cooperation in the field of foreign policy and reform of the institutions with a view to forthcoming enlargement. The Conference's work was given great impetus by the summits held in 1996 and 1997 in Florence, Dublin and Noordwijk. The first substantial draft Treaty was presented at the Dublin European Council on 5 December 1996 ("Dublin II")² with further drafts on 14 May, 30 May and 12 June.

After a series of negotiations, proposals from the Member States, the Irish and the Dutch Presidencies and various compromises, the Treaty of Amsterdam, agreed on 18 June 1998 at the Amsterdam summit, and finally signed on 2 October 1998 by the EU Foreign Ministers³. The Amsterdam Treaty amends the Treaty establishing the European Community and the Treaty of European Union.

Justice and Home Affairs were one of the IGC's main subjects of debate and the new Treaty has brought important changes in the context of the Third Pillar. A number of matters coming traditionally under the Third Pillar have been moved from the purely "intergovernmental" co-operation between the Member States and integrated into the EC framework. These changes include immigration and asylum matters, external border controls, measures to combat financial fraud against the EC, customs co-operation and judicial co-operation in civil matters.

The most significant initiatives were taken in the field of free movement of persons, immigration and asylum. A new title that has been introduced, Title IV, on "Visas, asylum, immigration, and other policies related to the free movement of persons"⁴, gave a further boost to the long-term demand for achieving the free movement of persons within the EU, by "communitising" the relevant issues. Therefore, issues relating to the crossing of internal and external borders, visa policy, immigration and asylum, which currently are dealt with by the JHA Council, are to be moved to the **First** Pillar, the EC Treaty, thereby giving the right of initiative to the Commission. However, as we will see below, this "right of initiative" is not granted automatically with the entry into force of the new Treaty, but is subject to time-limits and further derogations. Furthermore, the European Court of Justice is granted full competence in matters falling under the new Title.

¹ The IGC is the formal mechanism for revising the Treaties involving negotiations between the fifteen governments of the Member States of the Union. The scope of the Conference's work was set out at successive European Council summit meetings, with the aim of providing the Union with the means to respond to new challenges.

² The "Dublin II" draft proposed a new Title, "Free movement of persons, asylum and immigration" and an amended Title VI "Security and safety of persons" concerning policing, customs and judicial co-operation.

³ "Amsterdam Treaty and the Protocol on the institutions with the prospect of enlargement of the EU", CONF/4007/97- C 4-0538/97.

⁴ Articles 61-69 of the Treaty of Amsterdam.

Therefore, all measures taken by virtue of the new Title IV are subject to judicial control, although special conditions apply in the case of preliminary rulings. The jurisdiction of the Court does not apply, however, where the maintenance of law and order and the safeguard of security is involved¹.

Matters concerning police and judicial cooperation in criminal cases and co-operation of the Member States through Europol remain under the Third Pillar of the Treaty, although Title VI **has** been revised and the operational objectives of these matters are explained in more detail. The new Article **34** (ex-Article K.6) also sets out new forms and procedures for decision-making. These include: common positions, framework decisions, decisions for any other purpose, and conventions. The last three legislative instruments will be binding upon the Member States.

However, one of the key-innovations introduced by the Treaty of Amsterdam, relating to the right of free movement, is the incorporation of the Schengen acquis into the EU framework. After a series of draft proposals concerning the methods of incorporation and status of the Schengen acquis within the Treaty of Amsterdam, it is included in the final text of the Treaty in the form of a Protocol².

The agreement finally reached on the three main issues of "communitisation" of the free movement of persons, asylum and immigration, reform *of* the Third Pillar and the integration of Schengen, was accompanied by protocols which provide for the different position of the three countries that were the most reluctant to the idea of "communitisation" and the incorporation of Schengen (UK, Ireland, Denmark). These Protocols, annexed to the Treaty of Amsterdam are:

- * the Protocol on the application of certain aspects of Article 7a of the Treaty establishing the European Community to the United Kingdom and Ireland;
- * the Protocol on the position of the United Kingdom and Ireland;
- * the Protocol on the position of Denmark.

The UK and Ireland will therefore be entitled to carry out such controls on persons as they may consider necessary at their frontiers with other Member States. They may be permitted by the other Member States to take part in the adoption and application of measures established on the basis of the new Title, although they can not, in any event, be forced to do so. Denmark, on the other **hand**, will not take part in the adoption of **First** Pillar measures. However, it retains the right to decide, within six months of the Council's decision on a First Pillar measure, whether it will implement this decision within its own national law. If it decides to do so, this decision will create an obligation under international law between Denmark and the other Member States.

¹ Article 68§2 of the Treaty of Amsterdam.

² "Protocol integrating the Schengen acquis into the framework of the European Union" **1997**, Protocol annexed to the Treaty on European Union and to the Treaty establishing the European Community.

Part One - **SCHENGEN AGREEMENTS**

1. Introduction - The current situation

In the absence of further progress at EU level, the most significant development on the free movement of persons within Europe has been achieved through a number of international agreements between the Member States, the most important being the conclusion of the two **Schengen Agreements**.

The Heads of Government of France and Germany had agreed to start an inter-governmental initiative to abolish border controls between both countries by setting up the **Schengen Agreement** on 14 June 1985. Belgium, the Netherlands and Luxembourg, which had gained some experience in this field since the founding of the Benelux Economic Union in 1960, soon joined this initiative. The Agreement was supplemented by the **Schengen Implementing Convention** of 19 June 1990.

The internal borders were originally meant to be abolished on 1 January 1990. However, the deadline was not met because -contrary to the usual international practice- the Schengen Agreement could not enter into force automatically after all instruments had been deposited.¹ In addition, the conditions for implementation of the Agreement had to have been met and checks had to actually be in place at the external borders². Once these measures were reported to be satisfactory, on **22 December 1994**, the date of **26 March 1995** was set by the Executive Committee at its meeting in Bonn.

Participation in the Schengen Agreements is reserved **only for Member States of the European Union**. The Schengen Convention is subject to approval or ratification in accordance with the constitutional provisions of the State Parties. The Convention was by chronological order, signed by Italy (27 November 1990), **Spain** and Portugal (**25 June 1991**), Greece (**6 November 1992**) and Austria (28 April 1995). The Convention was brought into force for Italy on 26 October 1997³

¹ Article **139** of Schengen II.

² In a declaration by the Contracting States after the Schengen Implementing Convention, a new target date of 1 December **1992** for entry into force was set up. That deadline was also **missed**. According to the Executive Committee, this **was** due to **delays** ~~and~~ by **technical** problems with the Schengen Information System (**SIS**). Moreover, there were constitutional problems in France with the provisions on hot-pursuit and in *Germany* with the provisions on asylum. Furthermore, measures to combat **drugs** trafficking still had to be strengthened. The Schengen Convention entered into force in September **1993**, but the Executive Committee, charged with the application of the Convention, decided that a separate decision would be taken determining the date on which the Convention would become operative, thus creating more time for the contracting States to take implementing measures **to** strength the external borders.

³ Italy was concretely integrated into the Schengen *area* on 26 October **1997**, **and all** passport controls have been **abolished** for **flights** to and from Italy via bilateral agreement in each case. The delay of integration **was** caused mostly because of difficulties which **occurred** in the connection of the country with the SIS, national legislative gaps concerning the protection of private data and the doubts expressed by some Schengen **countries** regarding the effectiveness of Italy's border surveillance. However, control of persons was only completely eliminated by 31 March **1998**. The Netherlands and Italy have concluded an additional protocol which provide for the gradual abolition of controls between these two countries, at airports by 29 March **1998**. On 20 February **1998**, Italy also adopted a national law on immigration,, which is stricter against clandestine immigrants but socially favourable for legal immigrants. Negotiations are **also** taking place for reaching an agreement with Switzerland, Slovenia and Croatia **in** order to facilitate borders crossings with these countries.

and for Austria on 1 December 1997¹. Greece ratified the Convention in June 1997, and was connected to the SIS on 1 December 1997, at the same time bringing its visa policy in line with those of the other Schengen States².

Schengen's Executive Committee had granted observer status, since 1 May 1996, to the five Nordic Passport Union Members³. Denmark, Sweden and Finland signed the Convention on 19 December 1996⁴. Denmark ratified the Association Agreement on 23 September 1997. Until the time that the remaining countries ratify the Convention, the rules on the free movement of people do not apply to these three countries. During this intermediate stage they can participate in the Executive Committee's meetings. Iceland and Norway, not being EU Member States and therefore not able to fully accede to the Schengen Convention, the same day signed "Co-operation Agreements" with the Schengen Executive Committee, enabling them to be "associate members", without the right of decision. Iceland and Norway undertook, under this Agreement, all the obligations stemming from the Schengen Agreements and they also have the responsibility to guarantee at their frontiers "the level of Schengen security". Therefore they can participate in all the meetings held by the different organs of Schengen, they can express their opinions, observations and preoccupations but they do not have the right to vote. Only two Member States of the European Union, the UK and Ireland, remain outside the scope of the Schengen Agreements. They have shown no interest in adhering to Schengen, the former presumably because of its long-stated opposition to the abolition of internal frontier controls, and the latter presumably because of the common travel area which it shares with the United Kingdom. So far, the United Kingdom has taken the position that the measures taken within Schengen to compensate for the abolition of border controls are insufficient.

¹ **All** passport controls for flights to and from the country were abolished on 1 December 1997 and land border controls were to be gradually abolished by 31 March 1998 and Austria is connected to the central SIS. **Austria has** now become responsible for the borders of the whole Schengen area with Hungary, the **Czech Republic, Slovakia and Slovenia**, although Germany **has** repeatedly expressed its doubts **and** fears about whether **Austria** will be able to police its external frontiers in order to prevent illegal immigration from Eastern Europe (see, *Agence Europe*, N°71 11, 1-2 December 1997, p.6; *European Voice* 3-9 July 1997). **As far as** the borders with Switzerland and Liechtenstein are concerned, controls will take place within Austrian territory in order to avoid traffic jams at the borders.

² The Schengen Convention came into force for **Greece** on 8 December 1997 and the abolition of the internal frontiers are going to be the subject of a separate decision by the Executive Committee. It **was** hoped that Greece would become a full member **of** the Schengen *Area* by the second half of 1998, "*Immigration News Sheet*", November 1997, p. 1.

³ The Nordic **Passport Union**, which entered into force in 1957, provides for the free movement of persons between Denmark, Sweden, Norway, Finland and Faeroe Islands. The **NPU** aims to abolish passport controls at the internal borders of the Nordic countries and covers **some of** the main issues linked to freedom of movement **and** residence.

⁴ Finland **has** decided to lift all border controls for nationals of the other EU Member States in the year 2001 (except the nationals **of** Sweden and Denmark). It **also** postponed until 1999 the integration of the Schengen *acquis* into its national law due to the difficulties it faced to put into practice the SIS.

⁵ The Agreements **signed** with the five Nordic countries were the result of lengthy negotiations, at the end **of** which the five Nordic countries agreed to accept **the** entire Schengen *acquis* as well **as** the relevant "acquis communautaire". Furthermore, the Agreements may be denounced if the Executive Committee adopts a decision which Norway and/or Iceland are unable to approve. **A** list also has been compiled of the Schengen provisions which Norway and Iceland undertook to apply, *Annual report on the Functioning of the Schengen Convention*, Central Group, SCH/C (97)22 def., 25.4.97.

Three years after the application of the Schengen Implementing Convention certain restrictions still exist. Moreover, the French authorities continues to make use of the derogation provided for in Article 2(2) of the Schengen Convention maintaining border controls on persons from Belgium and Luxembourg although it has abolished controls at the borders with Germany and Spain. The main reason is because they are waiting for "operational solutions" to be defined in the fight against drugs trafficking¹.

In the field of external relations, the Baltic States (Latvia, Estonia and Lithuania) requested that discussions be started on the removal of the visa requirement for their nationals to enter the Schengen area. Similarly, Poland requested that a permanent structure for dialogue be set up, given that the preliminary stage of cooperation would necessarily consist of setting up frameworks for regular information exchange between States wishing to accede to the European Union and Schengen. Russia submitted an official proposal in which it expressed its interest in cooperation with Schengen's executive bodies dealing with the fight against illegal immigration, drug trafficking, organized crime and visa issues. At the moment an agreement is in force with the government of the Republic of Finland and the government of the Russian Federation concerning the regime at the Finnish-Russian frontier and the procedure for the settlement of frontier incidents. Switzerland reiterated its will to **set** up a framework for more practical cooperation with the Schengen States, notably in the form of an annual information meeting, based, as far as possible, on harmonizing national legislation in the different areas².

2. The Agreements

The 1985 Schengen Agreement was no more than a framework, setting out short-term and long-term measures which would have to be taken, while defining the major issues, goals and means of enhancing cooperation in the four areas mentioned in the Agreement: **free movement of persons, protection of public order and public safety, combating drug trading and illegal entry.**

The 1990 Schengen Implementing Convention contains the indications of the methods pursued. Some parts of the 1990 Schengen Convention contain very detailed provisions (e.g. for "prohibited arms"), whereas others are rather brief and vague, probably due to the lack of mutual agreement. The Schengen Implementing Convention sets the objective of free circulation within the Schengen Contracting States, while at the same time its provisions stipulate the counterbalancing measures which the Contracting States consider necessary.

In **a** way these two Agreements are a milestone in the process of developing practical implementing measures to abolish internal borders and to achieve free movement of persons, albeit only for a part of the European Union. In fact it all started as a somewhat harmless attempt to create an "experimental garden" an area without internal borders, that would set an example for a Community approach in the near future. The Schengen Implementing Convention explicitly refers in its Preamble to the aims of the Internal Market, though without referring specifically to Article 7a of the EC Treaty. Nonetheless, the Schengen Convention has served as a model for the development of immigration policies at Member States level.

¹ *Agence Europe, N°7064, 24.9.97, p.9.*

² *Annual report on the Functioning of the Schengen Convention, Central Group, SCH/C (97)22 def., 25.4.97.*

Schengen grants the citizens of the signatory countries the **right of free entry and free movement** within the Schengen area and extends to citizens of the other EU Member States the measures which were originally adopted by the countries participating in the first agreement and which were designed to facilitate borders crossing. Despite this, the Commission has consistently taken the view that the Convention is a laboratory in which to see what may be achieved in the area of regulation of the free movement of third country nationals.

During the drafting process of the Schengen Convention, the abolition of internal borders made the original contracting parties focus on enforcement of **external border** controls and compensatory measures related to domestic controls in order to regulate the influx of immigrants and asylum seekers. External borders were required to be strengthened and a buffer zone with neighbouring countries to be established. As regards entry and residence in the Contracting States, reliance is placed on whether an individual has been reported in the SIS. The Contracting States also agree to pursue a common visa policy.

The Convention defines **aliens** as nationals from the non-EU countries, without making any distinction between citizens from Schengen and EU Member States and those from EU Member States which are not parties to the 1990 Schengen Convention.

The 1990 Schengen Convention contains hardly any criteria for admission or immigration procedures in the field of immigration and asylum law. The **asylum policy** has been defined among the Schengen Member States in conformity with the Geneva Convention (July 1951) and the New York Protocol (January 1967). **Only one Member State is responsible for the examination of an asylum request.** The Schengen Convention lacks material or procedural provisions on status determination of refugees and does not ask for harmonization of asylum legislation. Rather it sets out criteria for defining asylum procedures once an application has been lodged. The asylum part of the Convention was drawn up merely as a temporary "solution", and has already been set aside with the entry into force of the Dublin Agreement¹.

Police forces will assist each other in detecting and preventing crime. Officers may be seconded to another Member State to assist with the exchange of information or surveillance at external frontiers. National police forces will have the right to pursue fleeing criminals and drug traffickers into the territory of a neighbouring Schengen State².

Essential to the effective operation of the Convention is the technical compensatory measure of the **Schengen Information System (SIS)** which deals with information concerning the entry of third country nationals, issuing visas and police co-operation. Access to the SIS is primarily reserved for police and customs checks carried out within a Schengen State and the authorities responsible for border checks. Each Member State is obliged to introduce national data legislation which at least corresponds to the standard of the 1981 Council of Europe Convention on the Protection for Individuals with regard to the Automatic processing of Personal Data.

¹ The Dublin Convention came into force on 1 September 1997.

² Greece has been exempt, by common statement of the contractual parties, from implementing the provisions of Article 41 of the Schengen Implementation Treaty on cross-border police cooperation. The reason is that Greece is the only Member State of the European Union which lacks a land frontier with another Member State; therefore all Greek borders are considered external frontiers of the European Union.

The **territorial application** of the Schengen Convention is limited to European territory¹.

The **Executive Committee** is charged with the supervision of the application of the Convention, but the Convention is silent on how this task is to be fulfilled. There is no provision on judicial or legislative powers of this Committee, although it seems to be accepted that it is empowered to take binding decisions.

2.1. The aims of the Schengen Agreements

- **to abolish the control of identity cards and passports for crossing the internal frontiers between the signatory Member States of the Schengen Agreement (which sets the objectives of free circulation within the Schengen Contracting States, while at the same time stipulating the counterbalancing measures which the Contracting States consider necessary in order to reinforce external borders)**
- **to reinforce the security of citizens by improving police, judicial and administrative cooperation between the Member States, and mainly to put in force a common information system (called SIS).**

2.2. Abolition of the control of persons at the internal frontiers of the Schengen Area

The Schengen Agreement's objective is the gradual abolition of the controls, **for all persons and regardless of their nationality, at the common, internal, borders.** The control on persons (which for the average traveller mainly concerns passport and visa controls) should no longer take place at internal borders.

Internal borders are defined as the common land borders of the signatory parties, their airports for internal flights and their sea ports for regular trans-shipment connections exclusively or from to other ports within the territories of the Contracting Parties and not calling at any ports outside those territories.

"Internal borders may be crossed at any point without any checks on persons being carried out"². This provision covers implementation of the imperative in Article 7a to establish free movement of persons between the Member States, both for European Union citizens and third country nationals. In this way the Convention comes into line with both the Commission's and the Parliament's interpretation of Article 7a. The said control has been partly transferred to the territories of the Member States but mainly to the external borders of Schengen territory.

¹ Article 138 of the Schengen Convention. Therefore, the common borders between the Kingdom of the Netherlands and the Republic of France on Sint Maarten/Saint Martin (Antilles) will not be abolished under the Schengen regime, although a treaty has been concluded between the Netherlands and France for cooperation on immigration controls at both **airports** on the island.

² Article 2 of the Schengen Implementing Convention.

Abolition of internal systematic border controls:

- the presentation of papers is abolished at internal borders for all nationals of the Schengen area and also for all other citizens of the Union and nationals of third countries;
- some security controls are still maintained;
- for insuring the security of the citizens, an identity control can take place close to the frontiers, at airports, ports and railway stations which are open to external traffic. Security controls are maintained during embarkation procedures for destination to Schengen area States. Exceptionally, for reasons of public order, the Member States can always reestablish controls at their frontiers for a limited period and they must always consult the other Member States on the subject.

The aim of the free circulation area essentially translates into **not** being required to present a valid travel document when moving within Schengen territory. However, in most, if not all, of these countries, there is an **obligation to prove one's identity. Thus, the traveller in Schengen in any event needs to carry a valid identity document.** The advantage of Schengen is that the document does not have to be produced at internal frontier controls, as there are none'. **As** a consequence of the requirement for a free area, airports within Schengen territory have been reorganised, as to comply with the new arrangements, by separating passengers from Schengen flights from other passengers. The same will also presumably apply to other travel points, such as railway stations and ports.

As a consequence of the entry into force of the Schengen Agreements, the total competences and obligations of the authorities concerned, of the signatory Member States, have been increased. **An** alien wishing to enter a Member State has to meet the conditions spelt out in the Aliens Act of that particular State, i.e. that the alien is not considered threat to national public order. Before Schengen, the authorities were not entitled to refuse entry to an alien who fulfilled all requirements. After the 1990 Schengen Convention entered into force an alien had not only to fulfil the conditions of one State only but also those imposed by the other States as parties to the Convention. Therefore, under the Convention, **he not be admitted** to Schengen territory if he is a **threat to the public order of one of the other Schengen States.** The control duties of the authorities concerned have actually been made heavier by protecting the public order of all the Schengen States, and the grounds on which they are authorized to refuse entry have increased.

A number of bilateral agreements signed among the Schengen members have also helped to step up security at internal border areas and reinforce co-operation². On 4 June 1996, Belgium, Luxembourg and the Netherlands signed a cross-border police co-operation agreement and Belgium and Luxembourg agreed to create joint police offices and patrols commencing September 1996. Further agreements were signed between Portugal and Spain, Spain and France, Germany and the Netherlands, and Germany and Luxembourg³.

¹ However, as also explained below, it seems that the advantage offered is more psychological than real. See below, "Strengthening external borders", p. 2.4.

² These bilateral Agreements were signed under Article 39(4) of the Schengen Convention.

³ *Annual report on the Functioning of the Schengen Convention, Central Group, SCH/C (97)22 def., 25.4.97.*

It should be noted that the incidence of spot checks inside national frontiers has been increased to such an extent that, in some cases, they were more extensive than the frontier controls which used to be carried out before the Schengen Agreements were introduced. Competent officials have, however, argued that this new system of controlling the movement of persons is more efficient, concerning localization of illegal immigrants than the border controls formerly applied.

2.3. Compensatory Measures

The Convention aims to abolish internal border controls for all accompanied people, with measures to improve combat crime, illegal immigration and drug trafficking. Therefore, as a prerequisite for the lifting or restricting of internal border controls, some compensatory measures must be taken in order to guarantee the external borders. These include external border controls, a common visa policy, the possibility of processing asylum applications, police and judicial co-operation and information exchange. The compensatory measures contained in the Schengen Convention describe all the necessary prerequisites for the abolition or easing of controls at internal borders.

2.4. Strengthening external border controls

The abolition of internal border controls will be combined with the simultaneous reinforcement and harmonization of external border controls. Each Member State will conduct its external border controls according to uniform harmonized standards and in the interest - as a trustee - of all other Schengen Members.

External borders may in principle be crossed only at border crossing points². All Schengen Member States nationals and EU citizens can enter the Schengen area only on presentation of a valid travel document and demonstration of an identity card or passport. A third country national may enter the territories of the Contracting Parties for visits which do not exceed three months:

- if they possess a valid travel document,
- are in possession of a visa, if required,
- have sufficient means of support,
- have not been reported as an undesirable person, and
- are not considered a threat to public policy, national security or the international relations of any of the Contracting Parties³.

An alien who holds a residence permit or a return visa issued by one of the Contracting Parties shall be permitted to enter in transit⁴.

¹ **European Institute for Public Administration**, Maastricht: Sixth colloquium: "The last days of Schengen? Incorporation into the new Treaty on European Union, external frontiers and information systems", Maastricht, 5-6 February 1998.

² Article 3.1.

³ Article 5.1.

⁴ Article 5.3.

Entry to the territories of the Contracting Parties **will be refused** if the third country national does not fulfil the conditions of entry laid down in the Convention, unless entry is permitted on **humanitarian grounds** or **in** the national interest or because of international obligations'. In such ~~cases~~ the admission of the third country national will be limited to the territory of the State which granted entry permission. Should the alien presents himself at the external borders of another contracting party he/she will be permitted to enter in transit, unless his/her name is on the national list of persons reported as to be refused entry within the territory of this Contracting Party.

The concepts of "public order" and "national security" are in principle interpreted in accordance with the national legislation of each signatory party.

Aliens holding a **uniform visa** who have legally entered the territory of a Contracting Party may move freely within the territories of all the Contracting Parties throughout the period of validity of their visas, provided they fulfil the general conditions of entry². Aliens **not** subject to a visa requirement may move freely within the territories of the Contracting Parties for a maximum period of three months during the six months following date of first entry³. However, each Member State can extend beyond three months the visit of a alien within its territory under exceptional circumstances or in implementation of a bilateral agreement concluded before entry into force of the Schengen Convention⁴.

An alien holding a **valid residence permit** issued by one of the Contracting Parties may, with this permit and a travel document, **circulate free for up to three months** within the territories of the other Contracting Parties'. **As** a condition of travelling freely within the whole Schengen Area territory, the holder of a residence permit must also have sufficient means of support, not to be considered a threat to public order, national security or the international relations of any of the Contracting Parties and not to be reported as a person not to be permitted entry with regard to any of the contracting States⁶.

The holders of a **visa of more than three months cannot** enter the other States of the Schengen area. Each Member State retains its own national legislation on entry permits and long duration visas. However, this national visa allows its holder to cross the territory of the other contracting States in order to return to the territory of the State which issued this long-stay visa, provided he satisfiesthe general conditions of entry⁷.

¹ Article 5.2.

² Article 19. The Schengen "uniform visa" neither authorizes transit for a European Union Member State which is not a contracting Schengen party, nor a State which, despite adhering to the Schengen Convention, has not yet fully implemented it.

³ Article 20.1.

⁴ Article 20.2.

⁵ Article 21.1.

⁶ See also below p. (At visa policy, the answer of Monti)

⁷ To be in possession of a valid travel document, not be reported as a person not to be permitted entry, and not considered a threat to public order, national security or the international relations of any of the Contracting Parties.

An alien who has legally entered the territory of one of the Member States is obliged to **declare himself** to the competent authorities of this State. Such a declaration may be made either on entry or **within three days** of entry to the territory of the Member State¹. The obligation to declare himself on entry into a Member State has also **an alien** legally resident within the territory of another Member State.

An alien who does not fulfil or who no longer fulfils the short-visit conditions applicable within the territory of a Member State must immediately leave the entire Schengen area territory. In the event that he holds a valid residence permit or temporary residence permit issued by another Member State, he must enter the territory of that Contracting **Party** without delay².

The crossing of external borders is put under the control of the competent authorities of the contracting State. Such controls are carrying out according to uniform principles, within the framework of national competences and legislation, always taking into account the interests of all the other Contracting Parties to the Schengen Convention. Thus, the state which carries out external borders' control **has** to examine whether, **as** regards national legislation, the alien complies with the conditions of entry foreseen in Article 5 of the Convention.

The Member States have communicated to the Executive Committee a list of the documents which they issue which are valid as residence permits or provisional residence permits and travel documents, within the meaning of Article 21 of the Schengen Convention.

During 1997, the Schengen States took a series of measures in order to harmonize implementation of the Schengen Convention and **as** a mean of improving borders controls. Within this framework, visiting committees were sent to the external borders of all the States in order to gather information on **any** problems encountered there regarding equipment and general way in which controls are organized. Furthermore, action was taken towards harmonization of the regulations³ governing sailors in transit⁴ and the exchange of statistics and specific information on problems encountered at the external borders in order to facilitate further analysis and proposals for practical solutions. At the same time discussions continued on the issue of the procedures for applying Article 5(3) of the Schengen Convention, which refers to the treatment of holders of residence permits, issued by one of the Signatory States, who are in the **SIS** for the purposes of non-admission, and also on the issue of amending the Common Manual and its annexes⁵.

On 15 December 1997, the Schengen Executive Committee, agreed on a common plan according to which they decided to step up controls at the external borders of the Schengen area and take concrete measures to improve the effectiveness of these measures⁶.

¹ Article 22.1.

² Articles 23.1 and 23.2.

³ These regulations came into force on 1 February 1997.

⁴ At the same time, a swift and sound procedure at border posts was introduced for issuing visas to seamen who, for exceptional reasons, did not possess one.

⁵ Specifically in regard to high-speed trains, arrangements for issuing visas at border posts and the updating of illegally the list of specimen documents, provided for in Annex XI to the Manual; *Annual report on the Functioning of the Schengen Convention*, Central Group, SCWC (97)22 def., 25.4.97.

⁶ See *Agence Europe*, N° 7134, 9 January 1998, p.11.

The measures must be implemented without delay and they include:

- * deployment of extra staff and the use of technical equipment,
- * the protection of areas not open to the public at airports as far as extra-Schengen flights and transfer travellers are concerned,
- * guaranteed mutual assistance in the field of training agents responsible for controls at airports and ports and also of airline company personnel, mostly through bilateral exchange programmes,
- * control of fences; implementing and encouraging the harmonization of sanctions against carriers transporting illegal immigrants into the Schengen area,
- * upstream controls of boarding at high-risk locations, which need stipulating,
- * exchange of information concerning the methods of illegal immigration networks, ensuring practical co-operation between police services and authorities responsible for border protection, and also cooperation between national authorities and liaison officials of the Schengen States working in third countries;
- * fingerprinting all foreigners who illegally entered the Schengen territory, and whose identity cannot be checked in any other effective way due to lack of official documents, and preserving these fingerprints in order to inform the authorities of other Contracting Parties (the principles concerning the protection of personal data information must always be respected),
- * preventing foreign nationals, who illegally entered the Schengen Area and whose identity is uncertain, from disappearing before their identity has been clearly established or the measures required have been taken by the relevant police units,
- * immediately removing foreign nationals who have illegally entered the Schengen area,
- * favour negotiations with a view to concluding readmission agreements between the Schengen States and Turkey, the Czech Republic, Slovakia, Hungary and Slovenia.

2.5. Common Visa Policy

Two main issues are mainly regulated:

- **common list of third countries whose nationals are subject to visa arrangements common to all Schengen countries;**
- **introduction of a uniform visa valid for the entire territory of the Schengen countries.**

Since aliens are able to move without any physical barriers in the whole Schengen **area**, differing visa regulations among the Member States may generate specific risks concerning security and illegal immigration for individual Member States. Therefore the harmonized visa policy, as agreed in Article 9, is a key element of the compensatory measures.

The core of the common visa policy is a common list of third countries whose nationals are subject to visa arrangements common to all Schengen countries. This **confidential list**, which comprises about 125 countries, **is legally binding in all Member States**¹. In addition, there are indicative lists of countries which are exempt from visa obligations in all Member States and countries for which the Schengen States have divergent visa regulations. The aim of Schengen is to continue the harmonization process and to make the latter list of divergent regulations as brief as possible.

The objective of Article 9 is harmonization along the lines of a negative and a positive list, gradually removing the grey area between, made up of those third countries on which no *consensus can* be reached. The Schengen Executive Committee has also recently decided to start up its harmonization policy in the field of visas from 1999 by, **on the other hand**, exempting from the visa obligation the nationals of thirteen countries² and, **on the other hand** imposing visa requirements, for all the Schengen States, for the **nationals of Bosnia-Herzegovina, Jamaica, Kenya and Malawi**, which up to now were under different regimes in each Member State³.

Another element of harmonization is the introduction of a **uniform visa valid for the entire territory of the Schengen countries**⁴. This is of great benefit to third country nationals who, until 26 March 1995, had to obtain a visa for each of the Schengen countries they intended to visit. **This visa, which is issued on a uniform visa-sticker, is generally valid for a stay of up to three months and entitles the holder to travel freely to all Schengen countries**. The uniform visa may be issued by the diplomatic and consular authorities of the Contracting Parties. However, each Member State *can* exceptionally reserve the right to restrict the territorial validity of the visa in accordance with common arrangements. The visa sticker, which is another pioneer project of Schengen, fulfils the highest requirements concerning protection against imitation and falsifications⁵.

In this context, the Schengen Convention not only provides for travel facilities for holders of a common visa but also for third country nationals **legally resident in one of the Schengen Member States**: such a person holding a residence permit issued by one of the Schengen countries may move **freely for up to three months within the entire Schengen territory**⁶. This represents a great step forward, for example, for school classes wanting to make a trip to a neighbouring Schengen country⁷.

¹ The Schengen provisions concerning 'visa' are compatible with the relevant community provisions on 'visa', specifically Regulation N° 2317/95 of the Council of 25/9/1995, which determines those third countries whose nationals must be in the possession of a visa in order to cross the external frontiers of the EU Member States.

² **Australia, Brunei, Costa Rica, Croatia, Guatemala, Honduras, Malaysia, Nicaragua, Panama, Paraguay, Salvador, Singapore and Venezuela.**

³ *Agence Europe*, N° 7123, 17 December 1997, p.3.

⁴ **Article 10.**

⁵ **Article 17.3(d).**

⁶ **Article 21.**

⁷ For example, up to now Turkish pupils in classes in Germany had to obtain a visa for a day-trip to Belgium, which presented both practical difficulties and unwanted segregation within the class. Now these Turkish schoolchildren are exempt from the visa requirement and can travel freely, just like their German schoolmates.

The Convention recognizes three types of visa:

1. A **travel visa (uniform visa)** valid for one or more entries, provided that neither the length of the continuous visit nor the total length of successive visits may exceed three months in any half-year as from the date of first entry (there are no more short-stay national visas; these have been substituted by the *uniform visa*);
2. A **transit visa** allowing its holder to pass through the territories of the Contracting Parties once, twice or exceptionally several times en route to the territory of a third state, provided that no transit lasts longer than five days;
3. A **national visa** issued by one of the Contracting Parties in accordance with its own legislation, for visits of **more than three months**. Such a visa will enable its holder to cross the territory of the other Member State in order to proceed to the territory of the Member State which issued the visa.

The Schengen regime on visas will apply to the nationals of the third countries resident in a non-Schengen Member State and who **ask** for a residence permit of short duration. The nationals of third countries who are resident in the EU are entitled to only one, harmonized visa, valid for the entire Schengen **area**, for up to three months. Actually the residence permit is equivalent to a visa and there is no need for separate visa to be issued'. However, every Member State is free to demand a visa from more third countries. For the holders of residence permits and long-stay visas, every Member State **has** conserve each own national legislation concerning immigration but they have to take into consideration the security of the other Member States.

No visa should be apposed either on a travel document which has expired or if that travel document is not valid for any of the Member States. In the case where it is valid for only a number of States, then the visa to be apposed has to be limited to the Member states in question².

As far as conditions of residence in another State are concerned, the Schengen Convention leaves this matter entirely for the Contracting Parties to decide at national level. Furthermore, the right to move around freely from one Schengen country to another is recognized for third country **nationals** (non EU-nationals), once they have been admitted to the territory by one of the Schengen countries³. The need to develop a uniform visa was one of the very few points on which agreement could be reached, even in a European Union context (Article 100c EU Treaty).

However, nothing in the Convention prevents Member States from maintaining or establishing identification and/or registration requirements. Problems will arise in those countries where such requirements do not exist'.

¹ Answer given by Commissioner Monti to the written question posed by Mr Phillip Whitehead (PSE) to the Commission, OJ C 51/16, 21.2.96.

² Article 14.

³ Article 21.

⁴ In Great Britain and the Netherlands there is no obligation to carry identification documents. Nevertheless in the Netherlands specific categories of situations are mentioned in the new legislation, with effect from 1 July 1994, in which proof of identification may be required.

With a view to harmonizing their visa policy, the Schengen States have established a number of objectives which have to be achieved. Among these is reducing the list of countries to which different visa schemes apply, applying identical visa fees in accordance with Article 17 of the Schengen Convention, harmonizing documents required when filing visa applications and drawing up a list of travel documents recognized by all Schengen States¹.

2.6. The SIS

One particular measure to compensate for the abolition of identity checks at internal borders is police cooperation between signatory States, in order to prevent and combat crime². This cross-border cooperation between police authorities is primarily based on the Schengen Information System (SIS). Since 1 December 1997, the SIS has been fully operational in ten signatory states (Austria, the Benelux countries, France, Germany, Greece, Italy, Portugal, and Spain).

Control standards at external border crossing points are based on two levels of control. A first level of checks for **all passengers**, including EU citizens, making it possible for them to establish their identity on the basis of the presentation of travel documents, and a second intensified level for **third country nationals** which involves consultation of the Schengen Information System (SIS).

This computer system contains, among other things, data about **aliens (non-EU citizens)** who are to be refused entry into the territory of the Schengen countries. SIS is in fact at the heart therefore the most vulnerable part of the Schengen implementation mechanism. The reliability of the external border controls is put under great pressure by the persistent fear of the influx of (illegal) immigrants and asylum seekers. Furthermore, from the point of view of protection of fundamental rights, the **SIS** may also prove a weak spot, as it contains information on people who must be refused entry to Schengen territory because they are regarded as a threat to public order, e.g. people involved in criminal activities and wanted by the police and illegal, 'unwanted' immigrants. Information in the **SIS** is provided by the national authorities, and centralized in the respective centres of the contracting states (National Schengen Information System or N-SIS). The responsibility for the accuracy of the information stored in the SIS lies with the national authorities.

Only information on a limited number of issues concerning a registered person can be put into the system, i.e. **name and forename, particular objective and permanent physical features, first letter of second forename, date and place of birth, sex, nationality, whether the person concerned is armed, whether the person concerned is violent, reason for the report, action to be taken**³.

One of the conditions which must be met for a state to become a party to the Schengen Convention, besides being a member of the EU, is that it has enacted national legislation on **data protection**. For some countries, lack of compliance with this provision was the reason for postponing the decision declaring the Schengen Convention operative on their part, e.g. Italy and

¹ *Annual report on the Functioning of the Schengen Convention, Central Group, SCWC (97)22 def., 25.4.97.*

² **Articles 39 seq.**

³ **Article 94.**

Greece'. The SIS is accountable to the Joint Control Authority (JCA), which is an independent body responsible for ensuring that the system is efficient and subject to democratic control². Another task of the JCA is to keep the public informed.

Because of the restrictions on information which may be put into and disseminated through the SIS, the need was felt to develop other data systems, like SIRENE (Supplementary Information Request at the National Entry). But besides Schengen a wide number of systems have been or are being developed to store and exchange data, such as EURODAC, the European Information System EIS, and the **EUROPOL** information system³. Another problem which had to be solved before the Convention could be declared operative was the functioning of the central computer containing all the SIS data in Strasbourg.

One of the main issues of concern in the Executive Committee is modernization of the SIS, considered essential in order to enable the States of the Nordic Passport Union (Denmark, Sweden, Finland, Norway and Iceland) to be integrated into the Schengen cooperative framework in good time and to ensure that the Schengen Convention enters into force in those countries⁴. Therefore, a second generation of SIS II has been under discussion since 1996, in order to include all the latest technological developments, including access to Internet.

2.7. The Executive Committee

The Schengen Agreement provides for its own executive body in Title VII: '**An Executive Committee shall be set up for the implementation of this agreement**'. This Committee is composed of the Ministers of the Contracting Parties, representatives of Norway and Iceland and observers of the Commission and the Council's General Secretariat. It has extensive powers and it takes decisions **unanimously**. It **can** adopt binding decisions and thereby issue binding rules which must be implemented in all Schengen States. These rules are aimed at individuals, particularly aliens and persons for whom international criminal law is relevant.

3. Comparison between the Schengen Convention and the European Union framework on the rules governing the free movement of people.

The Schengen Agreement pursues the same objective as Articles 7a and 5a of the EC Treaty. The result of this historical development is that with regard to free movement of persons, there are now two areas and two levels of legislation in Europe: the Schengen countries have put into place a system which guarantees both the freedom of Article 7a and the necessary compensatory

¹ Concerning Greece, a new law on the 'Protection of Individuals From Processing of Personal Data', was published in the Government Gazette on 10 April thus bringing the Greek legal system into conformity with Article 114 of the Schengen Implementation Treaty and EU Directive 95/46. Furthermore, on 10 December, 1997, a Regulation concerning 'Protection of Personal Data' was published in the Government Gazette (n°1095, 10. 12.1997).

² Norway and Iceland are also represented on that body. The JCA has already issued proposals concerning data protection and has called upon the Contracting Parties to bring their national legislation, concerning personal data protection into line with various security requirements.

³ The difference between the SIS and the Europol information system lies in the type of information contained in the systems. The SIS only contains 'hard' data, whereas the EUROPOL system also contains analyses and suppositions, in addition to 'soft data' relating to suspects and their contacts.

⁴ Press Release, Meeting of the Schengen Executive Committee held in Vienna on 7 October 1997.

⁵ Article 131.

measures. At European Union level, neither the realization of free movement of persons nor compensatory measures have reached a comparable degree of guarantee. **As far** as free movement of persons is concerned, reasons for the delay are to be found in the ongoing dispute over the interpretation of Article 7a.

The method chosen by the participating States for the creation of this legal order is that of an international convention. This means that the Schengen Agreement is a treaty under international law between the Schengen Member States, the provisions of which must, however, be consistent with the EC Treaty.

The relationship of a treaty under international law to the legislation of individual Member States is essentially determined, not by the provisions of Community law and its claim to precedence over national law', but by the different principles which each Member State generally applies to treaties governed by international law. The European Court of Justice has no jurisdiction to review and interpret such agreements and it is therefore not possible to guarantee that they are uniformly applied and interpreted, unless one is expressly conferred on it by **all the Member States**. Particular problems also **arise** due to the fact that international law treaties concluded between the Member States come into force solely through intergovernmental cooperation, without the transparent legislative process usually adopted for Community acts and without the European Parliament being involved, with the consequent lack of any democratic scrutiny. Ratification of the Agreement by national parliaments does not compensate for this shortcoming since they can only approve or reject the text but cannot change its content.

Controls will be maintained and strengthened at the external borders, without distinguishing between borders with EC Member States and non-Member States. This practice is manifestly contrary to Article 7 EC Treaty. Moreover, the Court of Justice has held in *Commission v Belgium* that the controls at the frontiers may not be systematic, arbitrary or unnecessarily restrictive, and in *Commission v The Netherlands* the Court held that border checks may essentially only be limited to identity controls in the case of Community nationals².

The Convention recognizes Community competence and indeed its definition of 'alien' only refers to non-Community nationals. Therefore, it **seems** to exclude Community nationals from its scope. **As** regards the free movement of persons, the Schengen Convention **only regulates the movement of aliens**. However, in so far as family members of EC nationals who are themselves aliens but enjoy rights of entry and residence under Community law are concerned, it is not clear to what extent they are covered by the Schengen Convention. Presumably their Community law rights take precedence.

According to Article **142** of the Schengen Convention, whenever Conventions are concluded between the Member States of the European Communities with a view to the completion of an area without internal frontiers, the Contracting Parties have to agree on the conditions under which the provisions of the present Convention should be replaced or amended in the light of the corresponding provisions of such Conventions. The Contracting Parties have thus to take account of the fact that the provisions of this Convention may provide for more extensive co-operation than that resulting from the provisions of the Schengen Convention. Provisions which are in breach of those **agreed** between the Member States of the European Communities have in any case to be adapted.

¹ **Article 189 of the EC Treaty.**

² Case C-68/89 *Commission v The Netherlands*, [1991] ECR-2637; Case 321/87 *Commission v Belgium*, [1989] ECR-997.

It is not clear though **if** the term 'conventions' can be broadly interpreted also included other Community instruments (i.e. common actions...) adopted within Title VI of the TEU (at least up to the point where they are compulsory for the Member States).

According to the provisions of Article 3(4) of the Schengen Convention, it **is** only the **frontier controls** and formalities which are banned. The elimination of controls on persons crossing internal frontiers does not deprive the competent authorities of the law enforcement powers which the legislation of each Member State has conferred upon them over the whole of its territory. Within their own territory, the contracting States retain the right to carry out identity controls according to their national legislation. **As** soon **as** a national of a contracting State has entered the territory of another signatory State he is obliged, in the same way as third country nationals, to **carry** with him a valid travel document or an identity card which allows him to cross the Schengen internal frontiers. However, these powers must be exercised without discrimination between domestic and cross border traffic. Therefore, any power to impose controls or penalties which were only exercised in connection **with** internal frontier crossing would be contrary to Article 7a.

In conclusion, it should be emphasized that Schengen and the Third Pillar are very much inspired by the same premises. Both are responses to the creation of an internal market including free movement of persons (Article 8a, TEU) and/or the relaxation of the control of persons at borders (Article 2 of the Schengen Implementing Convention). In the eyes of many, the abolition of internal border controls would cause a security deficit, necessitating the introduction of a compensatory regime. Schengen and the Third Pillar *can* both be viewed as sets of provisions that compensate for the security deficit. Secondly, Schengen should by no means be regarded as a definitive arrangement. The ~~final~~ objective is its **full** integration into the Treaty on European Union put forward by the Treaty of Amsterdam.

4. Some further remarks

Schengen is now an example of the two-speed Europe. It is outside the Union framework but within the Union orbit in the sense that all of its Members are Members of the Union and the Implementing Convention makes specific reference to the **aim** of the EC Treaty in creating **an** area without internal frontiers.

4.1. Priority of Community legal order

An issue which may be problematic concerning the existence and functioning of these two 'contradictory' legal orders, is the question of respect for and supremacy of the Community legal order. Schengen and the Third Pillar to a great degree regulate the same issues and identical provisions can be found therein. Although the Schengen Agreements stand outside the Union framework, the Implementing Convention respects the supremacy of Community law. Article 134 provides for the priority of Community law as follows: 'the provisions of this Convention shall apply only in so far **as** they are compatible with Community law'. Furthermore, Article K.7 **TEU**¹ allows for the establishment or development of closer cooperation between two or more Member States insofar **as** such cooperation does not conflict with or impede that provided for in Title VI, TEU. This provision would therefore allow for the continued existence of the Irish-British common travel area and Schengen. In the event of conflict between Schengen and Title VI, TEU, one would have to show that cooperation under Schengen conflicts with or impedes the work done under the Third Pillar.

¹ **Article K.7 reads: 'The provisions of this Title shall not prevent the establishment or development of closer cooperation between two or more Member States in so far as such cooperation does not conflict with, or impede, that provided for in this Title'.**

In such cases of conflict, the Schengen States would concede in favour of Union. If there is no such conflict or impediment, the norms adopted under the Third Pillar and those adopted within the Schengen context could have a dual existence.

Some of the issues likely to run counter to Community competence are the provisions regulating asylum procedures, the regulation of firearms, and the visa provisions. As far as asylum is concerned, the Schengen provisions ceased to be operative as soon as the Dublin Convention came into force. From that date the latter took full competence in this field. The issue of 'firearms' **has** been decided in favour of **Community** competence. The Community Visa Regulation has also been adopted on the basis of Article 100c of the EC Treaty and presumably the Schengen States have to comply accordingly.

4.2. Strengthening of external borders

Although there may not always be a direct relationship with the Schengen Convention, the psychological effect of abolishing national border controls is that all kinds of compensatory measures are deemed necessary. Open borders will lead to intensified domestic controls, as has occurred in **all** Schengen countries. In some countries the obligation to carry identity documents was introduced or became more rigorous. In order to avoid responsibility for asylum applications legal fictions were introduced for areas of international arrivals (airports, ports and railway stations). Because of the creation of 'international zones', asylum seekers are prevented from claiming that they have actually entered the territory and their return to the place of origin is facilitated. Furthermore, the creation of **so-called** waiting zones (zones d'attente) at (air)ports and international railway stations has been realized, enabling the authorities to hold an immigrant for a maximum period of 20 days. Other legislation, more closely connected with the Schengen Convention, involves penalization both of carriers bringing in undocumented aliens and those who assist illegal immigration on a commercial basis.

The Schengen Convention prohibits controls at the border, but not beyond the border. Moreover, it prohibits permanent controls, but not incidental controls. It could be argued that after-border controls carried out every day of the week are still in line with the Schengen Convention if interpreted to the letter, but this is certainly not in the spirit of the Convention. Nevertheless, the maintenance of public order is considered to be sufficient justification for such **an** interpretation, in light of the need to combat international crime.

Although the Schengen Convention contains no provisions on harmonization of immigration and asylum procedures, it **has** in fact resulted in a 'tacit harmonization', driven by the fear of potentially rising numbers of immigrants and asylum seekers. **In** this way, **downward harmonization** has taken place, despite the absence of **an** international obligation to harmonize or coordinate immigration laws and policies. **A** clear example of this phenomenon is the new Aliens Act of the Federal Republic of Germany which entered into force on 1 January 1997, introducing visa requirements for family members of EC nationals who are not EC nationals themselves. This implies a deterioration of the position of third country nationals in Germany. The reason for doing this was an attempt to bring the German visa requirements in line with those of other Schengen countries. Furthermore, carrier sanctions were introduced penalizing carriers for bringing in aliens possessing insufficient or forged documents and obliging them to return those aliens to the place where they apparently boarded the aircraft or ship.

Along the same lines, the Netherlands introduced stricter legislation on carrier sanctions and on penalization of commercial aid to illegal immigrants. Another drastic change was the abolition of the right to appeal to a higher tribunal for **all aliens**, motivated by the need to shorten the judicial procedures for immigrants and thereby limit the possibility of obtaining legal status during lengthy

legal procedures. Furthermore, more restrictive provisions were introduced concerning family reunification and family establishment. Several compensatory measures were said to be necessary to outweigh the effect of the abolition of border controls. First of all, a limited but controversial obligation to carry documents for the purpose of identification, which did not exist in the Netherlands before, was introduced. Further measures have been taken to intensify domestic controls on aliens and so **called** 'flying brigades' have been formed to **carry** out ad hoc controls just behind the borders. Although this is in line with the letter of the Schengen Convention, it is not in accordance with the spirit. Indeed, permanent controls at the borders have been abolished and this has had the paradoxical effect that instead of less, even more people are nowadays involved with border controls, targeting international crime, drug traffic as well as providing assistance to the immigration police.

In addition to these controls at the crossing points (roads, railroads, ports and airports), defined in detail in a common handbook, Member States exercise surveillance at external borders between crossing points, the so-called green and blue borders (i.e. land and sea borders). These controls aim at preventing the checks at crossing points. Furthermore, Article 5 defines the harmonized conditions for entry of third *country* nationals for a stay of up to three months: travel documents, visas, and sufficient means of maintenance.

4.3. "Democratic deficit"

Neither the Court of Justice nor the European Parliament were given any powers in relation to 'Schengen' and no system of national parliamentary control was envisaged. Judicial control by **national** courts is **another** troublesome issue. In cases where a national measure or rule is alleged to be contrary to some regulations or decisions of the Executive Committee, it will be difficult to reach a verdict since national courts cannot be aware of the context in which the decision was taken. Of course, the European Court of Justice, if it had competence to consider questions arising from the application of the Schengen Convention, would face the same problems, but it would have greater authority to decide whether a regulation or decision drafted by the Executive Committee was compatible with Community law (Article **134** of the Schengen Convention), especially regarding the right of freedom of movement of persons and other fundamental rights and freedoms which the EU claims to respect and protect'. The Dutch government decided to draw up two proposals for a protocol concerning the jurisdiction of the European Court of Justice in Schengen law. These were presented while it was considering approval of the Schengen Convention. The **first** proposal was intended to empower the Court to settle disputes between the State Parties on the Schengen Convention, the Dublin Convention on Asylum and the (draft) External Borders Convention. The second proposal was limited to the Schengen Convention but, like the first proposal, material provisions were excluded from the Court's jurisdiction and it did not provide for a preliminary procedure. France, which has already ratified the Schengen Convention, opposed these proposals, fearing the political problems that might arise through the Senate' monitoring commission.

One of the ongoing criticism of the Schengen Agreement and of the **SIS** is that there is no provision for democratic accountability, no role for the European Court of Justice and not even a limited, code of access to documents.

¹ **The Schengen Convention contains no provision on respect for human rights' treaties in force between the State Parties. Article 135 only provides that the Convention be applied with respect to the UN Convention on the Status of Refugees (1951) and the Protocol thereto (1967).**

Because of the intergovernmental character of cooperation within the Third Pillar, democratic and judicial control over this cooperation is essentially taken care of primarily at national level, the level of the Member State. For example, the Dutch government is not entitled to agree, in the Council of the European Union, to draft texts of a binding character without the prior consent of its national parliament.

4.4. Transparency in the decision making process

The lack of transparency and openness' in the decision-making process within Schengen is worrying.

Meetings of the Executive Committee are not public, except when decided otherwise². **As** the Executive Committee takes its decisions unanimously, the assumption of no-publicity can only be broken if all Ministers support the initiative taken by one of them for that purpose. **Only** 'experts' who accompany a Minister and the 'Commission of the European Communities' are invited to attend the meetings. Also the deliberations of the Executive Committee are confidential³.

Although the 'publication of the content of decisions' of the Executive Committee will be determined according to the national law of each of the Schengen states, this will be without prejudice to the confidential character which, in the event, may be attached to these decisions on their adoption⁴. The list of States whose nationals must be in possession of a visa when entering the Schengen **area** was classified as confidential at the initiative of one signatory State (Germany).

The result of this confidentiality is the creation of inequality between the public body (which knows these decisions) and the private individual (from whom they are kept secret).

The records will include the minutes of Executive Council meetings, documents presented to the Executive committee, draft decisions, conclusions and declarations, either of the Executive Committee itself or of one of its members'. Transparency of decision-making by the Schengen Executive Committee has not been clearly regulated. The two bodies are to decide whether or not certain acts and documents are to be made public (the Executive Committee' and the 'Presidency'). Finally, no international judicial body has been appointed as a supervisor of the executive and interpreting Schengen bodies.

¹ In this context 'openness' **means** the possibility for everyone to acquire knowledge of government activities by granting access **to** the **fora** where public decisions are taken and by making available information **sources** (documents and other visual or auditive instruments), in which these decisions are recorded and which provide insight into their preparation. Open government therefore exists where conference rooms or **other fora** where government bodies make or prepare their decisions are open to the public **and** where documents relating to these decisions **can be** consulted within a reasonable time-limit and without to much trouble. **See** '*The Principle of Open Government in Schengen and the European Union: Democratic Retrogression?*', Deirdre Curtin & Herman Meijers, CMLRev. **1995**, pp. 391-442.

² Article 3(1) of the Rules of procedure **of** the Executive Committee.

³ Article 2(1) of the Rules **of** Procedure of the Executive Committee.

⁴ Article **9** **of** the Rules of Procedure of the Executive Committee.

⁵ Article **7** **of** the Rules **of** Procedure of the Executive Committee.

5. Opinion of the European Parliament

The European Parliament has continuously expressed the opinion¹ that the Schengen countries have taken steps to guarantee both the right of freedom of movement and the right of security of their residents. It has, nevertheless, pointed out that, pursuant to Article 7a of the EC Treaty, the free movement of persons is an integral part of the internal market and of the European Union's objectives. Therefore, it called on the Commission, the Council and the Member States, using Community mechanisms, to put into practice the free movement of persons for all citizens of the Union and of third countries who are legally resident in the Union. It has expressed its regrets that the Schengen Agreements discriminate between citizens of the Union and citizens of third countries who are legally resident in the Union. The European Parliament considers that improving security of all residents must be an important priority of any policy, including therefore that concerning Schengen. In practice, however, implementation of the Schengen agreements is mainly geared to restricting migration. The European Parliament therefore urges that more selective measures be adopted, designed to combat crime, which should improve cooperation between police forces and judicial authorities, with attention being devoted both to the effectiveness of action by authorities and to the protection of residents' rights.

Moreover, the European Parliament has pointed out that Member States retain the right to stop suspected **criminals** at frontiers, particularly where natural boundaries provide easy check-points. Nevertheless, the abolition of checks at internal frontiers must not be accompanied by the introduction of new administrative checks which would infringe human rights. The creation of the Schengen area must not be the excuse for introducing systematic controls in border regions or for hermetically sealing the external borders ('Fortress Europe'). Furthermore, Parliament has expressed the view that the formulation of Article 2(2) of the Convention applying the Schengen Agreement, which permits a Member State to close its borders for a limited period 'where public policy or national **security** so require', is vague and national sovereignty prevails over the common interest through the operation of this provision.

With regard to checks at external borders it calls for a comprehensive report on this matter, including an analysis of all the problems occurring there. It has been calling for harmonization of visa policy and of the list of countries for which a visa is required in the Schengen area and for rules on common recognition of travel and residence documents. It maintains that the visa requirements and provisions on border control must be consistent with the right of individuals to **seek asylum** and the obligation of the State to respect the principle of non-refoulement. It has also asked for the term 'family' to be given a broader interpretation, covering all family members who live in the same household.

Setting up administrative and police cooperation at European level can not be done without adequate democratic control by the European Parliament, judicial control by the European Court of Justice, transparency and improvement of accountability. According to the European Parliament's opinion, Schengen does not fulfill any of these prerequisites. It therefore calls, for greater transparency in the Schengen arrangements, by drawing up coordinated Schengen rules

¹ See Resolution of 23.11.89 on the signing of the Supplementary Schengen Agreement, OJ C 323/98; Resolution of 14.6.90 on the Schengen Agreement, the Convention on the right of asylum and the status of refugees as defined by the ad hoc Group on Immigration, OJ C 175/170; Resolution of 19.11.92 on the entry into force of the Schengen Agreements, OJ C 337/214; Resolution of 10/2/94 on the Schengen Agreements, OJ C 61/185; Resolution of 6.4.95 on the Schengen Agreements and political asylum, OJ C 109/169; Resolution of 20.6.96 on free movement of persons within the Nordic Passport Union, the European Economic Area and the Schengen countries, OJ C 198/168; Resolution of 11.3.97 on the functioning and the future of Schengen, OJ C 115/30.

and compiling a public register of the Executive Committee's reports. In this context, an effort should be made to strike a balance between maintaining order and protecting rights, between efficient **policy** and respect for democratic control.

Finally, The European Parliament has drawn attention to the problems regarding uncontrolled registration and inadequate legal protection of the citizen, arising from departures from the rules **concerning the purposes** which data are intended to serve and vagueness of definitions (objective physical features, serious danger, serious offence, serious suspicion, public policy, internal security). The Schengen Implementation Convention does not contain substantive provisions on protection of privacy. It is the national law of the Contracting Parties which governs the data protection. One of the problems of Schengen is that these national laws vary considerably and their legal structures are complicated.

6. Amsterdam Treaty - The Schengen Protocol

One of the most important initiatives of the Treaty of Amsterdam, is the decision to incorporate the Schengen acquis into the framework of the Community'. The decision comes as a logical consequence of the fact that the objectives of the Schengen Agreement, which has already created a free movement **area** among 13 Member States, coincide with those contained in the new Treaty. Furthermore, one of the main advantages to be gained from placing Schengen cooperation within the Community structures is the introduction of a certain form of parliamentary and judicial control². After long discussions, draft proposals and compromises, it has been decided to incorporate Schengen into the new Treaty by means of a Protocol. The latter allows the 13 Member States of the European Union (except the United Kingdom and Ireland which are not signatories of the Schengen Convention) to establish **closer cooperation** among themselves within the scope of the Schengen Agreements. This co-operation will be conducted within the institutional and legal framework of the European Union, respecting the relevant provisions of the EU and EC Treaties.

¹ The first mention of incorporation of the Schengen acquis into the **Community** framework was made in the Irish Presidency's Dublin II' draft proposal, 5 December 1996. However, the comment then was that incorporation required 'further consideration', since the idea had not been very well received and the UK and Ireland were reluctant about such an initiative. During February, a series of 'Non-Papers' (negotiation position papers from the Dutch Presidency), were put on the table, concerning **this** matter. Two options were suggested: the first suggestion was through 'enabling clauses' on a case by case basis; the second that 'predetermined' approach attach a 'Schengen protocol' to the existing 'Schengen acquis'. Furthermore, a number of accompanying measures ('flanking measures') were deemed necessary for the elimination of internal **controls** by the signatory states of Schengen. These measures included the strengthening of external borders, visa policy, police cooperation, cooperation in criminal matters, extradition, **drugs, firearms, the SIS, goods transit, data** protection.

² Mr. Patijn, Dutch Minister for **European Affairs**, chairman of the group of representatives for the **IGC**, meeting of personal **representatives of Foreign Ministers** of the fifteen, **IGC, Brussels 6.5.97, Agence Europe, N°6969, 7.5.97, p.2.**

The Schengen Protocol constitutes the first attempt to apply the new principle of 'flexibility' incorporated for the first time in the Treaty of Amsterdam¹.

From the entry into force of the Treaty of Amsterdam, the Schengen acquis will immediately apply to the **13** Member States and the Council, acting unanimously, must take all appropriate measures to implement the incorporation. The 'Schengen acquis' includes the 1985 Schengen Agreement, the 1990 Schengen Implemented Convention, the Accession Protocols and Agreements to the 1985 Agreement and the 1990 Implementing Convention with Italy, Spain, Portugal, Greece, Austria, Denmark, Finland, and Sweden, the Association Agreements with Iceland and Norway, all the Decisions and Declarations adopted by the Schengen Executive Committee (more or less 200 decisions). Additionally, the Schengen Executive Committee, on entry into force of the new Treaty, will cease to exist and be replaced by the Council of Justice and Home Affairs². The same will happen to the Schengen Secretariat, which is going to be integrated into the General Secretariat of the Council³.

However, the determination of the Schengen acquis and its incorporation into the framework of the European Union is not without problems. Firstly, according to the Protocol, the Council, **and** only the Council, is responsible for such determination and moreover it will take all necessary decisions with **unanimity** voting. The Commission and the European Parliament are excluded from this process and even their opinions are not required. Secondly, according to the Annex attached to the Protocol, the Schengen acquis also consists of the decisions and declarations adopted by the Schengen Executive Committee (approximately 200 unpublished decisions) and also the acts adopted for implementation of the Convention by the organs upon which the Executive Committee **has** conferred decision-making powers. However, the majority of these legally binding provisions have been adopted in secret without any kind of political or parliamentary control by the Member States. **Additionally**, there is no annexed list of all the legal instruments which have already been adopted within the Schengen framework.

Before entry into force of the Treaty of Amsterdam, the legal basis of all the provisions which constitute the Schengen acquis has to be determined by the Council⁴ of the 15 Member States

¹ The new principle is regulated in a general way in Articles K. 15 to K. 17 **of** the EU Treaty and in a more specific way in Article 5a **of** the EC Treaty and Article K. 12 **of** the Third Pillar. The Member States that wish to establish closer co-operation between themselves **are** allowed to **use** the institutions, procedures **and** mechanisms laid **down** by the Union, provided that certain conditions have met, i.e. the majority of Member **States** **are** **involved**, the interests of the Union are protected **and** served, the cooperation is aimed at the **objectives** of the Union, **institutional** framework of the Union is respected, it is consistent with the acquis **communautaire**, is not **against** the interests of the non-participant Member States and is open to all Member **States** allowing them to become parties to the cooperation (Articles **43-44** TEU, as amended by the Treaty of Amsterdam). The decision to authorize this 'closer cooperation' would be taken in the Council by **qualified** majority, although the **possibility** for veto is reserved in special cases. In **this** respect, the **flexibility** principle applying to the Schengen acquis is special, since there is no need **for** authorization by the Council; this authorization is given by the Treaty itself and the Schengen Protocol.

² Article 2§1 of the Protocol integrating the Schengen acquis into the framework of the **European** Union.

³ **France** has already expressed its concern regarding difficulties on the physical incorporation **of** the Schengen acquis into the Treaty, due to the fact that the majority of the staff working at the Schengen Secretariat are Belgians. *Agence Europe*, N° **7260**, 10 July 1998, pp. **6-7**.

⁴ Declaration n° **44** adopted by the IGC. COREPER, at its meeting of 17 October 1997, decided to establish two **working groups**, the 'Schengen acquis' **group** and the 'Schengen/Norway-Iceland' group, with the aim of examining the issues concerning incorporation **of** the Schengen acquis into the framework of the community.

(therefore the UK and Ireland participate in this stage), again acting unanimously. This requires that each single decision and provision contained in the Schengen acquis has to be placed either within the EC Treaty (the First Pillar, under the new Title on 'Visas, asylum, immigration and other policies related to free movement of persons') or within the EU Treaty (the Third Pillar). Also the legal status of these instruments has to be determined, i.e. as a 'regulation', or a 'framework decision' or a 'common position'. If no decision is reached concerning particular issues before entry into force of the Treaty of Amsterdam, then these issues will automatically fall under the Third Pillar.

Furthermore, the Council of the **13** Member States, again acting unanimously, will decide the dates on which the Schengen acquis will apply to those Member States which, although having signed accession agreements with Schengen, do not meet the condition for this accession before the entry into force of the Treaty of Amsterdam¹.

Some provisions and matters regulated by the Schengen acquis have already been dealt with by EU legislation, i.e. **firearms**, money laundering, asylum. From an initial, general estimation it could be **assumed** that provisions relating to visas, immigration and asylum will move to the First Pillar, under the new Title, while provisions regulating cross-border police cooperation and mutual legal assistance in criminal cases will be moved to the Third Pillar. The 'Schengen acquis' group, composed of representatives of the **15** Member States and of the Commission, has undertaken the task of solving a number of problems and giving answers to a series of issues which have arisen concerning incorporation of the Schengen acquis into the Community framework. Among them are the determination of the Schengen acquis between the First and the Third Pillars, the SIS and its finance, the translation and publication of the Schengen acquis and, at a later stage, the determination of that part of the Schengen acquis which the United Kingdom and Ireland will decide to adopt.

The role of the Court of Justice in exercising its powers in matters connected to the Schengen acquis, has increased in importance regarding provisions of and decisions resulting from the Schengen acquis and their determination by the Council. The Court of Justice will exercise the powers conferred on it by the relevant applicable provisions of the Treaties. It will therefore have, on the one hand, broader competences in regard to decisions or provisions which will fall within the new Title on free movement of persons and, on the other hand, limited powers on issues which will **fall** under the Third Pillar. Moreover, Article **2**, para. **3** of the Protocol specifies that, in any event, the Court will have no jurisdiction on measures or decisions relating to the maintenance of law and order and the safeguarding of internal security. In any event, pending the implementation measures, the Schengen acquis will be subject to review by the **ECJ** in the same way as acts adopted under the Third Pillar. The ECJ's role is thus strictly limited.

¹ **This paragraph applies to Finland, Denmark and Sweden which up to now they have not implemented the Schengen acquis and therefore have not abolished controls at their internal borders with the other Member States. For this to be achieved, it is necessary that the other signatory States not only ratify the accession agreements signed by these States but also meet some other conditions. For example, effective controls at the external borders of these countries, necessary adaptation of international airports for the separation of travellers coming from another Schengen State and those coming from a third country, connection with the SIS, implementation of national legislation concerning personal data protection. Taking these preconditions into consideration, particularly existing difficulties for accession to the SIS, it seems unlikely that Finland, Sweden and Denmark will fully apply Schengen acquis before entry into force of the Treaty of Amsterdam; Nuno Piçarra, 'La mise en oeuvre du protocole integrant l'acquis de Schengen dans le cadre de l'Union européenne: regles et procédures', Sixieme colloque, 'Derniers jours de Schengen? Integration dans le nouveau traite sur l'Union européenne, frontières extérieures et systemes d'information', Institut Européen d'Administration Publique, Maastricht, 5-6.2.1998.**

Article 4 of the Protocol, deals with the special case of the United Kingdom and Ireland, which are not signatory members of the Schengen Convention and therefore are not bound by one Schengen acquis. These countries maintain the right of full control at their external borders although they *can* not block close cooperation by the other Member States in those areas. At the same time both countries may, at any time, request to take part in some, or all of the provisions of the Schengen acquis ('opt-in' clause). This means that they can choose which of the 200 or more decisions of the Schengen Executive Committee they would like to adopt and, additionally, the same applies to any of the provisions of the Schengen Agreements. However, such a decision requires unanimous agreement, in the Council, of all the other Member States of Schengen'.

Special arrangements have also been made for the case of Denmark where another specific Protocol applies. According to this Protocol, Denmark will have the right to 'opt-out' where provisions in the Schengen acquis are to be integrated into the First Pillar, under the new Title on free movement, asylum and immigration. Conversely, Denmark will normally apply those Schengen acquis measures which will fall under the Third Pillar². Denmark will decide, within 6 months of the Council's decision on a proposal or initiative to build upon the Schengen acquis under the provisions of the ~~First~~ **First Pillar** of the EU, whether they **will** implement this decision or not. However, this implementation will take place pursuant to national law and not pursuant to a Community obligation. Therefore this decision, to join any provision under the Schengen acquis with the new Title on free movement of persons, will create an obligation under international law between Denmark and the other Member States which apply one Schengen acquis. This means normal Community provisions on judicial and parliamentary control will not apply in the case of Denmark. Here also lies the difference between the special arrangements for Denmark on the one hand and the UK and Ireland on the other. The latter, whenever they adopt decisions under the Schengen acquis and/or the new Title on free movement, asylum and immigration, will do so under Community law and therefore will be subject to the Court of Justice's jurisdiction and control. Thus it may be reasonably argued that the special arrangement agreed in the case of Denmark will create an encroachment on the integrity of the Community legal order and will jeopardize the process of European integration. In any event, however, the Danish 'opt-out' does not apply to measures relating to EC Treaty provisions concerning visas (former Article 100c of the EC Treaty).

Norway and Iceland will be associated with the implementation of the Schengen acquis and its further development on the basis of the Cooperation Agreements signed with the Schengen Executive Committee on 19 December 1996. The procedure to be followed will be the subject of a separate agreement to be signed between the Council and these two countries, after unanimous decision by the 15 Member States of the EU³.

¹ Spain was the main Member State to insist on the requirement of unanimity by the Member States for the 'opt-in' of the UK or Ireland to any of the provisions of the Schengen acquis and/or the new Title on free movement, asylum and immigration. Spain had feared that if the UK got its way it one day Spain would be obliged to relax and even suppress its border controls at its frontier with Gibraltar, *Migration News Sheet*, N° 173/97-08, August 1997, p. 1.

² *Statewatch*, Vol. 7, no 3, May-June 1997, p. 16.

³ It is surprising that Ireland and Norway are excluded from participating in this group's work.

The British Presidency prepared a document regarding a draft negotiating directive aimed at associating Norway and Iceland with the Schengen acquis. This draft Directive should constitute the basis for negotiation. The aim is to adopt this Directive as soon as possible and also launch negotiations with these two Nordic countries'.

It is worth mentioning once more that, according to the Schengen Convention, the Schengen provisions are applicable only as far as they are compatible with Community law². The same principle is also reserve of the Protocol integrating the Schengen acquis into the Community framework. Citation 3 of the protocol states: '... the provisions of the Schengen acquis are applicable only if and **as far as** they are compatible with the European Union and Community law'. This principle, of Community law's supremacy over the Schengen acquis, also constitutes a judicial guarantee. Therefore, it is possible that the provisions of the Schengen acquis, integrated into the Community framework after decision by the Council and with entry into force of the Treaty of Amsterdam, may be **annulled** or declared invalid by the Court because of their incompatibility with the TEU, EC Treaty or the general principles of Community law.

¹ *Agence Europe*, N° 7253, 1 July 1998, p. 9. France, however, maintains its reservations due to the fact that the integration of these two countries into the Schengen acquis will make ratification of the Treaty of Amsterdam even more difficult. France wants them to play a limited role in discussions concerning incorporation of the Schengen acquis into the Treaty. On the contrary, the EU Nordic Member States seek a more active participation of Norway and Iceland in the negotiations.

² Article 134 of the Schengen Implementation Convention.

Part Two - COMMUNITY FRAMEWORK

1. General principles of the EC Treaty

Article 3(c) of the EC Treaty, one of the general principles on which the Community is based, mentions among the objectives of the Community the creation of an **internal market** characterised by the abolition of obstacles to the free movement of goods, persons, services and capital.

At this stage of European integration, the right of free movement is not granted to EC nationals in their capacity as citizens of the Community but as economic operators¹. It gives Community nationals the right, together with their families, to reside in another Member State for the purposes of their economic activity, but it only concerns people in their **own** capacity as **workers**. There were no other articles in the **original** Treaty relating to the wider aspects of **free** movement of **persons**, in particular of **tourists**.

2. Freedom of movement for workers

2.1. The right to take up employment

The Treaty provisions on freedom of movement for workers (*Articles 48 to 51 EC Treaty*) form an essential part of one of the earliest, central aims of the Community, namely the establishment of a common market.

Migration to the richest regions and countries provides the labour vital to their further economic development. In the EU in general, it facilitates the adjustment of the labour supply to variations in demand from **firms** and opens the way for more coherent and effective economic policies on a European scale. By encouraging the mobility of workers, it facilitates satisfaction of the employment market's human resource requirements. Freedom of movement of workers allows EU citizens to seek, within the community, better living and working conditions than are available to them in their places of origin and gives them the opportunity to add to their professional experience. Furthermore, it reduces social pressure on the poorest regions of the European Union and allows the living conditions of those remaining to improve. Finally, as a result of contacts between workers in the Member States, it encourages mutual comprehension, the emergence of a Community level social system and hence the ever close union among the people of Europe that is one of the **aims** of the Treaties.

The EC Treaty defines in Article **48** EC, "freedom of movement for **workers**" as entailing the abolition of any **direct or indirect discrimination** based on nationality in the case of access to employment, remuneration and other conditions of work and employment. Furthermore, it entails the right, subject to limitations justified on grounds of public policy, public security or public health, to accept **firm** offers of employment, to move freely within the territory of Member States for that purpose, to stay in a Member State in order to be employed there under the same conditions as nationals of that State and to remain there after such employment.

¹ **This central principle including "persons", is elaborated on for workers in Article 48 et seq., in the secondary legislation -both regulations and directives- and in the case-law of the European Court of Justice. There are also Directives for categories of persons who are not workers in the strict or normal sense. Initially that objective was specifically implemented by Articles 59-66 (freedom to provide services), Articles 52-58 (right of establishment) and Articles 59-66 (freedom to provide services).**

Article **48** represents the application of the Article **6** EC Treaty general principle that "within the scope of application of this Treaty[...] any discrimination on grounds of nationality shall be prohibited".

This freedom of movement includes, on the one hand, the right to be treated on an equal footing with nationals of the host State as regards employment, remuneration and other conditions of work and employment (Article 48(2)). On the other hand, an autonomous Community regime has been created independent of the abolition of discrimination on the grounds of nationality: the worker has the rights mentioned in Article **48(3)**, including the right to accept a firm offer of employment. In this sense, whilst these rights are enjoyed by those directly referred to there is nothing in the wording of Article **48** to indicate that they may not be relied upon by others, particularly employers. In order to be fully effective, the right of workers to be hired and employed without discrimination necessarily entails as a corollary the employer's entitlement to hire them in accordance with the rules governing freedom of movement for workers'.

The freedom of movement for workers, as it is governed by Article **48(3)**, also entails the right for nationals of Member States to move freely within the territory of the other Member States and to remain there for the purposes of seeking employment². Article **48(3)** lists, non-exhaustively, certain rights which benefit nationals of Member States in the context of the free movement of workers. Therefore, EU workers have the right to accept firm offers of employment, to move freely within the territory of the Member States for this purpose, to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action and to remain in the territory of a Member State after having been employed in that State.

The wording of Article **48** EC Treaty leaves a wide margin for interpretation as to whether it not only refers to Member State nationals but also to third country workers i.e. whether freedom of movement is secured for **workers**, in general. However, the secondary legislation subsequently passed to implement this provision³ made it clear that the right of free movement only applies to workers **who are nationals of a Member State**. This is also the interpretation of Article **48** adopted by the Court which stated that the Article guarantees freedom of movement **only** to workers "[...]from the Member States"⁴.

¹ Case C-350/96, *Clean Car Autoservice GmbH / Landeshauptmann von Wien*, judgement of 7 May 1998. The Court also held that the rules governing freedom of movement for workers "[...]could easily be rendered nugatory if Member States could circumvent the prohibitions which they contain merely by imposing on employers requirements to be met by any worker whom they wish to employ which, if imposed directly on the worker, would constitute restrictions on the exercise of the right to freedom of movement to which that worker is entitled under Article 48 EC Treaty".

² Case C-292/89, *R v Immigration Appeal Tribunal, ex parte Antonissen*, [1991] ECR I-745, [1991] 2 CMLR 373.

³ See Article 1(1) of Regulation No 161/68, Article 1 of Directive 68/360/EEC and Article 1 of Regulation No 1251/70. See also, with regard to social security, Article 2(1) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

⁴ The Court, in its "Meade" judgement (of 5 July 1984, Slg. 1984, pp. 2631-2638), confirmed that the term "workers" in Article 48 only covers nationals of a Member State.

Article 49 of the Treaty provides for the making of secondary legislation by the Council to bring about, by progressive stages, the **freedoms** set out in Article **48**. Several directives and regulations have been established in order to implement Article **48**, governing the conditions of entry, residence, and treatment of EC workers and their families¹.

In addition to this legislation, the case law of the Court of Justice has played a very important role by **clarifying**, to a great extent, the scope of these provisions. The Court has affirmed the **direct applicability**² of freedom of movement once the transition period ended (1 January 1970) which rendered all contrary national legislation inapplicable³. The Court made it clear that, since the rules on **free** movement of persons are fundamental to the Community, they are to be broadly and inclusively interpreted. **It also requires the term "worker" to be a Community concept** and it has been construed generously so that not only current workers, but also those who were workers and also part time workers may also be covered. The criteria by which the Court will judge whether or not someone qualifies as a worker for the purposes of Article **48** will depend, not on the reason for taking up employment, nor the amount earned, but on the **genuineness of the activity undertaken**. Once the activity constitutes "effective" work, then the worker will come within the scope of Community law. **A worker** is any person who "pursues an activity which is effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and **ancillary**"⁴.

2.2. "Wholly internal situation" and "reverse discrimination"

The Court **has ruled** on several occasions⁵ that Article **48** does not prohibit discrimination in a so-called "wholly internal situation".

Internal is a situation where there is no factor connecting the person concerned with any of the situations envisaged by Community law but rather falls within the area of national competence.

¹ The **most** important of **these** are: Directive 64/221, which governs the main derogations or exceptions to the **rules** on free movement; Directive 68/360, which regulates the formalities and conditions of entry and residence of workers and the self-employed; Regulation 1612/68, which elaborates on the **equal** treatment principle and **sets out** many of the substantive **rights** and entitlements of workers and their families; Regulation 1251/70, **which protects the right** of workers and those members of the worker's **family** listed in Regulation 1612/68 to remain in the territory of a Member State, mainly in the **case of** retirement, permanent incapacity to work or death, after having been employed in that state for a **period** of time and subject to certain conditions.

² The **consequence** of the principle of direct applicability is that the provisions of the **Treaty** referring to the free movement of **persons** are automatically becoming part of the national legal systems, without the need for separate national legal measures.

³ **In** the *Van Duyn* judgement of 4 December 1974.

⁴ Case 53/81 *Levin v Staatssecretaris van Justitie*, [1982] ECR-1035, para 17; **Case** 197/86 *Brown v Secretary of State for Scotland*, [1988] ECR-3205, **para** 21; **Case** C-27/91 *Le Munoir*, [1991] ECR I-553 1, para 7.

⁵ *Case* 175/78 *R. V. Saunders*, [1979] ECR-1129, [1979] 2 CMLR 216.

A person seeking to invoke a rule of free movement against the Member State of his nationality **has** to show that his situation **is linked** to one concerning free movement between Member States and that it is a situation governed by Community law'. The Community rules on the free movement of persons have no application in cases that lack the factor linking them to the Community legal order. This is the case of nationals of Member States who have **never** exercised their right to cross the internal borders as workers, self-employed persons, providers or receivers of services. The notion of "wholly internal situation" has been clearly illustrated in the case of **Morson and Jhanjan**² where the Court held that two Dutch nationals, working in the Netherlands, had no right under **Community** law to bring their parents, of Surinamers nationality, into the country with the aim of permanent residence. If they were nationals of any other Member State and they had exercised their right to work in a different Member State, the Netherlands, they would have the right to be accompanied by their family members, under Article 10 of Regulation 1612/68. However, due to the fact that they were Dutch nationals, working in their own Member State and had never exercised their right of **free** movement within the Community, they could not derive any rights from Community law (a situation of **reverse discrimination**).

2.3. Job-seekers

As far as unemployed persons are concerned, Community law does not provide a special regulation. However, the Court of Justice has held that, in these cases, the nationals of a Member State have the right to remain within the territory of another Member State with the aim of seeking work. In the absence of any relevant Community provision which regulates the right of unemployed Community citizens, this right stems directly from Article **48** of the EC Treaty.

The right to enter and reside for the purpose of seeking work is not a permanent one. The duration of the right of residence for unemployed persons is regulated by each Member State. **A** reasonable period of time must be given to those concerned in order to apprise themselves of offers of employment corresponding to their qualifications and to take the necessary steps to be hired. In the absence of a Community provision defining a "reasonable period", most Member States now operate a six-month period, although some still operate a three-month period. However, the right continues after that period if the persons concerned possess evidence that they are continuing to seek employment and that they have a genuine chance of being engaged. In such cases, they cannot be required to leave the territory of the host Member State⁴. Furthermore, it is possible that job-seekers do not enjoy the same rights as those who already have a job in the territory of a Member State. Therefore, many of the social and tax advantages guaranteed to workers within the Community are not available to those who are moving in search of employment⁵.

¹ **A national of a non-member country married to a worker having the nationality of a Member State cannot rely on the right conferred by Article 11 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community when that worker has never exercised the right to freedom of movement within the Community, Joined cases C-64/96 and C-65/96 of 5 June 1997 (references for a preliminary ruling from the Landesarbeitsgericht Hamm), *Land Nordrhein-Westfalen v Kari Uecker and Vera Jacquet v Land Nordrhein-Westfalen*, OJ C 252, p.3.**

² **Cases 35 and 36/82 *Morson and Jhanjan v Netherlands*, [1982] ECR-3723, [1983] 2 CMLR 221 at 698.**

⁴ **Case C-293/89 *R. V. Immigration Appeal Tribunal, ex p. Antonissen*, [1991] ECR I-745, [1991] 2 CMLR 373. See also reply of Mr Monti, ex parte the Commission to the Written Question E-0060/97, OJ C 186 of 18.6.97, p. 217.**

⁵ **Case 316/85 *Centre public d'aide sociale de Courcelles v Lebon*, [1987] ECR-2811, [1989] 1 CMLR 337.**

2.4. Part-time workers

The determination of who is a worker under Community law has been given by the Court. The issue of **part-time workers** was **first** raised in the Levin case¹. According to this ruling, part-time employment is covered by the application of rules on freedom of movement for workers and the Court judged that neither the reason for taking up employment nor the amount earned are sufficient criteria to qualify someone as worker. What really counts is the genuineness of the economic activity undertaken. Additionally, it does not matter if the workers supplement their income from other sources, such as family or private funds.

2.5. Cross-border workers²

Free movement of workers within the European Union also applies to "cross-border workers". The significance of this lies mostly in the fact that there are more than 380,000 frontier workers in the EU's internal border regions and in the regions bordering Monaco, Switzerland, San Marino and Andorra³. However, there is no uniform definition for cross-border workers and such definition may **vary** from one field to another (e.g. tax law, right of residence, welfare entitlements). Under Community rules, the term "frontier worker" means any employed or self-employed person who pursues his occupation in the territory of a Member State and resides in the territory of another to which he returns as a rule daily or at least once per week⁴. However, this definition applies only to social protection of EU cross-border workers.

In regard to taxation, workers are generally taxable in the Member State where the employment is **carried** out. However, it is often provided in tax conventions concluded between Member States that cross-border workers will be taxed in their country of residence. In this case, the concept of a "cross-border worker" for tax **purposes** is defined separately in each tax agreement.

Given the special situation of cross-border workers who, by definition are employed in a country other than their country of residence, Community law does not require the country of employment to issue them with residence permits. However, the competent authorities may issue them with a special card which is valid for five years and is automatically renewable⁵.

Cross-border workers, **like** all migrant workers, benefit **from** the principles of **non-discrimination** and **equal treatment** in respect of any condition of employment and the right to apply for jobs and social benefits. They are subject to the labour legislation of the country of employment and enjoy the same social and tax advantages as national workers⁶.

¹ **Case 53/81 Levin v Staatssecretaris van Justitie**, [1982] ECR-1035, [1982] 2 CMLR 454.

² For a detailed analysis on the issue of "frontier workers" within the European Union see also the working paper: "*Les Travailleurs Frontaliers dans l'Union européenne*", W-16, European Parliament, Directorate General for Research, Division for Social Affairs and Employment, public Health and Consumer Protection, Women's Rights, Cultural, Youth, Education and the Media, May 1997.

³ See, European Parliament Resolution on the situation of frontier workers in the European Union, Minutes of 28 May 1998, PE 270.286, p. 44.

⁴ Article 1(b) of EEC Regulation N° 1408/71.

⁵ Article 8, Council Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, OJ L 257/13, 1968, p. 485.

⁶ Articles 1 and 7 of the EEC Regulation N° 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257, 19.10.1968, p. 2.

Frontier workers are also protected by the provisions of Community legislation on the **social security** of migrant workers. Therefore they are insured in the country in which they work, are entitled to family benefits and receive a separate **pension** from each country they were insured for at least one year. As regards **sickness benefits**, frontier workers can obtain them either in the country of residence or in the country of employment. However, sickness benefits are no longer attributed by the country of employment once the worker becomes a pensioner since he has lost his **status** of frontier worker. Family members do not enjoy the same cross-border health benefits in all the Member States as this depends on the existence of bilateral agreements between the competent authorities of the Member States. **Unemployment benefits** are granted only by the Member State of residence unless it is proved that the frontier worker has stronger ties with the country where he was last employed'.

The European Parliament has consistently shown its concern on the situation of cross-border workers and their rights². In a recent Resolution, the EP pointed out that the wide legal discrepancies between Member States regarding relevant legislation on social security and taxation, cause the frontier workers a number of problems. It therefore urged for an immediate amendment of Regulations 1612/68 and 1408/71 so as to include new initiatives and solutions, specially with regard to the rules on early retirement, extension of the scope of the right of access to health care in the country of work, the rules on unemployment benefits and the inclusion of non-EU citizens. The European Parliament has called on the Commission to take initiatives towards eliminating the lack of coherence between tax and social security legislation and for the signing of a European Convention on the avoidance of double taxation on income and capital within the European Union. Furthermore, it has called for multi-annual financial and subject-matter planning for the EURES network and for a proposed programme to encourage Member States to improve services to migrant workers and frontier workers by arranging for national authorities to establish accessible call centres (EUREST Services - European Employment & Social Security & Tax-Services).

3. Freedom of Establishment and Freedom to Provide Services for Professional Occupations

Articles 52-66 of the EC Treaty covering freedom of establishment and freedom to provide services provide for the free movement of self-employed persons in the Community. Anyone pursuing an activity of a commercial or industrial nature, a craft or a profession on his own account must be able to pursue that activity freely on the territory of another Member State.

Freedom of establishment requires the removal of restrictions on the right of individuals and companies to maintain a permanent or settled place of business in a Member State as self-employed **persons**. The Council **has** been invited to issue Directives for the mutual recognition of diplomas and the coordination of the provisions laid down by law, regulation or administrative action in the Member States concerning the taking up and pursuit of activities as self-employed persons.

¹ See also, *Your Social Security Rights when Moving within the European Union, a practical guide of the European Commission, 1997, ISEN 92-827-5607-6, p.20.*

² EP Resolution of 16 December 1988 on the problems of frontier workers in the Community (OJ C 12, 16.1.1989,p.378) and Resolution of 9 February 1993 on the Commission **Communication** on the living and working conditions of Community citizens resident in frontier regions, with **special** reference to frontier workers (OJ C 72, 15.3.1993,p.43).

Free movement of services, on the other hand, requires the removal of restrictions on the provision of services between Member States, where either the provider supplies services in a State in which that person does not maintain an establishment, or the recipient travels to receive services in a Member State other than that in which the recipient is established. If freedom of establishment entails the pursuit of an economic activity from a fixed base in a Member State for an indefinite period, freedom to provide services by contrast entails the carrying out of an economic activity for a temporary period in a Member State in which neither the provider nor the recipient of the services is established. Moreover, the Court has established the principle that Article 59 **EC** Treaty not only applies whenever the provider and the recipient of the services are established in different Member States but also in the case when the provider of services offers such services in the territory of a Member State, other than the one in which he is established but in which the recipients of the services are established.

The General Programme on freedom to provide services stipulates that the right to provide services shall only be available to nationals who are established in the Community. Without the economic foothold within the Community, there is no right under Community law for a Community national or a company established outside the Community to provide temporary services within the Community. Article 59 could be used to regulate free movement of persons: everyone who is not in his "own" Member State uses services. In its case law, the Court of Justice interpreted freedom to provide services both actively and passively, so that users of services can also take advantage of this freedom.

Articles 48 and 52 are often compared from the point of view of the requirement of equal treatment for persons who are settled in a Member State other than that of their own nationality, either in an employed or a self-employed capacity. A situation of intra-community movement of persons will be analysed from the angle of free movement of workers if the person involved corresponds to the Community notion of "worker" within the meaning of article 48 **EC**. By contrast, a situation will be covered by the Community provisions on freedom of establishment if an independent professional ("a self-employed person" in the terms of the second paragraph of Article 52 **EC**) or a company within the meaning of Article 58 **EC** establishes themselves in another Member State in order to engage in economic activities there on a permanent basis'. Equally, Articles 48 and 59 are linked by virtue of the fact that they both concern economic activities engaged in by Community nationals throughout the Community, the only difference being the employed or self-employed status of the persons.

The dividing line between services and establishment is rather thin. Two elements are of crucial importance here. Firstly, the Treaty itself provides for a rule of conflict: pursuant to Article 60 **EC**, the Treaty rules on services only apply to services "in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons". Secondly, the Court has distinguished between the free movement of services and the freedom of establishment and **free** movement of workers in stressing that the first freedom involves a purely temporary activity in another Member State whereas establishment and free movement of workers imply the existence of "an activity carried out on a permanent basis or, in any event, without a foreseeable limit to its duration"³.

¹ See note above.

² *Case C-221/89 The Queen v Secretary of State for Transport, ex parte: Factortame Ltd e.a.*, [1991] **ECR** I-3905, para 20; *Case C-246/89 Commission v United Kingdom* [1991] **ECR** I-4585, para 21.

³ *Case 196/87 Steymann v Staatssecretaris van Justice*, [1988] **ECR**-6159, para 16.

The EC Treaty provisions on establishment and services are clear as regards their beneficiaries: pursuant to Articles 52 and **59, only nationals of Member States benefit from them.** The freedom of movement for workers and freedom of establishment have been dealt with somewhat cautiously in the EC Treaty, creating a closed-shop Europe. Although the right of an individual to work - as a dependent worker or as a self-employed persons- stands at the core of both freedoms, they both imply as a necessary corollary and pre-condition the right to take up residence in the country where a work- place is found or a business activity commenced. Thus, **they affect** one of the most sensitive rights which a sovereign state enjoys, namely the power to decide on the admission of foreign citizens. In the absence of provisions on a common immigration policy in the original version of the EEC Treaty, it was inconceivable for States to accept **an** enforceable right of every person established in the territory of any other Member State to immigrate, work and take **up** residence.

The question of mutual recognition of qualifications is important in both areas and, indeed, also to the free movement of workers. However, litigation and problems relating to the non-recognition of qualifications occur more frequently in the context of the right of establishment, generally when **Community** nationals wish to join a professional body in the State in which they wish to base their practice.

Article **54** requires the Council to draw up a general programme for the abolition of restrictions on establishment, and to issue Directives to attain freedom for particular activities. Article 57 also requires the Council to issue directives for the mutual recognition of diplomas and other qualifications. In this context, measures to facilitate the free movement of employed persons have been progressively implemented under a "General programme for the abolition of restrictions on the freedom of establishment" dated **18** December 1961¹. This requires the elimination of restrictive laws and administrative practices which treat nationals of other Member States differently from nationals of the State concerned, and it lists a range of examples of the sorts of restrictions such **as** licenses, periods of residence, tax burdens and various other measures which usually attach to the exercise of such activities. Not only direct but also indirect discriminatory restrictions on the exercise of activities by the self-employed are to be abolished.

3.1. Tourists

The Court **has** indeed taken the view that the **free** movement of persons is one of the fundamental principles and foundations of the European Community². It has therefore broadly interpreted the Treaty rules laying down this freedom³ and progressively expanded their scope and enhanced their content. Therefore, apart **from** giving a very broad meaning to the notion of "economic activity" for the purposes of the Treaty, it has also extended the right of free movement to persons who are not economic operators but nevertheless are -even potentially- involved in cross-border

¹ **OJ C 2,1962, p. 36.**

² *Case 167/73 Commission v France* ("French sailors" case), [1974] **ECR-359, para 43.** See also *inter alia* judgement in *Case 118/75 Watson and Belmann*, [1975] **ECR-1185, para 16;** judgement in *Case C-370/90 The Queen v Immigration Appeal Tribunal and Surinder Singh ex parte Secretary of State for the Home Department*, [1992] **ECR I-4265, para 15.**

³ **This has even become a principle of interpretation: see inter alia the judgement in Case 139/85 Kempf v Staatssecretaris van Justice**, [1986] **ECR-1741, para 13;** judgement in *Case C-292/89 Antonissen*, [1991] **ECR I-745, para 11.**

economic transaction. The Court has further recognised' that the freedom to provide services includes the freedom, for those concerned, to go to another Member State in order to receive a **service** there, without being obstructed by restrictions, and that tourists, persons receiving medical treatment and persons travelling for the purposes of education or business are to be regarded as recipients of services (i.e. transportation, hotel accommodation, restaurants, etc).

Tourism involves travel by individuals who do not have any intention of exercising economic activities during their stay abroad (other than expenditure) and would not prima facie fall within any of the Treaty articles referred to. However, from an early stage the Community accepted that it was a necessary corollary of the freedom to supply services that there must also be the freedom to travel to another Member State to receive those services and to receive information about them. (See Directive 64/220/EEC and Directive 73/148/EEC OJ L 172 28.6.73 p 14 abolishing restrictions on the free movement of recipients of services). That position was confirmed by the European Court in *Luisi and Carbone v Ministero del Tesoro*² where it was held that tourists are the actual or potential recipients of services and therefore by implication fall within the ambit of Articles 59 and 60 of EC Treaty.

3.2. Measures to encourage freedom of movement

3.2.1. *Education and tackling unemployment*

From the outset, the European institutions have sought to assist people in the areas of education and training. The European Commission's 1993 "White Paper on growth, competitiveness and employment" outlined the challenges and ways forward into the 21st Century, stressing that education and training would play a key role in transforming economic growth into jobs. To improve its contribution to this goal, the Commission recently reorganised its programmes in this area. Erasmus, Lingua, and other Comet programmes have been reformed and reorganised. Socrates and Leonardo Da Vinci have taken their place.

Socrates: **this** programme was launched in 1995 and now extends to the 15 Member States of the European Union plus Norway, Iceland and Liechtenstein. It has taken over the student exchanges of the Erasmus programme, the language studies covered by Lingua, in addition to new activities at all levels of education. Socrates gives its participants the opportunity to study abroad and learn about life in the other countries of the Union. It is open to students at all levels and in all types of education, schools, teachers, educational advisers, political decision-makers, associations, organisations and societies engaged in education-related matters. For all matters concerning information and exchange of experience in the field of education, the Eurydice network has been stepped up.

Leonardo **was** launched on 6 December 1994 and applies to all Member States of the European Union, **plus** Norway, Iceland and Liechtenstein. It will also be open to the associated countries of Central and Eastern Europe and Cyprus and Malta. Former Community programmes like FORCE (continuous training), **PETRA** (basic training), Comet (university business cooperation), Eurotinet (promotion of qualifications linked to technological innovation) and Lingua (language learning) have been

¹ Joined cases 286182 and 26/83 *Luisi and Carbone v Ministero del Tesoro*, [1984] ECR-377.

² Cases 286182 and 26/83, [1994] ECR-377.

combined in Leonardo Da Vinci to achieve greater consistency. Its primary aim is to help participants benefit from technological and industrial developments by stepping up vocational training. Leonardo Da Vinci is open to all local, regional or national groups interested in vocational training in Europe. Pilot projects, exchanges and other placements are open to young people undergoing training, young workers in continuous training, firms and groups of firms (especially small businesses), language teachers and all public bodies.

Youth for Europe is a five-year programme and was adopted in March 1995. It covers the 15 Member States of the Union plus Iceland, Norway and Liechtenstein. Outside school and work, this programme enables participants to meet other young people engaged on a common project, whether in cultural, social or other fields. Youth organisations, local, regional, national or European organisations, government and non-governmental bodies engaged in youth affairs (e.g. voluntary service, training for organisers, information for young people, etc.) and young people themselves within the framework of youth measures.

Tempus: its preparatory activities began in 1993-1994. Its field of activity is the development of higher education in the countries of Central and Eastern Europe and since 1994 it has grown to cover the states of the former USSR and Mongolia through cooperation with universities of the EC and the participating countries. It also stimulates the development of cooperation between universities and companies. Actions covered are the support to joint European projects between universities and companies, assistance, within the framework of joint projects, with the mobility of teachers and students, and assistance with complementary activities.

On 2.10.96 the Commission has adopted a "Green Paper" on the elimination of obstacles to mobility. The main lines of action put forward by this Green Paper are the creation of a real European *Area* of qualifications, providing everyone studying in another country in the European Union with **social** protection, and the establishment of a legal European framework for trainees.

3.2.2. Harmonisation and mutual recognition of qualifications

Initially, the legislative institutions pursued a "harmonisation" or "coordination" approach, which sought to take specific sectors of economic or professional life and obtain agreement from all Member States on the minimum standards of the training and education needed for a qualification in that field. It is mostly in the health sector where the greatest progress has been made. Two Directives were initially adopted on the right of establishment and freedom to provide services for doctors (75/362 and 75/363, OJ L 167 of 30.6.75) followed by similar legislation for dentists (78/686 and 78/687, OJ L 233 of 24.8.78), veterinary surgeons (78/1026 and 78/1027, OJ L 362 of 23.12.78), nurses responsible for general care (77/452 and 77/453, OJ L 176 of 15.7.77), midwives (80/154 and 80/155, OJ L 33 of 11.2.80) and pharmacists (85/432 and 85/433, OJ L 253 of 24.9.85). In 1989 two directives, Council Directive 89/594/EEC and Council Directive 89/595/EEC, were adopted amending directives 75/362/EEC, 77/452/EEC, 78/686/EEC, and 78/1026/EEC. A further amendment occurred, with Council Directive 90/658/EEC (OJ L 353 of 17.12.90), following the unification of Germany.

On 5 April 1993, the Council adopted Directive 93/16/EEC¹ to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications. The Directive applies to the activities of doctors working in a self-employed or employed capacity who are Member States' nationals. Each Member State shall recognise the diplomas, certificates and other evidence of formal qualifications awarded to nationals of the other Member States by giving such qualifications, **as far as** the right to take up and pursue the activities of doctor is concerned, the same effect in its territory as that which the other Member States themselves accord. Nationals of Member States may, however, be required by a host State to fulfil the conditions of training laid down in respect of specialisation by the host State's own laws, regulations or administrative actions. The host State shall, however, take into account, in whole or in part, the training periods completed by the person concerned. The competent authorities or bodies of the host State shall inform him of the period of additional training required and of the fields to be covered by it. The Directive has been further amended by European Parliament and Council Directive 97/50/EC of 6 October 1997 (OJ L 291, 24.10.1997) and Commission Directive 98/21/EC of 8 April 1998 (OJ L 119, 22.4.1998).

Council Directive 86/457² laid down measures providing for the mutual recognition of diplomas which provide evidence of specific training in general medical practice in the Member States. The first stage of this Directive concerns the establishment of a **minimum training period of two years** in general medicine; in the second stage, **from 1 January 1995**, the Member States will make the right to practise general medicine under their national social security systems dependent on possession of qualifications showing that the holder has received specific training in general medical practice.

On 22 March 1977, the Council adopted a directive to facilitate the effective exercise of the freedom to provide services for lawyers³. Further progress recently occurred in this field with the adoption of Directive 98/5/EC of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained⁴. According to the Directive, lawyers wishing to practise in a Member State other than that where they obtained their professional qualifications are required to register with the competent authorities of the host Member State. Lawyers who are not completely integrated into the profession of the host Member State are authorised to practise under their home-country professional title. After having pursued for 3 continuously years in the host Member State an activity involving the law of that state, including Community law, the lawyer is deemed to have acquired the skills necessary to be completely integrated into the profession of lawyer in the host Member State and therefore, to be exempt from any aptitude test. However, if such activity does not include either the law of the host Member State or Community law, lawyers may be required to take an aptitude test limited to the law of procedure and the rules of professional conduct of the host Member State. The deadline for implementing the Directive in the Member States is **14 March 2000**.

¹ OJ L 165 of 7.7.93.

² OJ L 267 of 19.9.86.

³ OJ L 78, 77/245 of 26.3.77.

⁴ European Parliament and Council Directive 98/5/EC of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, OJ L 77, 14.3.1998.

In the field of architecture, there is a Council Directive on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in architecture, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services¹.

On 18 December 1986, the Council adopted Directive 86/653 (OJ L 382 of 31.12.86) on the coordination of the laws of the Member States relating to self-employed commercial agents. **This** directive lays down rules harmonising the provisions on relations between commercial agents and their principals².

In addition, a number of Directives have been adopted on the recognition of qualifications based on professional experience applicable to the activities of self-employed persons in various sectors, such as industry and small **crafts** industries (64/427, OJ L 117 of 23.7.64 as amended by Council Directive 69/77/EEC, OJ L 59/8 of 10.3.69), the **retail** trade (68/364, OJ L 260 of 22.10.68), the food manufacturing and beverage industries (68/366 of 15.10.68), itinerant activities (75/365, OJ L 167 of 30.6.75), insurance agents and brokers (77/92, OJ L 26 of 31.1.77), transport and travel agencies (82/470, OJ L 213 of 21.7.82), hairdressing (82/489, OJ L 218 of 27.7.82) and transport (among which are 74/56] and 74/562, OJ L 308 of 19.11.74; 77/796, OJ L 334 of 24.12.77; 89/438, OJ L 212 of 22.7.89).

On 3 December 1997, the Commission presented a proposal for a directive amending Directives 89/48/EEC and 92/51/EEC on a general system for the recognition of professional qualifications and supplementing Directives 77/452/EEC, 77/453/EEC, 78/686/EEC, 78/68/EEC, 78/1026/EEC, 78/1027/EEC, 80/154/EEC, 80/155/EEC, 85/384/EEC, 85/432/EEC, 85/433/EEC and 93/16/EEC concerning the professions of nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, architect, pharmacist and doctor³. This proposal supplements Council Directive 85/384/EEC on the mutual recognition of diplomas. The proposal stipulates that Member States, when examining applications for recognition, must take into account experience acquired subsequent to the award of the diploma and introduces the concept of regulated training.

However, the main impetus towards the full application of the principles of freedom of establishment and the freedom to provide services, in particular by the self-employed, comes from the adoption by the Council of two directives: Directive 89/48 (OJ L 19/1 of 24.1.89) and Directive 92/51 (OJ L 209/2 of 24.7.92). The above Directives represent a new departure in this area, no longer based on the sectoral harmonisation of legislation on the qualifications and conditions of access to each profession **but on the establishment of a general system of recognition of diplomas.**

Directive 89/48 seeks, without harmonising training courses, to bring about the recognition, in a host Member State where professions are regulated, **of higher education diplomas awarded on completion of professional education and training of at least three years' duration.** It applies only to professions which have not yet been the subject of specific directives on the mutual

¹ Council Directive 85/384/EEC, OJ L 223 of 21.8.85. The Directive was amended by Council Directive 85/614/EEC of 20 December 1985 (OJ L 376, 31.12.1985), Council Directive 86/17/EEC of 27 January 1986 (OJ L 27, 1.2.1986) and Council Directive 90/658/EEC of 4 December 1990 (OJ L 353, 17.12.1990).

² See also the **commission report** of 23 July 1996, on the application of Article 17 of the Council Directive on the coordination of the laws of the Member States relating to self-employed commercial agents (86/653/EEC - COM(96)364 final).

³ COM(97)638 final, OJ C 28, 26.1.1998.

recognition of diplomas between Member States. Diplomas acquired by Community nationals in third countries are also covered by this Directive, where the training for which they were awarded took place mainly in the Community or where the holder has completed three years' proven professional experience in the Member State which recognised the diploma.

Where there are substantial differences between the education and training received and those covered by the diploma required in the host Member State, the latter may require the applicant to complete an adaptation period or take an aptitude test. The applicant shall have the right to choose between these two options, except in the case of the legal profession, where the host Member State may decide. Alternatively (and not cumulatively), where the training received by the applicant is at least 1 year less than that required in the host Member State, the latter may require him to show evidence of previous professional experience, although the period required may not exceed 4 years. A decision on a request to practise a regulated profession must be taken within four months after full documentation has been submitted by the applicant and shall be subject to appeal under national law.

Following on from Directive **89/48** the Council adopted **Directive 92/51/EEC** which is supplementary to and follows the same approach as the system for recognition established by the earlier Directive. **It applies to the recognition of diplomas which are awarded after a post-secondary course of at least one year's length, and which qualify the holder to take up a regulated profession, certificates, which are awarded after educational or training courses other than these post-secondary courses of one year's duration, or after a probationary or professional practice period, or after vocational training, which qualify the holder to take up a regulated profession. It applies to professions which are not covered by specific Directives** concerning mutual recognition and extends to employed persons the scope of certain specific Directives -relating, in particular, to commerce and small crafts industries- which are currently applicable only to the self-employed. It also provides for the means to overcome disparities, which may be used by the Member State where there are significant differences between the training received by the applicant and that required (an adaptation period or an aptitude test) or where the training received by the migrant is at least 1 year less than that required in the host Member State (previous professional experience).

As with most of the Treaty provisions on free movement of persons, **neither** the secondary Directives **nor** the general mutual recognition Directives **cover non-Community nationals. Nor do they apply to qualifications obtained outside the Community** although, under Directives **89/48** and **92/51**, a diploma awarded within the Community may, in certain circumstances, take into account education or training received outside the Community. The Council has, however, passed a recommendation encouraging Member States to recognise diplomas and other evidence of formal qualifications obtained in non-member countries by Community nationals (Council Recommendation **89/49**, **QJ L 19/24**).

It is possible that there may be cases in which the education or training received does not fall within the Directives, or is said by a Member State not to satisfy all of the conditions in the Directives, for example in the case of persons who have not completed a formal course of secondary education but who nevertheless have gone on to complete a vocational course or other professional training. In such cases, the basic principle stemming from the Court's interpretation of Article 52 in the cases of *Heylens* and *Vlassopoulou* will be important to protect the person who seeks to exercise the right to practice in a self-employed capacity.

4. Direct Effect

From the outset, the Court **has** stressed that rights of entry and residence in connection with the free movement of persons are grounded directly on the EC Treaty and that the provisions of secondary Community law on this subject are merely intended to determine the practical details regulating exercise of those rights. Since the *Royer* case¹, it is well established case law that the rights of Member State's nationals to enter the territory of another Member State and reside there for the purposes intended by the Treaty -in particular to seek or pursue an occupation or activity **as** employed or self-employed persons, or to rejoin their spouse or family- **is a right conferred directly by the Treaty**, or by the provisions adopted for its implementation. Therefore, individual applicants have the right to have the relevant provisions immediately enforced in national courts. Furthermore, Article **48** does not only have "vertical" direct effect but also "horizontal", i.e. it can not only be enforced against state bodies but also against private employers². The Court has concluded from this that the right of entry and of residence is acquired independently of the issue of a residence permit by the competent authority of a Member State. Such a residence permit - which, pursuant to secondary Community law, host Member States must issue to workers, self-employed persons and their family members- should therefore not be regarded as a measure giving rise to rights, but **as** a measure by a Member State serving to prove the individual position of a national of another Member State with regard to the provisions of Community law. The mere failure of nationals of other Member States to comply with legal formalities concerning access, movement and residence of aliens cannot be regarded as a breach of public policy or public security in the sense of the EC Treaty and therefore cannot be a reason for deportation or expulsion. However, Member States keep their right to provide for appropriate sanctions where necessary in order to ensure the efficacy of those formalities. The Court took the view that the obligation to answer questions put by frontier officials cannot be a pre-condition for the entry of a national of one Member State into the territory of another³.

The foregoing does not mean that Member States are totally denied the right to impose administrative requirements concerning workers' or self-employed persons' right of access to their territory. Community law has not excluded the power of Member States to adopt measures enabling their national authorities to have **an** exact knowledge of population movements affecting their territory⁴.

The absence of Community directives regulating or co-ordinating particular professional qualifications was not an obstacle to the **direct effectiveness** of Article **52**, and the obligation it imposed on Member States to ensure, whenever possible under national law, the free exercise of the right of establishment.⁵ In the most recent case of *Vlassopoulou*⁶, the Court held that in the absence of national recognition or Community legislation on the co-ordination or the mutual

¹ **Case 48/75 *Royer***, [1976] **ECR 497**; **Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh ex parte Secretary of State for the Home Department***, [1992] **ECR I-4265**.

² **Case 36/74, *Walrave and Koch v. Association Union Cycliste Internationale***, [1974] **ECR-1405**, [1975] **1 CMLR 320**.

³ **Case C-68/89 *Commission v Netherlands***, [1991] **ECR I-2637**.

⁴ **Case 118/75 *Watson and Belmann***, [1976] **ECR-I 185**.

⁵ **Case of *Thieffry* (Case 71/76)**, [1977] **ECR-765**.

⁶ **Case 340/89**, [1991] **ECR-2357**

recognition of legal qualifications, Article 52 imposed an obligation on Member States' authorities to closely examine and compare the qualifications of a Community national wishing to practise in that State, and to take into account any further knowledge subsequently acquired in the host State. National authorities are required to consider any education and training received by the person, indicated by their certificates or diplomas, and to contrast the knowledge and skills acquired with those which are required for the domestic qualification. If they are found to be equivalent, the Member State must recognise the qualification, and if they are not so found, the state is obliged to go on to assess whether any knowledge or practical training the person may have acquired in the host Member State, through study or experience, is sufficient to make up for what was lacking in that person's qualification.

A first crucial step was taken by the Court in the first half of the Seventies, after the transition period for the establishment of the Common Market had passed. It is striking that this step was taken almost simultaneously for the free movement of workers, freedom of establishment and free movement of **services**. In the course of **1974**, the **Court** ruled that the basic Treaty provisions of Articles **48**, **52** and **59** had become directly applicable since the end of the transitional period. It did so in a series of landmark cases, i.e. the judgements in the "French sailors" case¹, *Reyners*², *Van Binsbergen*³ and *Van Duyn*⁴. These judgements implied that the Treaty provisions in question could be invoked by private parties in national courts against the public authorities of that Member State, and that national courts are obliged to respect those rights and put aside national rules which are incompatible with those Treaty provisions. From the judgement in the *Walrave case*⁵ it followed that the EC Treaty provisions concerned, at least as far as they incorporate the prohibition of discrimination on grounds of nationality, **also** have a **horizontal direct effect**, i.e. they can also be relied upon against private persons and organisations.

Although Articles **48**, **52** and **59** EC prohibit discriminatory national rules in the first place, none of these provisions is specifically limited to such prohibition of discrimination. On the contrary, their wording leaves room for a more far-reaching approach as Article **48(1)** stipulates generically that "freedom of movement for workers shall be secured within the Community" and both Articles **52** and **59** generally prescribe the abolition of "restrictions" on the freedom of establishment and the freedom to provide services. Recently the Court went well beyond them, shifting its emphasis from discriminatory to non-discriminatory barriers to free movement. The case law on services has played a pivotal role in this regard. In the *Säger case*⁶, the Court ruled that Article 59 EC requires not only the restriction of any discrimination against the providers of services based on their nationality, but also the abolition of **any** restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or **otherwise** impede the activities of a provider of services established in another Member State where he lawfully provides similar services.

¹ **Case 167/73** *Commission v France (French sailors' case)*, [1974] ECR-359.

² *Case 2/74 Reyners v Belgian State*, [1974] ECR-631.

³ *Case 33/74 Van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, [1974] ECR-1299.

⁴ **Case 41/74 Van Duyn v Home Office**, [1974] ECR-1337.

⁵ *Case 36/74 Walrave v Union Cycliste Internationale*, [1974] ECR-1405.

⁶ **Case C-76/90 Säger v Dannemeyer & Co. Ltd.**, [1991] ECR I-4221.

All commercial rules capable of hindering, "directly or indirectly, actually or potentially" the provision of **services** on an intra-Community basis, are to be regarded as prohibited by Article 59 EC'.

In the Kraus judgement the Court explicitly ruled that Articles 48 and 52 EC oppose any national measure which, even if it applies without discrimination on grounds of nationality, is liable to hinder or render directly or indirectly, actually or potentially, less attractive the exercise by Community nationals, including those of the Member State which has adopted the measure, of the fundamental freedoms warranted by the EC Treaty.

5. Right of Residence within the EU

5.1. Legal basis

The general right of a person to move freely within the European Union also entails the right to **leave the first Member State**, the right to **enter to another Member State**, right to **residence in the latter** and the right to **remain** there after having ceased working. These basic rights, incorporated in the general principle of free movement, apply to different categories of persons: a) workers, self-employed persons, providers/receivers of services, b) job-seekers, c) retired persons, d) students, e) citizens not covered by any of the above-mentioned categories. Permanent arrangements on freedom of movement were introduced by Regulation 1612/68 (OJ L 257/2, 1968) which was subsequently amended by Regulation 312/76 (OJ L 39/2, 1976), Directive 68/360 (OJ L 257/13, 1968) and Regulation 1251/70 (OJ L 142/24, 1970). The Court has already stated that the provisions, concerning right of entry and residence in the territory of another Member State, applying to the different categories of persons are based on the same principles².

EC Legislation referring directly to the Right of Entry and Residence for EU citizens and their families	
Regulation (EEC) N° 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community	OJ L 257/475, 19.10.1968, English Special Edition: Series-I 68(II)
Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families	OJ L 257/485, 19.10.1968, English Special Edition: Series-I 68(II)
Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services	OJ L 172/14, 28.6.1973
Regulation (EEC) N° 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State	OJ L 142/24, 30.6.1970

¹ See also, Case C-398/95 *Syndesmos ton en Elladi Touristikon kai Taxidiotikon Grafeion/Ypourgos Ergasias*, of 5 June 1997.

² Case 481/75 *Royer*, [1976] ECR-497; Case 118/75 *Watson and Belmann*, [1976] ECR-1185.

Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity	OJ L 14/10, 20.1.1975
Council Directive 90/364/EEC of 28 June 1990 on the right of residence	OJ L 180/26, 13.07.1990
Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity	OJ L 180/28, 13.07.1990
Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students	OJ L 317/59, 18.12.1993
Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health	OJ L 56/117, 4.4.1964, Special English Edition: Series-I (63-64)
Council Directive 72/194/EEC of 18 May 1972 extending to workers exercising the right to remain in the territory of a Member State after having been employed in that State the scope of Directive 64/221/EC	OJ L 121/32, 26.5.1972
Council Directive 75/35/EEC of 17 December 1974 extending the scope of Directive 64/221/EEC to include nationals of a Member State who exercise the right to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity	OJ L 14/14, 20.1.1975

Directive 73/148¹ was passed, under the terms of Articles 54 and 63 of the Treaty, to provide for the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to **establishment and the provision of services**. Article 1 covers those wishing to establish themselves or to provide or receive services, and their families, which include the **same** family members **as** those listed in Regulation 1612/68 on workers. The Directive requires Member States to guarantee the right to enter and leave a Member State for these purposes, without any visa requirements other than that for non-EC nationals. **A** right of permanent residence **as** evidenced by a permit is to be granted to those who establish themselves in a self-employed activity, and a right of temporary residence for those providing or receiving **services** which is of **equal** duration to the length of the services. The right of temporary residence is to be formalised by the issue of a "right of abode" where the period during which services are provided or received exceeds three months. **All that is needed to apply for a residence permit or right of abode is an identity card or passport and proof of being one of the persons covered by the Directive.**

¹ OJ L 172/14, 1973.

5.2. The right to leave from the Member State

European Union citizens have the right to leave their territory in order to take up activities as employed persons in the territory of another Member State. This right will be exercised **simply on production of a valid identity card or passport (valid for at least five years) which their Member State must provide them with and which will be valid throughout the Community** and the countries through which the worker will pass.' No exit visa or any equivalent document may be demanded.

5.3. The right to enter the territory of another Member State

EU nationals may enter the territory of another Member State simply on production of a valid identity card or passport and no **entry** visa or any equivalent document may be required². Persons covered by these provisions are not required to reply to questions on the purpose and duration of their trip or on their financial resources, although they may be required to do so for reasons of public policy, public security or public health³. Sporadic and unsystematic inspections of residence permits at the borders is not considered to be a condition of **entry** into the territory of the Member State and therefore is not prohibited. However, such controls could constitute a barrier to the right of free movement of persons if they were carried out "in a systematic, arbitrary or unnecessarily restrictive manner".

5.4. Residence permits

Member States are required to grant right of residence in their territory to workers, self-employed persons and providers/receivers of services. The right of residence should result in the issuing of a permit (other than the residence permit for "ordinary" foreigners) called a **Residence Permit for a National of a Member State of the EEC'**. It is valid throughout the territory of the Member State which issued it. It is issued and renewed **free of charge** or on payment of an amount not exceeding the fees and taxes charged for the issue of identity cards to nationals. It is issued automatically (whereas other foreigners receive "permission" to reside, which implies that the national authorities have discretionary powers). **The permit is valid for at least five years and is automatically renewable even if the person in question has lost his job.**

¹ Article 2§§1,3,4 of Directive 68/360 for workers, Article 2§§1,3,4 of Directive 73/148 for self-employed persons and providers/receivers of services.

² Article 3§§1,2 of Directives 68/360 and 73/148. However, visas may be demanded from family members, to whom Directives 68/360 and 73/148 also apply, who are not nationals of a Member State. In such cases, Member States shall accord to these persons every facility for obtaining a visa.

³ Case C-68/89 *Commission v. Netherlands*, [1991] ECR I-2637, Case 48/75 *Royer*, [1976] ECR-49.

⁴ Case 321/87 *Commission v Belgium*, [1989] ECR-997.

⁵ Article 4§2 of Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ L 257, 19.10.1968) and Article 4(1) of Directive 73/148 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ L 172, 28.6.1973).

The Court concluded that such an obligation to be granted a residence permit could not in itself be regarded as an infringement of the rules concerning freedom of movement for persons¹. Furthermore, Community law does not prevent a Member State from carrying out checks in compliance with the obligation to be able to produce a residence permit at all times, provided that the same obligation is imposed on its own nationals as regards their identity cards². In the event of failure to comply with this obligation, national authorities are entitled to impose penalties comparable to those attaching to minor offences committed by their own nationals, such as those laid down in respect of failure to carry an identity card, provided that they do not impose a penalty so disproportionate that it becomes an obstacle to the free movement of workers³. Therefore, in the event that a Member State treats nationals of other Member States residing in its territory disproportionately differently, as regards the degree of fault and the scale of fines, from its own nationals when they commit a comparable infringement of their obligation to carry a valid identity document, then this Member State fails to fulfil its obligations under Articles 48, 52 EC Treaty, Article 4 of Directive 68/360 and Article 4 of Directive 73/148⁴.

Completion of the formalities for obtaining a residence permit is not on the one hand, a precondition for the immediate *start* of employment under a contract concluded by the applicant⁵. On the other hand, a **valid** residence permit may not be withdrawn solely on the grounds that the worker is unemployed either involuntarily or through incapacity due to illness or accident, provided that the unemployment office confirms this.

Documents which may be required by Member States for issuing a residence permit for each category of persons	
employees	The document with which he entered their territory and a signed statement from his employer (Article 4(3) of Directive 68/360)
self-employed persons and providers /receivers of services	The identity card or the passport with which he entered the territory of the Member State and proof of self-employed status by any appropriate means (Article 6 of Directive 73/148)
student	They must be registered with an approved educational establishment, prove that they (and any member of their family who are with them) have adequate sickness insurance and state in writing that they have sufficient financial resources
retired or out of work	Proof of adequate sickness insurance and sufficient financial resources for themselves and for any member of their family who is with them

¹ *Watson and Belmann case*, *supra* note.

² *Case 321/87, Commission v. Belgium*, [1989] ECR-997, para 12.

³ *Case C-265/88 Messner*, [1989] ECR-4209, para 14.

⁴ *Case C-24/97, Commission v. Federal Republic of Germany*, judgement of 30 April 1998, not yet published.

⁵ *Article 5 of Directive 68/360*.

Temporary residence permits can be issued for temporary workers who work for more than three months but less than a year. **Short-term** workers (with an activity that lasts less than three months), **seasonal** and **frontier-workers** have the right of residence without the need for residence permits.

An infringement of the Community rules on free movement of persons may arise, when the time limit allowed for making the declaration of entry from the day of arriving in the territory of the Member States is not reasonable (i.e. within only three days) or when the penalties for failure to discharge that obligation are disproportionate to the gravity of the infringement'. **Deportation** would not therefore be permitted since this right conflicts with the fundamental principle of free movement which is directly conferred and guaranteed by the Treaty².

The Court **has** also **ruled** that whenever national provisions require residents of Member State to give information on the identity of the persons to whom they provide accommodation, these should mostly concern the internal security of the State. These measures can only be prohibited if they constitute an indirect restriction on freedom of movement for persons.

5.5. Right to work

5.5.1. *Taking up employment*

Nationals of one Member State have the right to take up employment in another Member State under the same conditions as that Member State's nationals³ and discrimination against such workers or employees, in conducting and performing contracts of employment, is prohibited⁴.

Direct or indirect discriminatory administrative practices are prohibited, such as reserving a quota of posts for national workers, restricting advertising or applications, or setting special recruitment or registration procedures for other Member States' nationals, reserving certain jobs for nationals, the subjection of foreigners to procedures and conditions which do not apply to **nationals**, e.g. work permits, and discriminatory vocational or medical criteria for recruitment and appointment. The spouse and children of workers are also entitled to work even if they are not Community citizens⁵.

¹ Case 118/75 *Watson & Belmann*, [1976] ECR-1185; Case C-265/88 *Criminal proceedings against Messner*, [1989] ECR-4209, where the Court applied this case-law to an Italian law which imposed on nationals of other Member States, exercising their right of free movement, the obligation to make a declaration of residence within three days of entering that state's territory, subject to a penal sanction for failure to comply.

² Case 48/75 *Royer*, [1976] ECR-497; Case 118/75 *Watson & Belmann*, [1976] ECR-1185.

³ Article 1 of Regulation, 1612/68.

⁴ Article 2 of Regulation, 1612/68.

⁵ Article 11 of Regulation, 1612/68.

5.5.2. Equal treatment at work

A Community worker must be treated in the same way as national workers:

- * in respect of any conditions of employment or work, especially as regards remuneration, dismissal and reinstatement¹;
- * in the case of benefits not directly connected with employment, i.e. social and tax advantages, including vocational training, housing benefits, aid intended to ensure a minimum subsistence level as well as family allowance²;
- * in respect of trade union responsibilities and staff representation duties in his undertaking, although he may not be allowed to take part in the management of bodies governed by public law (he may not be elected to social security bodies).

The rule of equal treatment in the context of freedom of movement for workers, enshrined in Article 48 EC Treaty, may also be referred to by an employer in order to employ, in the Member State in which he is established, workers who are nationals of another Member State³.

5.6. The right to remain in the host country after working there

In June 1970, the Commission adopted **Regulation 1251/70**⁴ based on Article 48(3)(b) of the EEC Treaty, on the right of workers to remain in the territory of a Member State after having been **employed** in that State. This Regulation guarantees that the worker may remain permanently in the State where he last worked, provided that he has reached the age of retirement or suffers from permanent disablement or, after three years of employment and residence in the territory of the State, he works in another Member State. Continuity of residence must be proved by any of the means used in the country of residence. No formalities are required on the part of the person concerned in respect of the exercise of his right to remain. The persons involved are entitled to a residence permit which will be issued and renewed free of charge, will be valid throughout the territory of the Member State issuing it and it will be valid for at least five years. The same right also applies for the members of his family who live with him and they can enjoy this right even after his death.

Directive 75/34⁵ provides for the right of nationals of a Member State to remain in the territory of another Member State after having **pursued an** activity there in a **self-employed capacity**. The conditions which must be satisfied by the person concerned in order to qualify for this right are very similar to those which apply to employed persons under Directive 1251/70 and, like that Directive, they **also** apply to the **family** members who are listed therein.

¹ Article 7(1) and (4) of Regulation, 1612/68.

² Article 7(2) and (3) and Article 9 of Regulation, 1612/68.

³ Case C-350/96, *Clean Car Autoservice GmbH / Landeshauptmann von Wien*, judgement of 7 May 1998.

⁴ OJ L 142, 30.6.1970.

⁵ OJ L 14/10, 1975.

5.7. Right of Residence for categories other than workers

In 1990 the Council with a view to transforming the Community into an area of genuine freedom and mobility for all Community citizens and following the Commission proposals¹ of this kind in the early 1980's, adopted three Directives which guaranteed rights of residence to categories of persons other than workers.

The right of free movement and of residence has now been extended to **students** (Directive 93/96/EEC)², to **employed and self-employed people who have ceased to work** but without necessarily having moved to another Member State (Directive 90/365/EEC)³, and **persons** who do not already enjoy a right of residence under Community Law (Directive 90/364/EEC).

As a pre-condition, they must be covered by health insurance and/or can otherwise support themselves without resort to the social security system of the host State.

Following **an** action brought by the European Parliament, the Court of Justice, in its judgement of 7 July 1992⁴, annulled Directive 90/366/EEC on the right of residence for students, as its legal basis was incorrect and the Council has thus replaced it by Directive 93/96/EEC.

The Directives require Member States to grant the right of residence, as evidenced by a residence permit, to those persons and to certain members of their families, **provided that they have adequate resources so as not to become a burden on the social assistance schemes of the Member States and are all covered by sickness insurance**. The directives allow the **spouse** and **dependent children** of those who come within the scope of these Directives to take up employment, if they are non-Community nationals and the rights set out in these measures are subject to the same **derogations on grounds of public policy, security and health** as those under Article **48**.

Another point concerning these Directives is that they impose rather important restrictions on the right of residence, such **as** the requirement that the employee or independent professional and his family be the beneficiaries of a sickness insurance scheme, which covers all the risks in the host country, and/or of sufficient financial means.

Mention should also be made of the Court of Justice's contribution in this field. The Court has given **an** extensive interpretation of Articles 7 and **128** of the EEC Treaty with regard to the free movement of students. Since the *Gravier* judgement⁵, it is well-established case-law that students who are nationals of a Member State have the right of equal treatment under the EC Treaty as regards the conditions for access to professional education in another Member State. In the *Raulin* case⁶, the Court made it clear that this implies that students who are admitted for professional education in another Member State also enjoy a right to reside on the territory of the host State for the duration of their training.

¹ **COM(80)358**.

² **OJ L 180**, 13.7.90 p. **28**.

³ **OJ L 180**, 13.7.90p. **28**.

⁴ Case C-295/90, *European Parliament v Council*, [1992] **ECR I-4193**

⁵ Case 293/83 *Gravier v City of Liège*, [1985] **ECR-593**; Case 242/87 *Blaizot v Universite de Liege*, [1988] **ECR-379**.

⁶ **Case C-357/89 Raulin v Minister van Onderwijs en Wetenschappen**, [1992] **ECR I-1027**.

6. Social advantages'

Article 7(2) of Regulation 1612/68 provides that an EU worker who is working in another Member State enjoys the same social (and tax) advantages as national workers'. This right only applies to workers, not job-seekers³. The Court has interpreted this provision as covering all social and tax advantages, not just those linked to the contract of employment, and even in the cases where they are of **indirect** benefit to the worker⁴. However, the advantage has to be of some direct or **indirect** benefit to the worker himself and not just to a member of his family'. Granting a social advantage to a migrant EU worker cannot be subject to the completion of a given period of occupational activity or residence when national workers are not subject to such conditions⁶.

The social advantages granted under **this** provision are all those which:

"[...]are generally granted to national workers primarily because of their objective **status as workers** or by virtue of the mere fact of **their residence on the national territory** and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the Community".

¹ See further, *EC LAW, Texts, Cases and Materials*, Paul Graig & Grainne De Burga, Clarendon Press, Oxford, 1995; *Free Movement of persons in the EU*, John Handoll, Partners, Paisner & Co, London, 1995.

² Article 7(2), **EEC Regulation N° 1612168** of the **Council** of **15 October 1968** on freedom of movement for workers within **the Community**.

³ *Case 316/85 Lebon*, [1987] ECR-2811.

⁴ *Case 32/75 Fiorini (nee Cristini) v. Societe Nationale des Chemins de Fer Français*, [1975] ECR-1085, [1976] 1 CMLR 573; *Case 94184, Office National de l'Emploi v. Jozsef Deak*, [1985] ECR-1873.

⁵ **Case 316/85 Lebon**, [1987] ECR-2811.

⁶ **Case 157/84 Frascogna**, [1985] ECR-1739; **Case C-3/90 Bernini**, [1992] ECR 1-1071

⁷ *Case 249/83 Hoeckx*, [1985] ECR-973; *Case 207/78, Ministere Public v. Even and ONPTS*, [1979] ECR-2019, [1980] 2 CMLR 71.

Examples of social advantages¹:

- fare reduction card issued to large families;
- allowance for handicapped adults;
- subsidised child-birth loans for low income families;
- birth and maternity allowances;
- use of migrant's language in proceedings before the courts of the host Member State;
- possibility for a migrant worker to have their unmarried companion live with them;
- an educational grant awarded for maintenance and vocational training;
- a benefit guaranteeing a minimum means of subsistence.

It must be pointed out that, since Regulation No. 1612/68 is of general application regarding the free movement of workers, Article 7(2) thereof may be applied to social advantages which at the same time fall specifically within the scope of Regulation No. 1408/71².

7. The EURES Network

EURES, European Employment Services³, is a European network comprising national employment services, their social and economic partners, public or private, and the Commission. This network is responsible for developing the exchange of information and cooperation provided for in the EEC Regulation N° 1612/68. The information to be exchanged concerns vacancies and applications for employment in other Member States, on the state and trends of the labour market broken down by regions, sectors of activity and if necessary by level of worker qualification and, finally, on the general living and working conditions in other Member States.

Although most of the employment services are national, the regions are increasing their role in employment matters and are often specialised in certain professions or categories of employee. These regional services focus on specific zones of employment in which there is major cross-border labour movement.

They aim at ensuring the circulation of information concerning vacancies and applications between the border regions concerned, and at providing information concerning living and working conditions in these regions. The specific feature of these regional services is their multilateral nature, since only local social operators (trade unions, employers, public-sector employment services) are involved.

Access to and use of the EURES network is free of charge to both workers and employers.

¹ **Relevant Cases:** Case 32/75 *Cristini v. SNCF*, [1975] ECR-1585; Case 63/76 *Inzirillo*, [1976] ECR-2075; Case 65/81 *Reina*, [1982] ECR-33; Case C-111/91 *Commission v Luxembourg*, [1993] ECR-817; Case 137/84 *Mutsch*, [1985] ECR-2681; Case 59/85 *Reed*, [1986] ECR-283; Case 39/86 *Lair*, [1988] ECR-3161.

² Case C-85/96 *Maria Martinez Sala v Freistaat Bayern*, judgement of the Court of 12 May 1998.

³ Commission Decision 93/569/EEC of 22 October 1993, OJ L 274, 6.11.1993, p.32.

8. Social security

The right of free movement of workers and self-employed persons is supported by a system for the co-ordination of social security schemes. Regulation 1408/71 is based on Articles 51 of EC Treaty, which provides for the Council to adopt any measures in the field of social security as are necessary to provide freedom of movement for workers'. With Regulation 1390/81 (OJ L 143/1, 1981) it has been extended to self-employed persons and their families.

A first point to be clarified is that the Community provisions on social security do not replace the different national social security systems and they do not create a single European system of social security. Community legislation on social security aims primarily at the coordination of these national systems and its main objective is to ensure that EU or EEA nationals who exercise their right to move within the Union and take **up** a professional activity in the territory of a Member State other than that of their own nationality, are not in a worse, discriminatory position than that of a national of the host State².

The Community provisions on social security do not apply to all persons who move, stay or work within the Union. The categories covered and protected by the relevant provisions are:

- employed and self-employed persons who are EU citizens or nationals of an **EEA** country and have been insured under the legislation of one of these States;
- pensioners, nationals of an EU State or of an EEA country³;
- civil servants, unless they are insured with a special scheme for civil servants;
- family members of the above-mentioned persons, irrespective of their nationality⁴.

Conversely, students, disabled persons and non-active persons who are not covered by the category of family members, civil servants who **are** insured with a special scheme for civil servants and third country nationals are **not covered** by the Community rules on social security.

Regulation 1408/71 applies to all national legislation concerning:

- (a) sickness and maternity benefits;
- (b) invalidity benefits;
- (c) old-age benefits;
- (d) survivor's benefits;
- (e) benefits as a result of accidents at the work place and occupational diseases;
- (f) death grants;

¹ **Council Regulation 1408/71 of 14 June 1971 as amended and updated by Regulations 2001/83 and 1945/93.**

² **See further, European commission DG V, *Your social security rights when moving within the European Union, a practical guide*, Brussels 1997, 220 pp., ISBN 92-827-5607-6.**

³ **Even if their country joined the EU or EEA after they became pensioners**

⁴ **Persons covered by the term "family members" are those defined or recognised as a member of the family by the national legislation of the State of residence.**

(g) unemployment benefits;

(h) family benefits.

It does not matter whether the social security schemes are contributory or not, or whether they are paid by the employer, social insurance institutions or by the public administration. The Regulation, however, **does not cover** the case of social and medical assistance, benefit schemes for victims of war or its consequences and special schemes for civil servants¹.

Community provisions on social security include rules that determine which national legislation is applicable in each case. **As** a basic principle, employed or self-employed persons are covered by the legislation of a single Member State, that in which the person concerned exercises their professional activity. Should the employed person be temporarily sent to another State to work for a period exceeding **24** months (posting abroad), the legislation of the new Member State will apply. Otherwise, they remain subject to the legislation of the original country and form E 101 needs to be issued certifying that they remain covered by the old security scheme (form E 102 is needed should the initial 12-month period be extended by 12 more months).

Special categories of persons:

- **mariners:** insured in the Member State where the vessel is registered;
- **workers in international transport:** insured in the Member State where the international transport company is based;
- **civil servants:** insured in the Member State of the administration which employs the person;
- **soldiers:** insured in the Member States whose armed forces they serve;
- **persons employed by diplomatic or consular missions:** insured in the Member State of employment;
- **persons working in more than one Member State: insured** in the Member State of residence if part of the work is carried out in this State; otherwise in the State where the employer resides;
- **persons employed in one Member State and self-employed in another:** insured in the Member State where they work as an employed person;

EU citizens who are insured in another State, where they exercise their profession, are entitled to the same social rights and obligations as nationals of that country and can always rely on the principle of equality of treatment. Direct discrimination and also all forms of indirect discrimination are prohibited.

A number of Commission proposals are currently pending before the Council concerning the modernisation and development of social security provisions. These proposals are intended to extend the scope of the **main** legislation in this field (Regulation 1408/71) in order to cover special schemes for **civil** servants, students, pre-retirement benefits and extension of the exportability of unemployment benefits. To this end, in June 1998 the Council adopted a Regulation amending Regulation 1408/71 **in** order to cover special schemes for civil servants². This regulation entered

¹ **Article 4 of Regulation 1408/71.**

² **Council Regulation No. 1606/98/EC of 29 June 1998 amending Regulation No. 1408/71/EEC on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation No. 574/72/EEC laying down the procedure**

into force on **25** October 1998. Within the Commission's programme for 1998 concerning the introduction of initiatives for improving workers' rights, a proposal for reforming and simplifying Regulation 1408/71 will also be included'. The extension of this Regulation to third country nationals is also part of the Commission's long-standing policy to improve the legal status of third country nationals legally residing and working in the Union. In this regard, the Commission has made a proposal for a Council Regulation to amend Regulation No 1408/71/EEC with the view to extending it to third country nationals².

8.1. Supplementary pensions

In June 1997 the Commission published a Green Paper on supplementary pensions³ stating that provisions on pensions are a fundamental aspect of social protection in the European Union and that supplementary pension schemes should increase efficiently in the context of the Single Market and the free movement of workers. Based on this paper, the Commission recently adopted a Directive concerning the regulation of supplementary pensions for employed and self-employed persons⁴. The aim of the Directive is to ensure that appropriate protection is given to the individual rights, acquired or in the course of acquisition, of members of supplementary pension schemes (both voluntary and compulsory), who move from one Member State to another within the European Union. The Directive applies to **all** members of supplementary pension schemes and to members of their families and their survivors. The term "supplementary pension" means invalidity, retirement and survivors' benefits intended to supplement or replace those provided in respect of the same contingencies by statutory social security schemes. The aim is to ensure that the rights acquired by a worker under a supplementary scheme are preserved at a level at least comparable to that from which they would have benefited if they had changed employers but had remained within the same Member State.

The European Parliament approved the Directive with its Resolution of 30 April 1998⁵, subject to some amendments. Additionally, the European Parliament expressed its concern on guaranteeing adequate pension rights in respect of temporary and part-time employment.

for implementing Regulation No.1408/71/EEC with a view to extending it **to** cover special schemes for civil **servants**, OJ L 209, 25/7/1998, pp. 1-15.

¹ Within this framework, the Council has already adopted Regulation No 1223/98/EC of 4 June 1998 amending **Regulation** No 1408/71/EEC on the application of social security schemes to employed persons, to self-employed **persons** and to members of their families moving within the Community and Regulation No 574/72/EEC laying down the procedure for implementing Regulation No 1408/71/EEC, OJ L 168, 13/6/1998, pp. 1-13. **See also** **European** Parliament's relevant Legislative Resolution of 31 March 1998, OJ C 152, 18/5/1998, p. 47.

² COM(97)561 final of 12.11.1997.

³ Commission Green Paper on Supplementary Pensions, COM(97)283 final.

⁴ Council Directive of 8 October 1997 on safeguarding the supplementary pension rights of employed and self-employed persons within the European Union, OJ L 209, 25/07/1998, pp.46-49.

⁵ Legislative Resolution of **30** April 1998 embodying Parliament's opinion on the proposal for a Council Directive on safeguarding the supplementary pension rights **of** employed and self-employed **persons** moving within the European Union, OJ C 152/69, 18/5/1998.

9. Restrictions on freedom of movement posed by Community law

9.1. Restrictions on the right of entry and residence

Article 48(3) sets out the rights attaching to freedom of movement of workers, but states that these are subject to limitations justified on grounds of **public policy, public security or public health**. Articles 56(1) and 66 EC treaty, covering freedom of establishment and freedom to provide services, contain similar provisions for special treatment for nationals of other Member States on grounds of public policy, public security or public health. The reservations contained in Articles 48 and 56 of the EC Treaty permit Member States to adopt, with respect to the nationals of other Member States and on the grounds specified in those provisions, measures which they cannot apply to their own nationals, in as much as they have no authority to expel the latter **from** the national territory or to deny them access thereto. The scope of these derogations has been further defined in secondary legislation, Directive 64/221¹.

There is no single uniform interpretation of the **public policy** exception. Whereas in the case of nationals the right of entry is a consequence of the status of national, so that there can be no margin of discretion for the State as regards the exercise of their right, the special circumstances which may justify reliance on the concept of public policy as against nationals of other Member States may vary over time and from one country to another, and it is therefore necessary that the Member States retain a degree of discretion in defining its content². **However, those exceptions must be strictly interpreted** especially where they are used as a justification for derogating from the fundamental principles of freedom of movement and equality of treatment. Its scope can not be unilaterally determined by the Member States without at the same time being subject to control by the Community institutions.³ From the outset the Court has adopted a very restrictive approach vis-a-vis this notion.⁴ The limits to the exercise and scope of the exceptions are set out by the general principles of law, such as the principles **of non-discrimination, proportionality and protection of fundamental rights**.

Furthermore, Directive 64/221/EEC of 25 February 1964⁵ covers the extent of Member State's discretion in those **areas** and co-ordinates all measures relating to entry and deportation from their territory and issue or renewal of residence permits. **The exceptions cannot be invoked to serve economic ends**. The threat to public policy must stem exclusively from the personal conduct of the individual concerned. The particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and therefore the competent national authorities should be allowed an area of discretion in this matter, albeit within

¹ OJ 56, 5.4.1964. It concerns the co-ordination of special restrictive measures on the movement and residence of foreign nationals justified on grounds of public policy, public security or public health.

² Joined cases C-65/95 and C-11/95, *The Queen v Secretary of State for the Home Department, ex parte Mann Singh Shingara and ex parte Abbas Radiom*, [1997] ECR I-3343; Case 41/71 *Van Duyn v Home Office*, [1974] ECR-1337.

³ Case 36175, *Rutili v Minister for the Interior*, [1975] ECR-1219.

⁴ Case 41/74, *Van Duyn v. Home Office*, [1974] ECR-337.

⁵ OJ 850/64, 1964, English special edition p. 117. The scope of Directive 64/221/EEC was extended by Council Directives 72/194/EEC of 18 May 1972 (OJL 474, 1975, English special edition) and 75/35/EEC of 17 December 1974 (OJL 14114, 1975) respectively to cover persons who exercise their right to remain in the territory of another Member State after having been employed there or after having pursued an activity in a self-employed capacity there.

the limits imposed by the EC Treaty'. The circumstances **must also constitute a genuine and sufficiently serious threat to the fundamental interests of society**². Although there is no uniform scale of values as regards the assessment of conduct which might be considered as contrary to public policy, conduct might not be considered as being of a sufficiently serious nature to justify restrictions on entry or residence where the Member State in question did not adopt, with respect to the same conduct by its own nationals, repressive measures or other genuine and effective measures intended to combat such conduct. National authorities could not base the exercise of their powers on assessment of certain conduct which would have the effect of applying an arbitrary distinction, to the detriment of nationals of other Member States³.

Previous criminal convictions cannot in themselves constitute sufficient grounds for exclusion, but past conduct may be evidence of a present threat to public policy where, for example, there is evidence that the individual is likely to offend again.

In the absence of a Community definition, the Court of Justice has assumed the right to monitor Member States' interpretations of what public policy means. According to its case law:

- States may have recourse to the public policy reservation only **exceptionally** and in a **limited way**;
- Measures may **not** be collective or reflect a wish to achieve general exclusion;
- Finally, in accordance with the principle of identity of treatment, the contact in question must **not be tolerated in the case of nationals either**.

An Annex attached to the Directive sets out a list of infections and contagious diseases, which are subject to quarantine **has listed** by the World Health Organisation, such as tuberculosis and syphilis (but not AIDS) which can justify refusal to permit entry on grounds of public health. **Once an initial residence permit has been issued, subsequent infection with one of the listed diseases cannot justify deportation.** Drug addiction and mental illness are to be treated under the headings of public or police security.

Directive 64/221 also lays down a number of procedural rights for individuals seeking entry to another Member State. Persons must be notified of any decision to refuse them entry or residence and must be given full reasons, unless this prejudices state security⁴. The person concerned will have the same legal remedies in respect of any decision concerning entry, or refusal of the issue or renewal of a residence permit, or the order of expulsion from the territory, as are available to nationals of the State concerned in respect of administrative acts.

Where there is no right of appeal against the decision of refusing entry to a court of law, the person concerned must have the right to obtain a second opinion from a competent authority, of the host country, as provided for by the domestic law of that country.

¹ Case **41/74**, *Van Duyn v. Home Office*, [1974] **ECR-1337**.

² Case 30/77, *R. V. Bouchereau*, [1977] **ECR-1999**.

³ **Joined cases 115 and 116/81** *Adoui & Cornuaille*, [1982] **ECR-1665**, para.8.

⁴ Case 293/83, *Gravier v. City of Liege*, [1985] **ECR-593**.

Examples of instances in which the Court was **not** willing to consider certain reasons as being covered by the notion of public policy are:

- economic aims¹;
- the mere failure by a national of a Member State to comply with the legal formalities concerning the entry, movement and residence of aliens²;
- the exercise of trade union rights³;
- the refusal to issue a residence permit on the ground of immoral conduct, i.e. "waitresses in a bar which was suspect from the point of view of morals", in cases where the Member State does not adopt, with respect to the same conduct on the part of its own nationals, repressive measures or other genuine and effective measures intended to combat such conduct⁴;
- measures taken against activities which are simply "socially harmful"⁵;
- the mere fact that a national legislation carries penal sanctions; the protection of consumers or the fairness of commercial transactions⁶;
- the refusal to issue a residence permit to a Community national on the grounds that he is not carrying out his activities in conformity with the social legislation in force⁷;
- the requirement of having only one place of business imposed upon physicians, dentists and veterinary surgeons, on the basis of the *intuitus personae* character of the medical contact, in order to assure the permanence of the medical care and the good functioning of emergency services⁸.

However, decisions prohibiting entry into the territory of a Member State of a national of another Member State constitute derogations from the fundamental principle of free movement. Consequently, such a decision cannot be of unlimited duration. In cases where entry has been refused or a Community national has been expelled from a Member State, a new application for a residence permit may be submitted and, if this application is made after a reasonable time, must be examined by that State's competent administrative authorities⁹.

¹ Case 352/85 *Bond van Adverteerders v Netherlands*, [1988] ECR-2085.

² Case 48/75 *Royer*, [1976] ECR-497.

³ Case 361/75 *Rutili v Minister for the Interior*, [1975] ECR-1219.

⁴ **Joined cases 115 and 116181 *Adoui v Belgian State and Cornuaille v Belgian State***, [1982] ECR-1665; **see also Case 249/86 *Commission v Germany***, [1989] ECR-1263.

⁵ Case 301/77 *R. V Bouchereau*, [1977] ECR-1999.

⁶ Case 16/83 *Prantl*, [1984] ECR-1299.

⁷ Case C-363/89 *Roux v Belgian State*, [1991] ECR 1-273.

⁸ Case C-351/90 *Commission v Luxembourg*, [1992] ECR 1-3945.

⁹ **Joined cases C-65/95 and C-11195 *The Queen v Secretary of State for the Home Department, ex parte Mann Singh Shingara and ex parte Abbas Radiom***, [1997] ECR 1-3343; **Joined cases 115181 and 116181 *Adoui and Cornuaille v Belgian State***, [1982] ECR-1665.

9.2. Restrictions on taking up employment

The rules on freedom of movement, according to Article 48(4), may also not be applicable in the case of **employment in the public service**. Therefore, if a post falls within the exception, a nationality requirement can be imposed. A similar, but more restrictively formulated, exception is provided for in the area of establishment and services'. The rationale behind both exceptions is identical, namely that some acts of public authority require a degree of loyalty which a State can **only** expect from its own citizens.

The exception covers a series of posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities. Such posts in fact presume on the part of those occupying them the existence of a special relationship or allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality².

The exception applies **only** to access to protected posts. It **cannot** justify different terms and conditions of employment if the non-national is recruited to a potentially protected post.

In order not to leave this concept to the discretion of Member States, when the legal situation of public service employees varies so much that Member States could abuse this exception, the Court of Justice **has** been obliged to define it. The Member States, in several of the cases brought before the Court, argued for the adoption of an "institutional" approach to the interpretation of "public services". Under this approach the exception would apply to all posts within a given body such as the States' civil services. However, the Court rejected this argument in favour of the "functional" approach, **which allows the consideration of the nature of a given post within an institution and determines whether or not the functions involved preclude non-national access**³.

In the light of the fundamental character of the free movement of persons, the Court has given a narrow reading of both exceptions, holding that they should not be given a scope beyond that which is strictly necessary for safeguarding the aim for which they were included in the Treaty. In the absence of any distinction in the provision of Article 48(4), it is immaterial whether a worker is engaged as a workman, a clerk, or an official or even whether the terms on which he is employed come under public or Community law⁴. Member States cannot deem a particular post to be "in the public service" by the name or designation given to that post, or by the mere fact that the terms of the post are regulated by public law. A post will only benefit from the derogation in Article 48(4) if it involves **both** direct or indirect participation in the exercise of power conferred by public law **and** the safeguarding of the general interests of the State or of other public authorities'.

¹ According to Article 55 EC (which applies to services pursuant to Article 6 EC), the Treaty provisions concerned do not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority.

² Case 149/79 *Commission v Belgium*, [1980] ECR-3881, para. 10.

³ Case 149/79 *Commission v Belgium*, [1980] ECR-3881 para 12. See also Case 307/84 *Commission v France*, [1986] ECR-1725 para 12.

⁴ Case 152/73 *Sotgiu v Deutsche Bundespost*, [1974] ECR-153.

⁵ Case 661/85 *Lawrie-Blum*, [1986] ECR-2121.

Jobs in the public service are those which involve **direct or indirect participation** in the exercise of powers conferred by public law **as** characterised by exercise of a power to constrain individuals or by association with higher interests, such as the internal or external security of the State¹.

There is currently no secondary legislation which attempts to clarify the concept of "public services". In 1988, the Commission instead, published a document relating to the scope of Article 48(4), and providing some guidance on the sorts of State functions which it considered as either falling or not falling within that provision².

The activities considered **as** forming part of the "public service" were the specific functions of the State and **allied** bodies, such **as** the armed forces, the police, the judiciary, the tax authorities and the diplomatic service and, secondly, employment in governmental departments, regional authorities and other **similar** bodies and central banks where this involved staff (officials and other employees) who **carried** out activities organised on the basis of a public legal power or of another legal person governed by public law. In this category fall posts which concern the preparation of legal acts, the implementation of such acts, monitoring of their application and the supervision of subordinate bodies.

Posts which were unlikely to be within the exception, because the functions involved were removed from the activities of the public service, were: bodies administering commercial services (e.g. public transport, electricity and gas supply, airlines and shipping companies); public health care services; teaching in State educational establishments; research for non-military purposes in public establishments.

The Commission notes that each of these activities exists in the private sector, without the imposition of nationality requirements. It has also pointed out that any misuse of the exception under Article 48(4) *can* be dealt with in proceedings before national courts³. The notion of "public service" has also been elaborated by the Court of Justice. Thus, the exception also covers supervisors, night-watchmen and architects employed by local authorities⁴, as well as managers in a public bodies and those advising the state on scientific or technical questions⁵. Posts held **not** to be covered by the exception include gardeners and painters employed by local authorities⁶.

¹ Case **149179** *Commission v Belgium*, [1980] ECR-3881.

² *Freedom of movement of workers and access to employment in the public service of the Member States: Commission action in respect of the application of article 48(4) of the EEC Treaty*, OJ C 7212, 1988.

³ See also Commission answers to WPQ No. 2631/92 (OJ 1993 C 106135, in relation to British crown servants and the European Communities (Employment in the Civil Service) Order 1991 and WPQ No. 599193 (OJ C 264179, 1993).

⁴ Case **149179** *Commission v Belgium*, [1982] ECR-1845, para 8.

⁵ Case **225185** *Commission v Italy*, [1987] ECR-2625.

⁶ Case **149179** *Commission v Belgium*, [1982] ECR-1845.

The scope of **Article 55** was made clear in the *Reyners* judgement¹ in which the Court refused to consider the profession of "avocat" in Belgium as an activity connected with the exercise of official authority². The Court held that the exclusion of other EC nationals on the basis of Article 55 must be "limited to those activities which, taken on their own, constitute a direct and specific connection with the exercise of official authority". The Court confirmed this strict interpretation in the *Thijssen* case³, where it held that the activity of a certified auditor of insurance companies (which assist the official control authority in the prudential control of those companies) cannot under Belgian law, by reason of its auxiliary and preparatory nature, be considered as direct and specific participation in official authority within the meaning of the first paragraph of Article 55 EC. Moreover, the Court held that the fact that private individuals set up private vocational training schools or they provide this kind of education was not connected with the exercise of official authority under Article 55. These private activities were subject to supervision by official authorities which could ensure protection of the interests entrusted to them without the need to restrict freedom of establishment.

Another point concerns the possible impact which the provisions on citizenship (Article **8 TEU**) could have on the Court's interpretation of the derogations provided for by the EC Treaty concerning employment in the public services. Formally, Articles 48(4) and 55 EC remain unchanged after the Treaty on European Union. However, as these provisions are based on the idea of an exclusively economic Community without any political integration, it seems reasonable to expect that the Court will further narrow their scope, now that the provisions on citizenship have given a political dimension to the EC Treaty.

10. The Single European Act and Article 7a EC Treaty

The free movement of persons remains one of the aspects of the internal market, the completion of which requires that all persons who are lawfully in one of part of the market should have the right to move to other parts and that such movement should not be subject to controls when the internal frontiers to the market are crossed.

In the case law established by the Court of Justice prior to the Single European Act, the common market was defined in very broad terms as involving "the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market"⁴.

The Intergovernmental Conference, which took place between June 1985 and February 1986, led to the adoption of the Single European Act which, among other things, also changed the Community's decision-making procedures. On matters related to free movement of people, unanimity voting was replaced by qualified majority voting in the Council of Ministers, and consultation with the European Parliament was replaced by the co-operation procedure. It is accepted that the concept of free movement of Community citizens received further impetus from

¹ **Case 2/74 *Reyners v Belgian State*, [1974] ECR-631.**

² **The Court held that the most typical activities of this profession - consultation and legal assistance together with representation and defence in court- could not, even where the intervention or assistance of the "avocat" was compulsory or a legal monopoly, be considered as connected with the exercise of official authority. The exercise of these activities left the discretion of the judicial authority and the free exercise of judicial power intact.**

³ **Case C-42/92 *Thijssen v Controledienst voor de Venekeringen*, [1993] ECR I-4047.**

⁴ **Case 15/81 *Schul*, [1982] ECR-1409, ground 33.**

Article 7A EC Treaty, introduced by the SEA in 1987. That Article required the Community to adopt measures with the aim of achieving the **internal market** by 31 December 1992 and provided that "the internal market shall comprise an area without internal frontiers in which the free movement of goods, person, services, and capital is ensured in accordance with the provisions of the Treaty". **The right of free movement is no longer conferred only on economic actors, as in the original Treaties, but refers to all persons.**

Article 7a imposes on the Community an obligation to produce results; that obligation can only be met if all controls at internal frontiers are abolished. The Community was obliged to achieve the internal market by the specified date. This obligation is imposed by the Treaty on the Community institutions; however, Member States also share this obligation and a duty to cooperate in achieving of this aim'. In pursuit of the aims of this Article, a Community driving licence was created², a common passport has been introduced³ and most border controls between the Member States have been removed but the free movement of persons has not, so far, been totally achieved. The 1992 deadline has been exceeded, largely as a result of failure to take the required action in relation to external frontiers. The price of abolishing internal frontier controls as required by Article 7a EC Treaty would appear to be the establishment of compensatory controls which entail judicial **and** police co-operation, the exchange of information on persons, the possibility of greater intrusion in private life by spot-checks on the territory of a Member State to control identity and legal residence, and increased controls at the external frontiers. Although it might appear that border controls within the Community would be incompatible with this provision, there **has** been disagreement over the question of passport controls, given the concerns of Member States over security and their desire to control the flow of immigrants from outside the Community. It is clear that the Community task set out in Article 7a of the EC Treaty **does not envisage preconditions**. Soon **after** entry in force of Article 7a, it became obvious that the Member States had different opinions concerning interpretation of that provision. While the Commission and the majority of Member States, including all Schengen countries, understood Article 7a to mean the abolition of all border controls for all travellers, EC citizens as well as third country nationals, other EC Member States, in particular the United Kingdom and Denmark, stressed that the free movement of persons had to be applied "according to the provisions of the Treaty". According to them Article 7a only applies to EC citizens and allows for maintaining controls of third country nationals; therefore it does not contain any obligation to abolish these controls. It **has** to be mentioned though that the UK's and Ireland's reservations stem mostly from differences in their traditional approach to immigration policy.

¹ Article 5 EC Treaty.

² Council Directive 91/439/EEC, OJ L 237, 24.8.91

³ Since 1985, passports issued by the EU Member States have a uniform format.

⁴ The UK's refusal to open its borders and to implement the relevant EC legislation on free movement of persons has several direct effects. Firstly, Ireland, with which the UK has a common travel area, is obliged to follow the same policy. Secondly, the UK persistently refuses the right of third country nationals, legally resident in other Member States, to freely cross the borders, and last, but not least, it refuses to apply one of the main principles of the Community's legal order, Article 7 EC Treaty, which was inserted into the Single European Act with the aim of removing all controls for persons, goods and capital at the internal borders of the Union, (*Statewatch*, vol 7, no 1, January-February 1997, p.21).

In contrast to most continental countries, which carried out identity checks throughout their own territory (with residents being obliged to carry identity cards on their persons, obligatory reporting to local authorities, etc), in the UK and Ireland identity checks or passport controls were traditionally conducted at external frontiers¹.

In addition, while Denmark, Greece, Ireland and the United Kingdom agreed on the point that abolition of internal borders must be compatible with the maintenance of the security, the rest of the Member States - Belgium, Germany, France, Luxembourg and the Netherlands - did not share this view, although they set some conditions for the removal of frontiers in order to guarantee Member States' security, i.e. a visa requirement for nationals of countries posing security or irregular emigration problems or countries from which numerous fraudulent asylum applications come. *All* Member States agreed that the complete abolition of internal border controls would be subject to identical international commitments with respect to asylum, co-operation in the search for wanted persons and improved information exchange, improvement of international legal assistance in criminal matters (including extradition), alignment of narcotics and arms legislation and the conclusion of re-admission agreements between the Member States if one of them deemed it necessary*. Another essential point to be mentioned is that Article 7a **does not have direct effect** and accordingly **does not confer rights on individuals** which can be invoked before national courts or the Court of Justice. Thus an individual cannot complain of those border controls which still remain, as long as they are not discriminatory³.

10.1. Distinction between Article 7a and Articles **48-66**

The free movement of persons in the common market must not be confused with the rights which flow directly from Articles **48-66**, and in particular the taking up of economic activities as self-employed persons and hence the right of residence, and which, subject to the second paragraph of Article **59**, **apply only to nationals of Member States**. In addition, as Article 7a EC Treaty does not refer to Article **48** it must be understood as empowering the Community institutions to enact rules for the free movement of persons in general. Article 7a is found in **Part** One of the EEC Treaty, entitled "principles" and, like Article 3(c), is a general provision which not **only**

¹ **European** Institute for Public Administration, Maastricht: Sixth colloquium: "The last days of Schengen? Incorporation into the new Treaty on European **Union**, external frontiers and information systems", Maastricht, **5-6** February 1998.

² **A** further corroboration of the view that issues relating to the status of thirdcountry nationals fall within the domestic jurisdiction of Member States is provided by the Declarations accompanying the conclusions of the Single European **Act**. In the first Declaration, Member States noted that "nothing in these provisions shall affect their right[...] to take such measures **as** they consider necessary for the purpose of controlling immigration from third countries". On the other hand, they declared their will to co-operate in promoting the **free** movement of persons, without prejudice to the powers of the **Community**, in particular **as** regards "the entry, movement and residence of national of third countries". Such action should not affect the rights of Member States to take such measures **as** they consider **necessary** for the purpose of controlling immigration from third countries, and so combat terrorism, crime, the **traffic** in drugs and illicit trading in works of art and antiques. What they asserted actually with these Declaration is that any regulatory power in this regard is vested in them and does not belong to the **Community**.

³ *R v Secretary of State for the Home Dept, ex p Flynn* [1995]. According to the **case** law of the Court it **has** established **that**, for such **an** action to be brought, it is necessary **that** the measures which it is claimed should have been enacted are defined with sufficient specificity for them to be identified individually, and adopted pursuant to Article 176. (Case 13/83, *European Parliament v. Council* [1985] **QJ C** 1/24). This is not to **be so** where the relevant institutions **possess** discretionary power, with consequential policy options, the content of which **cannot be** identified with precision. (Case C-445/93, *European Parliament v. Commission*, [1994] **QJ C** 1/24).

applies to the persons referred to in Articles **48-66** but also to nationals of Member States **who are not economically active**. The completion of the internal market requires therefore that, in principle, all persons who are lawfully in one part of that market should have the right to move to other parts. It therefore establishes a clear and simple objective which that allows no margin of discretion. But the abolition of borders does not deprive the competent authorities of their power to act throughout their territory and up to the frontier of that territory. However, as the crossing of the frontier may no longer give rise to controls, such intervention must form part of internal monitoring arrangements covering the whole of the territory.

10.2. Commission position on the interpretation of Article 7a of the EC Treaty

The Commission, in its Communication to the Council and the Parliament, of 18 December 1991¹, highlighted the many different checks and formalities at internal frontiers and hence the wide range of measures to be adopted. It stressed that all these checks and formalities must be abolished if Article 7a EEC Treaty (Article 7a EC Treaty) is to be fully effective, since the continued existence of just one of them would undermine the political dimension of the objective laid down in that Article.

There is controversy between the Commission and some Member States on the meaning of Article 7a EC regarding the competence of Member States to maintain control of third country nationals, even at **their** internal borders. Behind the dispute on the abolition of border controls, opinions also **differ** on the objectives and powers of the Community relating to the rights of those third country nationals legally resident in a Member State of the Community.

From the outset the Commission **has** pointed out that the legal interpretation of Article 7a requires that the Community internal market must operate under the same conditions as a national market. This area without internal frontiers cannot be realised in practice unless all goods, services, capital and individuals moving within that area are covered. In a position paper on the internal market concept², the Commission pointed out that the phrase "free movement [...] of persons in Article 7A refers to all persons whether they are economically active and irrespective of their nationality". The internal market, in order to operate under conditions equivalent to those in a national market, pre-supposes the abolition of all controls at internal frontiers, whatsoever their form and whatever their justification. Any other interpretation would deprive Article 7a of the Treaty of any practical effectiveness.

10.3. Position of the European Parliament

The European Parliament, challenging the maintenance of border checks, brought an action against the Commission at the end of 1993, under Article 175 of the EC Treaty, for failure to act. The Parliament claimed that, in breach of the obligation to create the internal market, including the abolition of internal border controls, the Commission had not put forward the necessary proposals for adoption of the relevant legal measures³.

Furthermore, the European Parliament has made a number of proposals trying to encourage the Commission and the Council to introduce the measures mentioned in the Commission White Paper **aiming** at the creation of a border-free area within the Community.

¹ COM(91) 549.

² SEC (92) 877 final.

³ Case C-445/93 *European Parliament v European Commission*, [1994] **QJ C 1/24**.

The European Parliament has continuously argued that no distinction should be made or discrimination shown between beneficiaries of the right of **free** movement of persons, whether they are citizens of the Union or third country nationals, legally resident in a Community State.

Moreover, the EP *insists* on the point that immigration matters should not constitute an obstacle to the free movement of persons, as these are two separate issues. The question of freedom of movement of persons in the EC and the abolition of internal borders is one which must be dealt with at **Community, not intergovernmental, level**, with judicial review by the European Court of Justice and parliamentary control by the EP. The European Parliament takes the view that, already under Articles 3(c), 7a(2) and 235 the Community has sufficient regulatory power to extend freedom of movement to third country nationals legally resident within the Community and to enact common entry and visa regulations. Finally, it objects to the Council's proposal to make freedom of movement for persons dependent on accompanying measures¹.

11. The Treaty on European Union

Articles 8-8e EC, as inserted by the TEU, have established the citizenship of the Union, to be conferred on every person holding the nationality of a Member State.

The right of free movement and the right of residence are, as they have been throughout the debate on European citizenship, the foundations of Union citizenship. According to Article 8a of the EC Treaty, Union "citizens have the right to move and reside freely within the territory of the Member States, subject to the limitations laid down by Community law"².

¹ Resolution of the EP of 20 June 1990 on free movement of persons within the Nordic Passport Union, the **European Economic Area** and the Schengen countries (OJ C 198/168, 8.7.96); Resolution of the EP of 11 March 1994 on the incompatibility of passport controls carried out by certain airline companies with Article 7a of the EC Treaty (OJ C 91, 28.3.1994); Resolution of the EP of 28 October 1993 on the crossing of the EC external borders (OJ C 315/244, 22.11.93); Resolution of the EP of 15 July 1993 on **free** movement of persons pursuant to Article 8a of the **EEC Treaty** (OJ C 255/183, 20.9.93); Resolution of the EP of **25 May** 1993 on **free** movement of persons pursuant to Article **8a** of the **EEC Treaty** (OJ C 176/35, 28.6.93); Resolution of the EP of 11 February 1993 on freedom of movement for persons (OJ C 72/136, 15.3.93); Resolution of the EP of 19 November 1992 on the abolition of controls at internal borders and free movement of **persons** within the European Community (OJ C 337/211, 21.12.92); Resolution of the EP of 13 September 1991 on the **free** movement of persons and security in the **European Community** (OJ C 267/197, 14.10.91); Resolution of the EP of 15 March 1990 on the free movement of **persons** in the internal market (OJ C 96/274, 17.4.90).

² In a recent *case*, Advocate-General La Pergola expressed the opinion that the right to move freely constitutes the primary right, the first right attached to citizenship of the Union. It is not just a right to move freely but also to reside in any other Member State. The latter is not just a derived right but is inseparable from the concept of Union citizenship, in the same **way as** the other rights expressly conceived as necessary corollaries of the new **status** of citizenship introduced by the Treaty on **European Union**, (Conclusions of Advocate-General Antonio La Pergola of 1 July 1997 in Case C 85/96 *Maria Martinez Sala v Freistaat Buyer*). However, in its judgement the **Court** did not consider it necessary to examine whether a person *can* rely on Article 8a EC Treaty in order to obtain recognition of a new right to reside in the territory of a Member State since in this specific case the appellant **had** already **been** authorised by the national authorities to reside there, although she had been refused a residence **permit**.

Their rights are conferred on them in their capacity as citizens of the Union and do **not depend on the exercise of an economic activity**¹. Although they are still sometimes subject to controls when crossing an internal frontier, they have the right to cross it merely on production of a valid identity card or passport² and they must indicate to the authorities in the host Member State the grounds on which they are staying in that State's territory only if and when they apply for a residence permit, i.e. when they intend to take up residence in the host Member State. Provided they are staying temporarily, as tourists, in the territory of another Member State, they are not subject to any other formality. The freedom of EU citizens to move within the internal market is therefore at present only restricted by the continued existence of controls on persons at internal frontiers.

Nationality of the Member States and national citizenship are unaffected by the citizenship provisions. The TEU does not create a nationality of the Union, but rather a complementary citizenship to citizenship of a Member State. Union citizenship is available only to nationals of the Member States and the latter may determine which of their nationals may qualify. Union citizenship may be acquired or lost only in parallel with the acquisition or the **loss** of the nationality of a Member State and, therefore, the benefits stemming from this Article are conditional upon those arising from national citizenship. In any event Member States, retain full competence to determine who is to be considered to be a "national" and therefore to profit from the EU provisions on citizenship³.

What Article 8 underlines is that freedom of movement is to be understood as an attribute of EU citizenship, which is not automatically granted to third-country nationals. Article 8a alone does not constitute a legal basis from which **all** rights concerning the free movement of EU citizens can derive. It can not replace existing legal bases dealing with specific categories of persons⁴. Of course this provision does not prevent the Community, if so empowered under the EC Treaty, from extending certain rights from the spectrum of freedom of movement to foreign citizens by acts of secondary Community legislation. Thus, third country nationals can acquire citizenship of the Union only by acquiring the nationality of a Member State; this remains true even if they have resided in the Union for a very long period. Similarly it applies to all present and future rights derived **from** citizenship of the Union. From the point of view of potential immigrants, at least, citizenship of the Union must therefore seem an essential element of "Fortress Europe". But even from the point of view of third country nationals who have lived in the Union for long periods for professional or other reasons, this limitation may seem restrictive. At least the tax-payers among them may wonder why, if they are helping to fund the Community/Union, they should not be allowed to enjoy at least some of their rights as citizens.

¹ **Freedom to move "[...]as a right conferred on every citizen of the Union, it is now regarded as a fundamental and personal right, within the European Community, which may be exercised outside the context of an economic activity", Second Report from the Commission on Citizenship of the Union, COM(97) 230 final, Brussels, 27.05.1997.**

² **Article 3 of Directive 73/148/EEC.**

³ **Second Report from the Commission on Citizenship of the Union, COM(97) 230 final, Brussels, 27.05.1997.**

⁴ **Second Report from the Commission on Citizenship of the Union, COM(97) 230 final, Brussels, 27.05.1997.**

It follows, however, from the Court's Micheletti judgement of 7 July 1992 that this reliance upon national law does not mean that Member States enjoy unlimited discretion in determining which persons are entitled to the rights of free movement granted by Community law'. Although, in accordance with international law, it is for every Member State to define the conditions under which acquisition and loss of nationality is obtained, **this power must be exercised with due respect for Community law and one Member State may not weaken the consequences of another Member State's granting its nationality to a person by making the recognition of that nationality dependent on a supplementary condition, such as habitual or effective residence.** The concrete meaning of the judgement in the interpretation of Article 8 seems to be that Member States have to recognise, without reservation, that when another Member State has granted its nationality, and therefore citizenship of the Union, to a person, they may not then impose additional conditions. If a Community national presents his valid identity card or passport which, pursuant to Article 3 of Directive 73/148, constitutes proof of his quality as a Member State's national, then he also has the right to enter and/or reside within the territory of another Member State.

This exclusive competence granted to the Member States may be contrasted with the interpretation of Article 48. In Community law concerning the free movement of persons, the Court has held that the concept of "worker" is a Community concept which cannot be defined by reference to national law, but rather must be interpreted in the light of Community law, as otherwise it would be subject to unacceptable variations. Nevertheless, as regards nationality, possession of which is a sine qua non for primary entitlement to fundamental Community rights, such as the free movement of persons, the Member States are deemed to have exclusive competence. TEU provisions deny the possibility of extending Union citizenship to third country nationals legally resident in the Community. More particularly as regards entry into, and short stays in, the territory of another Member State, the Court of Justice has held that "nationals of the Member States of the Community generally have the right to enter the territory of the other Member States in the exercise of the various freedoms recognised by the Treaty and in particular the freedom to provide services which, according to now settled case law, is enjoyed both by providers and by recipients of services"².

Article 8a does **not confer the rights of free movement and residence on family members of Union citizens who do not possess the nationality of a Member State.** Nationals of third countries legally resident in the Community are excluded from the scope of Article 8 EC Treaty and no new political subjects have been created: individuals remain nationals of their Member States. Of particular importance in this context is the fact that citizens of the Union and members of their families who move to another Member State may still encounter conflicts of rules with regard to family members because of differences in national law and the lacunae which still exist in Community law. This is particularly true where spouses are nationals of different States.

It is doubtful if this Article provides any new rights over and above those already in existence at the time of the Treaty's amendment, although it would be open to the Council to extend those rights by adopting provisions under sub-paragraph 2. Despite all the progress already made in secondary legislation, there are still restrictions on free movement and residence at Union level. The main reason is that **the right provided by article 8a(1) is not a directly applicable individual right:** citizens of the Union only have the right to move and reside freely in other

¹ Case C-369/90 *Micheletti v Delegación del Gobierno en Cantabria*, [1992] ECR I-4239.

² Case C-68/69 *Commission v Netherlands*, [1991] ECR I-2637, para 10.

Member States subject to the "limitations and conditions" laid down in the Treaty and in the implementing provisions. Thus, an EU citizen does not have an unfettered right to reside in any Member State; he must qualify under one of the Treaty Articles (e.g. under Article **48**) or under a directive (e.g. Directives 93/36, 90/365, and 90/364) **and**, in particular, he must not be a burden on the State. Similarly, it would appear that a Member State may continue to exclude an EU citizen **from** entry to its territory on the grounds of public security. If the right to move freely and to reside in any Member State is no longer tied to economic status but to a notion of Union citizenship, any EC national, employed or not, could move freely throughout the Community and reside in **any** Member State. However, close analysis of Article 8 shows that the reality is different.

The introduction of unlimited freedom of movement would entail considerable problems with regard to social insurance systems a point which has repeatedly been cited. The coordinating provisions concerning the Member States' social insurance systems, so far adopted on the basis of Article 51 of the EC Treaty, apply only to certain limited categories of persons (mainly employees, the self-employed and member of their families, Regulations 1408/71, 1390/81, and 1248/92) and have been used **as an** argument against further progress. In view of major differences between the Member States' social insurance systems, there is no simple way of providing full social insurance cover for citizens taking advantage of unlimited freedom of movement and residence in the Community. However, practical difficulties for insurers and the risks of creating new opportunities for fraud and additional financial burdens by no means justify blocking the right of citizens of the Union to unlimited freedom of movement and residence.

Furthermore, the three "new generation" Directives on the right of residence ultimately make the right of residence conditional on proof of adequate means of subsistence and medical insurance. Unlike a person's freedom of movement as a citizen in their home State, their freedom of movement in the Union is limited. **Any** possible further development of the right provided for in Article 8a should therefore aim to ensure that citizens of the Union enjoy unlimited **and** unconditional freedom of movement and residence in the territory of all Member States. This could be achieved both by means of gradual adjustments to secondary legislation and by revising Article 8a(1).

Closely associated with **freedom** of movement is the subject of controls on persons at the internal borders. Although internal border controls have largely been eliminated under the Schengen Agreement, this does not apply for all Member States and has been brought about neither by a legal act of the Community nor by a convention concluded within the Union so that there is no link with citizenship of the Union. However, certain uniform measures taken for accelerating checks on **citizens** of the Union at airports in the Member States give EU citizens the impression when travelling that they are receiving better treatment than third country nationals because of their citizenship of the Union.

In conclusion, it is clear firstly that the Treaty on European Union does not alter Articles **48, 52** and **59 EC** and, secondly, that the new Article 8a(1) grants the right of free movement and residence only "subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect". Therefore, the free movement of persons **as** provided for by the EC Treaty remains a privilege for those citizens of the Union who intend to move and reside in another Member State **for economic purposes**. Persons who are not or not yet economically active or who will never become economically active will, depending on their personal or family situation, only enjoy a conditional right of free movement provided by secondary Community rules. There is also the possibility that these persons are in a situation which brings them, according to the Court's case law, within the scope *ratione personae* of the free movement of persons, such as being a recipient of a service, a tourist, a consumer or a student. Sceptics may

wonder what Article 8a(1) adds to Community law. Maybe its value is most of all symbolic and psychological. Nevertheless, given the clear and strong wording of this provision, especially if compared to the more ambiguous formulation of Article 5b concerning the right to vote, it seems fair to say that at least some measures of direct effect should not be denied it¹.

Additionally, the Court **has** pointed out that **as** Article 8(2) EC Treaty attaches to the status of the citizen of the Union the rights and duties laid down by the Treaty, these rights also include the general right, laid down in Article 6 EC Treaty, not to suffer discrimination on grounds of nationality within the scope of application *ratione materiae* of the Treaty. It follows, therefore, that an EU citizen, **lawfully** resident in the territory of the host Member State, can rely on Article 6 of the Treaty in all situations which fall within the scope *ratione materiae* of Community law².

11.1. Opinion of the European Parliament

Union citizenship has been considered one of the most dynamic concepts, a key element in the process of European integration. The European Parliament upholds that Union citizenship and its accompanying rights must play an indispensable role in the creation of a European awareness among citizens and make a contribution to building a common consciousness of living, working and moving freely in one large European economic and political region without internal frontiers³. The European Parliament has therefore invited the Member States to initiate, without delay the preparatory work for integration of the Schengen acquis into the framework of the European Union and has pointed out that the free movement of Union citizens within the territory of the Union can only be guaranteed if the controls at the internal borders of the Union are abolished. Towards this **aim**, it has asked the Commission to take all appropriate measures and to submit as soon **as** possible a legislative proposal abolishing all the existing inequalities regarding residence in the Member States. Moreover, it has expressed its concern regarding the harmonisation process of educational systems in the Member States and the existing obstacles to the unhindered exercise of the freedom of establishment due to complexities in the mutual recognition of educational diplomas and vocational training certificates. The European Parliament considers that a precondition to effective application of the freedom to move and the right of residence is that the Commission continue with the infringement proceedings already launched and furthermore, if necessary, initiate new proceedings against Member States which have not yet transposed the relevant EC Directives into their national law. Finally, the European Parliament is in favour of granting Article 5a EC Treaty direct applicability in order for EU citizens to invoke, in cases of infringement, their right of EU citizenships before the national courts.

¹ Some **of** the rights contained in Article 8 EC Treaty flow from provisions **of** the Treaty and existing secondary legislation (such **as** provisions governing the **free** movement and residence of all nationals of Member States), whereas others are new rights conferred by the EC Treaty as amended by the Treaty on European Union (**such as** the right to vote in municipal elections and elections to the European Parliament). Some **of** these rights already have direct effect, whereas for others the implementing provisions remain to be decided on by the Community institutions or the Member States. Any **infringement of** one **of** these rights on the **part of** the authorities **of** a Member State constitutes a failure to comply with Community obligations and the Commission may bring the matter before the Court of Justice in accordance with Article 169 **of** the Treaty. Individuals may always apply to the national courts for orders requiring the authorities to observe those **of** their **rights** which have direct effect. See, answer given by Mr Delors on **behalf of** the Commission, to written question No 2958/92 on the Commission by Mr Sotiris Kostopoulos (NI), OJ C 264/4, 1993 .

² Case 85/96 *Maria Martinez Sala v Freistaat Buyer*, [1998] ECR I-2691.

³ *European Parliament's Resolution on the second Commission report on citizenship of the Union* (COM(97)0230-C 4-0291/97), adopted 2 July 1998, Minutes of the plenary sitting of 2.7.98, p.57.

11.2. The Treaty of Amsterdam - Article 8 of the EC Treaty

The Treaty of Amsterdam introduced three new provisions regarding the rights of EU citizens.

- In Article 8 EC Treaty, para 1, it adds that "Citizenship of the Union shall complement and not replace national citizenship";
- In Article 8d, it introduces a new para, according to which every citizens of the Union may write to any of the institutions or bodies in one of the official languages of the Union and have **an** answer in the same language;
- In the Preamble to the EC Treaty, a new paragraph is added referring to the decision to promote broad access to education and its continuous updating.

However, despite though these amendments **and** the further progress made, there are some issues **left** unregulated in regret of the European Parliament's expectations'. Firstly, the concept of national citizenship has not being replaced by EU citizenship. The new provision added to Article 8§1 talks about EU citizenship as being complementary to national citizenship. This complementary character and nature does not effectively reinforce the concept of EU citizenship which continues to depend on the application of differential national legislations and norms regarding the categories of persons who will be granted Community rights. Furthermore, any future strengthening of the rights contained in the concept of EU citizenship is subject to the unanimous decision of the Council and there is no provision for Article 8a to become directly applicable, as the European Parliament has continually requested. Regarding the case of third country nationals **lawfully** resident in the Union, Article 8 does not bring any further progress and their rights are still not fully recognised.

12. The principle of "non-discrimination"

Union citizens exercising their right to enter **and** reside in another Member State must be treated on **an equal** footing with nationals of that Member State. The rights of workers are very extensive in **this** respect. In relation to non-workers, such as tourists, the right, although less extensive, still exists. The State may, however, treat foreigners differently if this is justified by an objective criterion. For example, foreigners may be required to produce identification documents in order to establish their right to reside or stay there, as distinct from illegal immigrants.

In the field of free movement of workers, the principle of non-discrimination was put into practice **and** was specifically implemented by Articles 48, 52 and 59-60 EC and the secondary Community legislation, adopted on the basis of these Articles, particularly Council Regulation n° 1612/68 and Council Regulation n° 1408/71 concerning the application of the social security regime to workers and members of their families which reside within the European Community.

All direct or covert discrimination is prohibited, i.e. **rules** which specifically provide for different treatment of non-nationals.

¹ **Task Force on the Intergovernmental Conference**, Note for the attention of Mr **Jose Maria** Gil-Robles Gil-Delgado, President of the European Parliament and Mr **Julian** Priestley, Secretary-General, on the *European Parliament's priorities for the IGC and the new Amsterdam Treaty: Report and initial evaluation of the results*, Strasbourg, 15 July 1997, DOC-EN/DV/332/332457.

² **The Court has confirmed this** in a series of cases: see inter alia the judgement in Case 186/87 *Cowan v Tesor Public*, [1989] ECR-195. See also Case C-131/96, *Carlos Mora Romero/Landesversicherungsanstalt Rheinprovinz* of 25 June 1997.

The Court has subsequently refined the concept of discrimination and held that **indirect or disguised discrimination** is also prohibited, i.e. rules which, although based on criteria which appear to be neutral, in practice lead to the same result, namely discrimination against nationals from another Member State¹.

Another type of discrimination is the so-called **reverse discrimination**, which occurs in situations where a Member State discriminates against its own citizens in favour of foreign nationals. Up until now the Court has taken a restrictive stand with regard to this type of discrimination. In a constant series of cases, it has ruled that the EC Treaty provisions on free movement of persons cannot be applied to activities which are confined in all respects within a single Member State and therefore display no link with any of the situations envisaged by Community law (so-called "purely internal situations")². It follows from this that a Member State's own nationals are not in a position to challenge the compatibility with Community law of their own State's legislation which puts them at a disadvantage unless a relevant intra-Community factor is present. Most EU agreements grant workers the right of non-discrimination in employment compared with Member States' own nationals, in terms similar to those of Article 48(2) EC and Article 7(1) of Regulation 1612/68. However, it is **only** the EEA and Decision 1/80 which bar discrimination in **access** to employment **for** Turkish workers and the spouses and children of workers from EFTA countries; all other workers are only guaranteed non-discrimination **while** in employment.

12.1 The Treaty of Amsterdam and the principle of non-discrimination

A new Article 6a has been inserted into the Treaty of Amsterdam which envisages the possibility for the Council, acting unanimously on a proposal by the Commission and after having consulted the European Parliament, to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. It must be mentioned that the non-discrimination clause inserted by the new Article applies equally to EU citizens and third country nationals.

The fact that in the new Article there is no mention of prevention of discrimination on the grounds of "nationality" may seem bizarre. However, an explanation for this omission could be the fact that third country nationals, because of their objective status and role within the legal order of the Community, *can* not be treated in absolutely the same way as EU nationals. The whole structure of the Community legal order (citizenship, rights of workers and self-employed persons) is mainly based on the idea of granting special, reinforced rights to EU citizens and facilitating the free movement of Member State nationals and not that of third country nationals. However, this does not mean that the third country nationals have to be left without protection in the exercise of their own rights. It could be a challenging opportunity for the ECJ, using the principle of proportionality, to make a further distinction between acceptable "different" treatment and illicit "discriminatory" treatment between EU and third country nationals³.

¹ Case 125/73 *Sotgiu v Deutsche Bundespost*, [1974] ECR-153, concerning the area of free movement of workers; Joined cases 62 and 63/81 *Seco v EVI*, [1982] ECR-223, concerning the field of services.

² Case C-41/90 *Höfner and Elser v Macrotron*, [1991] ECR I-1979 (free movement of services); Case C-332/90 *Volker Steen v Deutsche Bundespost*, [1992] ECR I-341 (free movement of workers); Joined cases C-330/90 and C-331/90 *Lopez Brea*, [1992] ECR I-323 (freedom of establishment).

³ Carlier J.Y.(UCL), *De nouveaux instruments normatifs après le Traité d'Amsterdam*, Journée d'Etude sur "Les discriminations dans l'Union européenne après le Traité d'Amsterdam" organisée par le Groupe d'Etudes sur l'Ethnicité, le Racisme, les Migrations et l'Exclusion et l'Institut d'Etudes européennes de l'ULB, 26 mars 1998.

Unfortunately, the main consequence of this insertion is that of failing to give the provision a **direct effect**, unlike the clause in Article 6 concerning the non-discrimination principle concerning nationality. Moreover, the newly **inserted** Article 6a does not actually prohibit such discrimination but **only** provides for the combat **against** diverse forms of discrimination based on a different basis **as listed** in the clause to that of nationality. The competence to combat this form of discrimination **can only** be exercised on issues where there is already a legal basis for Community action which, in terms of scope, is narrower than that of Article 6 which refers to the "scope of application of this Treaty". Furthermore, unanimity in the Council is envisaged as the decision-making procedure for the adoption of secondary legislation and the European Parliament is therefore merely consulted. The adoption of the relevant necessary legislation is not subject to a transitional period starting from entry into force of the Treaty of Amsterdam. However, this might also have a negative effect because it leaves the Commission the absolute initiative to launch action on the issue; therefore, the Commission may never take any relevant initiatives if it does not wish to do so, although this would be rather unlikely².

Articles 2 and 3 (where a new paragraph has been added) of the EC Treaty have been expanded by including **as** one of the Community's tasks the guarantee of equality between men and women, and, on the one **hand**, the **aim** in all its activities to eliminate equalities and, on the other hand, to promote equality between men and women. In this regard, the principle of non-discrimination, which also constituted one of the main and basic principles envisaged by the founding Treaty of Rome, has been expanded to not only cover non-discrimination in matters of remuneration but also all other working conditions and those of employment. The expansion of the clause is a consequence of progress achieved in the field since the signing of the Treaty of Rome, through the case law of the Court of Justice and the adoption of relevant directives.

13. Cooperation in the fields of Justice and Home Affairs

Matters concerning free movement of third country nationals, immigration and asylum are dealt with on **an** inter-governmental basis, under the provisions on Justice and Home Affairs in the TEU (Articles K to **K.9**) which in principle fall outside the scope of the European Community.

¹ "Making Sense of the Treaty of Amsterdam", § 27-29, **Challenge Europe, The European Policy Centre, Brussels.**

² "Analysis of the Treaty of Amsterdam in so far as it relates to asylum policy", **European Council on Refugees and Exiles (ECRE), CONF/4007/97.**

According to Article K.1 TEU, Member States will regard the following areas as matters of common interest in order to achieve the free movement of persons in general:

- asylum policy;
- rules governing people crossing of the external borders of the EU; immigration policy and policy regarding nationals of third countries:
 - a) conditions of entry and movement by third country nationals on the territory of the Member States,
 - b) conditions of residence of third country nationals on the territory of the Member States, including family reunion and access to employment, and
 - c) combating unauthorised immigration, residence and work of third country nationals on the territory of the Member States;
- combating drug addiction;
- combating fraud on an international scale;
- judicial co-operation on civil matters;
- customs co-operation; and
- policy co-operation for the purposes of combating terrorism, drug trafficking and other serious forms of international crime, including the exchange of information within a European Office (Europol).

The **list** of matters of common interest are exhaustively mentioned in Article K. 1. Moreover, the Commission is fully associated with work in all the areas referred to in this list and, additionally, has the right to take initiatives on matters falling within the scope covered by numbers 1-6. Finally, one particular element of immigration policy -that related to visa policy- is transferred by the Treaty on European Union to the First Pillar, Article 100c. According to the Preamble of the EU Treaty, the provisions of the Third Pillar have the objective of facilitating the free movement of persons, while insuring the safety and security of Member States' citizens.

The parallel functioning of the First and Third pillars has further complicated decision-making within the Union. Not only do both pillars deal with aspects of free movement, but the line between the two pillars is not always clear. In addition, free movement is tied to security, considered primarily as a matter for national governments.

As far as the role of the Court of Justice is concerned, it is not given any jurisdiction to ensure the uniform interpretation of the provisions under Title VI. Only Conventions adopted under article K may stipulate such jurisdiction'. The European Parliament will be regularly informed and its views duly taken into consideration. The Parliament may ask questions and make recommendations.

Therefore, it is the European Council which mainly defines the Union's general political guidelines in this field and which gives the necessary impetus to the Union's development. The Ministers of Justice and Home Affairs meet twice per year and decide on proposals initiated by Member States and the Commission in the **first** six areas of common interest, and on the initiative of the Member States on the last three areas of common interest. Decisions are taken by **unanimity**, except on procedural matters, or when otherwise decided by the adoption of Joint Positions. Conventions can be adopted by a two-thirds majority. A Co-ordination Committee gives opinions to the Council and *can* contribute to the preparation of the Council's decisions on matters which are of common interest and which relate to the question of visas. Three Steering Committees have been

¹ K.3 TEU.

created: the Steering Group on Immigration and Asylum, the Steering Group on Police/Custom Co-operation and the Steering Group on Judicial Co-operation in Civil and Criminal Matters. The Commission is fully associated with the work of the Council, but Article **K.8** of the **TEU** has omitted Article 155 EC Treaty which gives the Commission the power to ensure that the provisions of the Treaty and the measures taken by the European Institutions are applied.

This legal framework results to the adoption of Joint Positions and Joint Actions and Conventions. However, there is no clear definition of what constitutes a Joint Position or Joint Action. Under international law, Joint Positions can best be compared to Recommendations or Declarations, and **are not binding** on the Member States. Taking into consideration the structure of the Third Pillar of the Union, it seems unlikely that Joint Actions, under this Title, are legally or politically binding upon Member States.

The **TEU** has introduced a new **form** of Treaty by arranging for some aspects of the same issues to be regulated under Community competence and some others to fall under Member State competence at intergovernmental level. The reason for choosing this form is quite clear. Member States were, on one hand, willing to give the Community new or extended competence in some areas but, on the other hand, they considered that it was essential to national sovereignty to retain powers over certain issues. Therefore, there are a number of points linked to the Community, although competence is not transferred and the Community process as such is generally excluded. In this respect, the most important Article is **K.9 TEU**, the “bridge provision”. This provides for the possibility of transferring competence in areas covered by title VI from the Member States to the Community if the Council, acting unanimously, so decides. Furthermore, in Article **K.6 TEU**, “the Presidency and the Commission **shall** regularly inform the European Parliament of discussions in the areas covered by this Title”. The European Parliament is to be consulted on the principal aspects of the activities covered by Title VI and its views must be “duly taken into consideration”. The European Parliament may **ask** questions to the Council or make recommendations and every year it is required to hold a debate on the progress made on implementation of the areas covered by Title VI. Furthermore, under Article **K.3.2(c) TEU**, the Member States **may** attribute jurisdiction to the European Court of Justice to interpret provisions drawn **up** by the Council.

13.1. The Treaty of Amsterdam and the creation of an area of Freedom, Security and Justice

As has already been mentioned above, one of the main objectives of the new Treaty of Amsterdam, **agreed** on 16 and 17 June 1997, is to transfer the **majority** of the areas related to Title VI (Justice and Home **Affairs**) to the First Pillar. Immigration and asylum matters, external border controls, measures to combat financial fraud against the EC, customs co-operation and judicial co-operation in civil matters have been moved out of the Third Pillar of the EU and intergovernmental cooperation between the Member States and have been “communitised”. Matters relating to police and judicial co-operation in criminal matters and co-operation between the Member States through Europol remain under the Third Pillar of the Treaty, at an

¹ “Communitise” means to transfer a matter which, in the **institutional** framework of the Union, is dealt with using the **intergovernmental** method (Second and Third Pillars) to the **Community** method (First Pillar). **Community** method is the expression used for the institutional operating mode set up in the First Pillar of the European Union. It proceeds from an integration logic with the due respect for the principle of subsidiarity. In this framework, the Commission has sole right of initiative, qualified majority voting in the Council is the rule, the European Parliament has an active role to play and there is uniform interpretation of Community law by the Court of Justice. Conversely, in the intergovernmental method of operation used in the Second and Third Pillars, the Commission’s right of initiative is **shared** with the Member States or confined to specific areas of activity, the Council acts unanimously, the European Parliament has a limited consultative role and the Court of Justice plays only a minor role.

intergovernmental level. The new Treaty also adds the prevention and combating of racism and xenophobia as one of the areas in which the Union will develop common actions. This initiative is planned in order to solve current problems created by existing conflicts regarding the division of powers between the First and the Third Pillars.

Specifically concerning the free movement of persons, a new Title IV has been created on "Visas, Asylum, Immigration and other Policies related to Free Movement of Persons" which gives a further boost to the issues relating to immigration, asylum and the crossing of external borders as these issues will be dealt with on entry into force of the new Treaty, under the First Pillar.

The Council, with the aim of achieving the establishment "[...] of an area of freedom, security and justice[...]" has to take measures which will ensure complete freedom of movement of persons crossing internal borders, without border controls and irrespective of their nationality. These measures will be taken in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration and also measures to prevent and combat crime¹. Measures on the crossing of Member States' external borders will consist of the adoption of standards and procedures to be followed by the Member States when carrying out checks on persons crossing these borders, the adoption of rules on visas for stays which do not exceed a period of **three** months and will include the drawing up of a list of third countries whose nationals must be in possession of visas when crossing the external borders as well as those whose nationals are exempt from that requirement, the procedures and conditions for issuing visas by Member States, the establishment of a uniform format for visas and rules on a uniform visa². Finally, measures are intended to be adopted setting out the conditions under which nationals of third countries shall have the freedom to travel within the territory of the Member States during a period of no more than three months³.

Furthermore, the Council will take measures on EU immigration policy concerning entry and residence of immigrants, rules relating to the issuing of residence permits, family reunions and the conditions under which third country nationals, legally resident in a Member State, may reside in another Member State.

The new Treaty introduces a transitional period of five years during which the Council is free of one taste of adopting the measures necessary for achieving an area of free movement. Taking into account the fact that the Treaty of Amsterdam will not enter into force before 1999, it is easy to conclude that the right of free movement is not going to be fully achieved before the year 2004. There are some exceptions though. Matters related to visas will be adopted by the Council as soon as the new Treaty comes into force. Moreover, measures on immigration policy and measures defining the rights of third country nationals legally resident within the Union, will not be subject to the five-year period and the Council has the discretion to adopt the relevant measures whenever it considers so appropriate.

¹ **Article 61 Treaty of Amsterdam. However, the last category of measures against criminality continue to form part of the Third Pillar, even after entry into force of the Amsterdam Treaty, and are therefore subject to intergovernmental cooperation between the Member States.**

² **Article 62 Treaty of Amsterdam.**

³ **A Protocol on the external relations of the Member States with regard to the crossing of external borders safeguards the Member States' competence to negotiate or conclude agreements with third countries, provided that Community and international law is respected.**

In any event, fail we to adopt any of the measures provided for during one-year period does not create any kind of judicial consequences for the Council on the basis of failure to act. The only obligation provided for in the new Title **is** the re-examination and possible amendment of the procedure under which measures will be adopted'.

During the transitional period of five years, unanimity in the Council will be the rule, while the Member States and the Commission will have a right of initiative. Meanwhile, the right of veto is maintained. After this period, the Council will have the discretion to take a decision, acting unanimously however, with a view to providing for all or parts of the areas covered by this new Title to be moved to qualified majority voting and co-decision with the European Parliament,

The Court of Justice has been granted full competence to rule in matters falling under the new Title (e.g. Articles **169, 170, 173, 175**). However, the role of the Court has been reduced regarding the procedure for preliminary rulings, which has the aim of securing a uniform interpretation in all Member States of the provisions of this Title and of Community acts. Article **68** of the Treaty of Amsterdam holds that only a national court of final instance ("[...] against whose decisions there is no judicial remedy under national law") may seek a ruling on the interpretation of a provision of the Treaty. Additionally, it can do so "[...]" if it considers that a decision on the question is necessary to enable it to give judgement [...]" and therefore there is no obligation on national courts to seek a preliminary ruling. The Council, the Commission and every Member State are granted the right to request the Court of Justice to give a ruling on a question of interpretation under this Title. However, the ruling in response to such a request will not apply to judgements which have become *res judicata*².

A second limitation to the powers of the Court contained in para. 2 of Article 68. In any event, the Court will have no jurisdiction to rule on any national measures or decisions taken pursuant to the abolition of controls on persons crossing internal borders of the Member States relating to the maintenance of law and order and the safeguarding of internal security.

The role of the European Parliament within the framework of the new Title is intended to be limited during the five-year transitional period and it will only have the right of being consulted. Additionally, this consultative function of the Parliament is going to be maintained, even after expiry of the five-year period, for all matters falling into the sensitive field of immigration and asylum.

Unfortunately, the new Treaty does not lack problems. Denmark, **the UK** and Ireland are not bound by **certain** provisions of the new Treaty relating to the abolition of border controls. The UK and Ireland maintain the right of **full** border controls at their internal borders, while they may continue to make arrangements between themselves relating to the movement of persons between their territories ("Common Travel Area" between the UK and **Ireland**)³. Consequently, the other Member States are entitled to exercise at their frontiers or at any point of entry into their territory, such controls on persons seeking to enter their territory from the UK or from Ireland.

¹ Franklin Dehousse, "Les résultats de la Conférence intergouvernementale", Centre de recherche et d'informations socio-politiques, *Courrier hebdomadaire*, 1997, No 1565-1566, p. 19.

² Article **68**, para. 3 of the **Treaty** of Amsterdam.

³ However, in a Declaration to the Final Act by Ireland, that **country** declared its willingness to take part in the adoption of **all** measures compatible with the maintenance of its Common Travel Area with the United Kingdom.

Denmark will not take part in measures pursuant to the new Title except those determining the non-member countries whose nationals must be in possession of a visa when crossing the Member States' external borders, or measures relating to a uniform format for visas. It has, however, reserved the right to apply these provisions in the future, but pursuant to national legislation and not pursuant to a community obligation. Therefore, Denmark's decision to adhere to any provision under the new Title creates an obligation under international law and not Community law. **As** a consequence, the provisions of Community law concerning judicial control by the Court of Justice will not apply in the case of Denmark. The latter will apply the provisions of the new Title pursuant to national legislation and not as an obligation under Community law.

At the end of 1997, the Council adopted a Resolution on the priorities for cooperation in the field of the Third Pillar starting from 1 January 1998 until entry into force of the Treaty of Amsterdam'. Regarding cooperation between Member States in the field of free movement of persons, immigration and crossing of the Union's external borders, the Council intends to examine the legal status of third country nationals residing legally in the territory of the Member States, to strengthen measures to combat illegal immigration, illegal immigration networks and illegal employment, to improve cooperation regarding expulsion of illegal immigrants and to work on the proposal for a convention on the rules for admission of third country nationals to the Member States of the European Union, **as well as** the draft convention on the crossing of external frontiers and its implementing measures. Furthermore, it intends to examine the problem of family reunification, to combat marriages of convenience, to increase operational cooperation between authorities carrying out checks at external frontiers and start discussions on harmonising visa policy. In preparation for entry into force of the Treaty of Amsterdam, the Council's discussion will also pay particular attention to incorporating the Schengen *acquis* into the framework of the European Union.

13.2. Opinion of the European Parliament

The European Parliament, in its Resolution of 19 November 1997, generally welcomed the drafting of the new Treaty, considering it to be a further step towards the construction of a European political Union². However, it has also expressed its strong criticisms on a number of issues, either **because** they remain unresolved or because they have been unsatisfactorily regulated. The EP considers that the Treaty of Amsterdam has failed to implement one of the primary principles of the Community by once more postponing the free movement of persons for at least five years and by introducing compensatory measures. It regrets the fact that the co-decision procedure (when decisions are taken by the Council and Parliament) is only applicable for issues concerning the Union's visa policy and that the Council, even five **years** after entry into force of the new Treaty, will have the right of acting unanimously for most of the issues falling into the new Title concerning the right of free movement, asylum and immigration. Regarding the role of the Court of Justice and its competences, the EP criticises the fact that common positions and matters relating to the maintenance of law and order and of internal security are excluded from the powers of the Court in so far as preliminary rulings are concerned. Finally, regarding the incorporation of the Schengen *acquis* into the Treaty, the EP expressed its concern on the

¹ Council Resolution of 18 December 1997 laying down the priorities for cooperation in the field of justice and home affairs for the period from 1 January 1998 to the date of entry into force of the Treaty of Amsterdam, OJ C 011, 15.1.1998, pp.1-4.

² EP Resolution on the Treaty of Amsterdam, Minutes of 19.11.1997, p.64; See also, opinion of the Committee on Civil Liberties and Internal Affairs, for the Committee on Institutional Affairs, on the Amsterdam Treaty, 21.10.1997, EP 224.190/fin, Claudia Roth, MEP.

inadequate level of democratic decision-making, judicial and parliamentary control and on the opts-out granted to the United Kingdom, Ireland and Denmark. It has therefore called on the Council to decide promptly on the legal basis for each of the legislative norms which constitute the Schengen *acquis*, so as to ensure the competences of the Parliament, the Commission and the **Court** in this area.

Graphics

(See following pages)

Tableau 4
STRUCTURE DE TRAVAIL ACTUELLE

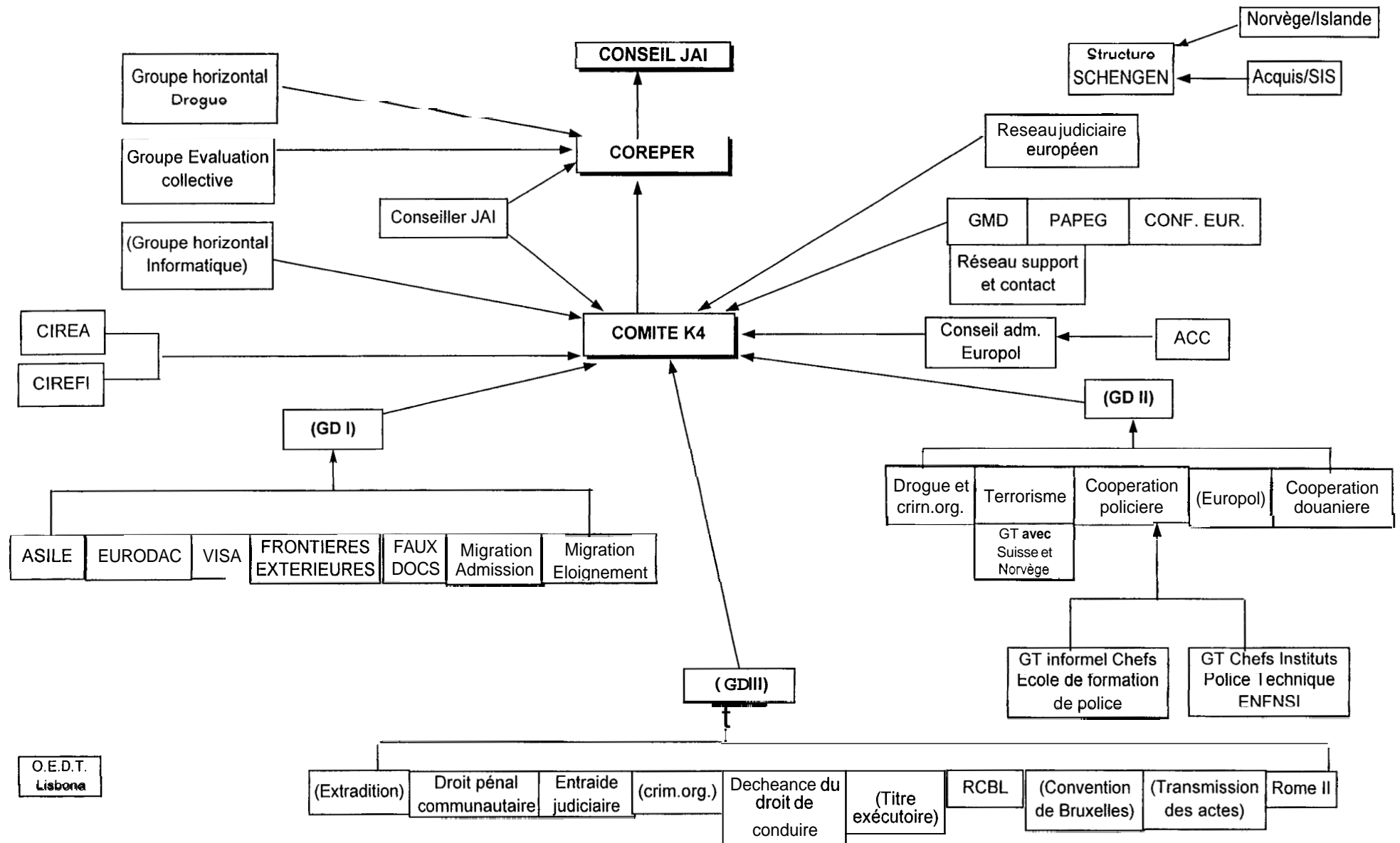
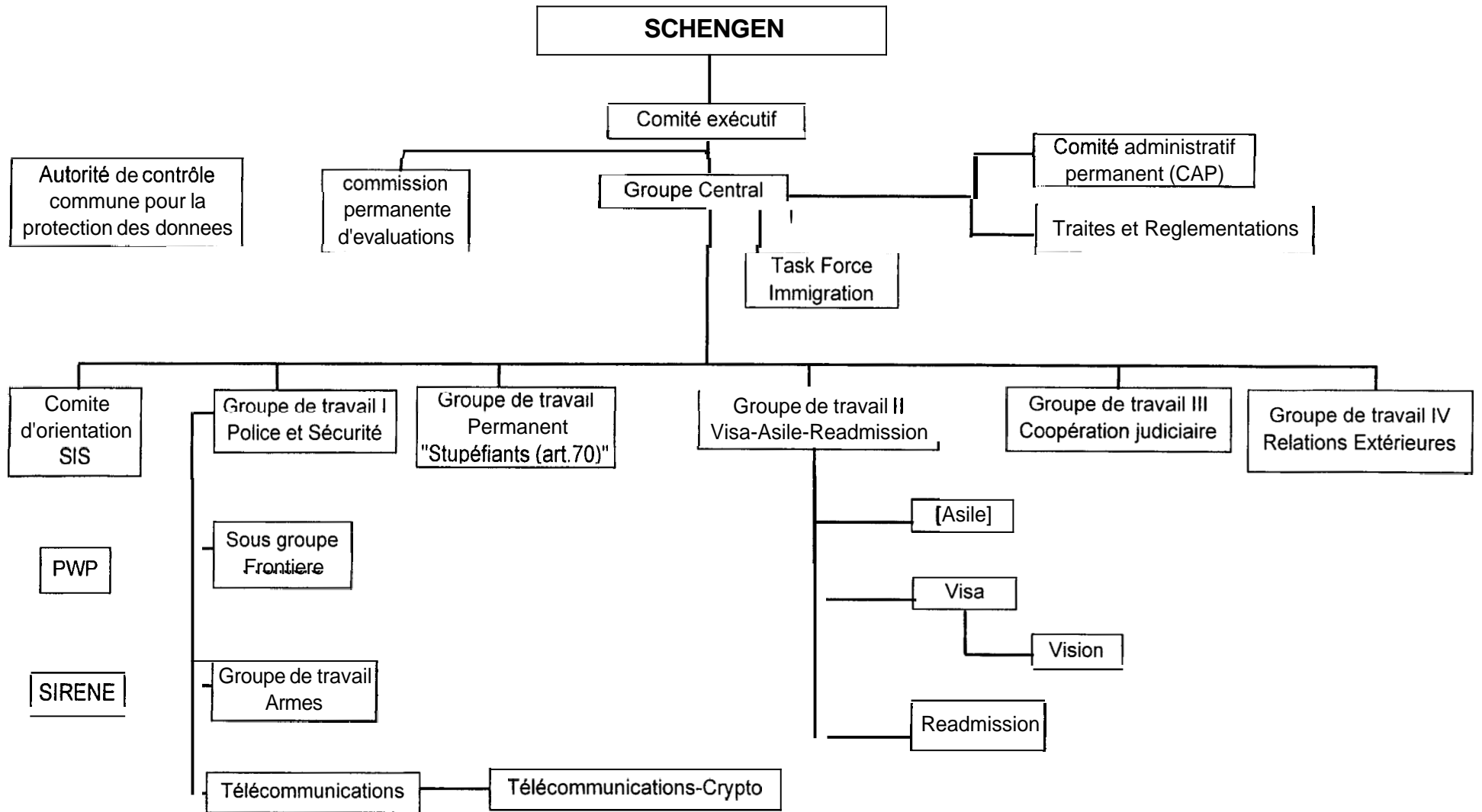


Tableau 5



14. Third country nationals

14.1. The general position

The position of third country nationals, regarding their rights of entry and residence within the territory of the EU, differs from that of EU citizens. Nationals of non-EU Member States are subjected, on crossing an internal Community frontier, to controls by that Member State and their rights of entry and residence, even for a short period, in the territory of the Member State is currently governed by the Member States' national laws, which are no yet harmonised or coordinated'.

Under the **original** EEC Treaty, the Commission had no power to legislate rules for entry into the territory of the Community of third country nationals². Such competence for the Commission does not derive from Articles 48 et seq. Entry of nationals from outside the Community and the regulation of immigration policy was considered to be the exclusive competence of the Member States. A non-Community national, lawfully within the territory of one Member State, can travel in the internal market situated in another Member State only under the conditions and in accordance with the procedures laid down by that Member State. In particular, nationals many third countries are required to obtain, in advance, a visa from the authorities in each Member State they intend to visit or through which they intend to pass.

However, the boundary between Community and Member State competence, has not been fully clarified. Some aspects of third country nationals' rights are covered by Community law, under the First Pillar, at least in so far as they are related to the Community employment market and working conditions³.

In addition, the European Community, pursuant to Articles 228 and **238** of the Treaty, has concluded a number of association and cooperation agreements with third countries which contain provisions on the treatment of third country nationals working within the Community, in particular those from ACP countries, Turkey, the Maghreb countries and, more recently, the countries of Central and Eastern Europe. These agreements form part of Community law and may have direct effect according to the interpretation given by the Court of Justice. For the European Commission these agreements form an important step towards the equal treatment of non-EC and EC-workers.

¹ Distinction should be made between: a) crossing of **internal frontiers**, which is intended to be without any frontier controls at all; the relevant draft legislation provides for a limited right of free circulation. However, it is not yet broadly accepted that identity controls should be abolished for the citizens of third countries; and b) crossing of **external frontiers** which is governed by the Member States' own immigration laws, **subject to derived rights** for **family** members and rights under the EEA and also subject to the coordination and limited mutual recognition established under the External Frontiers Convention on its entry into force.

² The Member States reluctance to expand EC competence over third country nations is seen **also** in the Single European Act, where the Member States attached a Declaration specifying that they retained powers over immigration matters. Further, more the Treaty on European Union holds that action on immigration from **outside** the EU and the treatment of third country nationals are within the power of the Member States, without prejudice to EC powers.

³ TEU Agreement on **Social** Policy, Article 2(3), which confirms that working conditions of third country nationals are within EU (excluding UK) competence.

In its 1985 guidelines for a Community Policy on Migration, it is mentioned: "[...] an initial step in the gradual extension of Community treatment to workers from other countries will be achieved by the implementation of co-operation and association agreements concluded between the Community and certain countries".

From 1975 onwards the **first** initiatives were taken to establish cooperation between the Member States in the field of immigration, asylum and in the fight against terrorism. Within these initiatives, the Trevi Group was established, with the participation of the Ministers of Home Affairs, with the aim of combating terrorism in the EEC and coordinating police cooperation between Member States.

In the Commission's White Paper to the European Council of 14 June 1985 on completing the internal market', the Commission stated that **all controls, formalities, procedures, checks, examinations, inspections, etc. at internal frontiers should be abolished if the Community is to become a genuine internal market operating under the same conditions as a national market.**

The programme gave notice of a series of proposals for Directives on the approximation of legislation on **arms** drugs, the **status** of third country nationals, the abolition of controls at internal frontiers, the right of asylum, the status of refugees, the coordination of national visa and extradition policies.

In July 1985, the Council of Ministers adopted a Resolution on the Commission's Guidelines for a Community policy on migration. The Council recognised: "[...] that it is desirable to promote co-operation and consultation between Member States and the Commission as regards migration policy, including vis-a-vis third countries, and noted the Commission's intention of drawing up appropriate procedure to this end"².

A later report drew up a set of basic principles on the integration of migrants, which could take a similar form to the Community Charter and would include principles concerned with freedom of expression, freedom to come and go, non-discrimination on racial or religious grounds, equal rights **for** men and women and the rights of children³.

In October 1986 the Ministers **confirmed** the commitment of the Member States to the promotion of free movement of persons according to the Single European Act. They recognised that the abolition of internal frontiers must remain compatible with efforts to combat terrorism, drug trafficking, other crime and illegal immigration. At this meeting, the Ministers created the Ad hoc Group on Immigration with the aim of producing a working programme, including measures to be taken and dates for their completion, and of co-ordinating its work with all those working for the completion of the internal market by 1992. At the same time, the Ministers responsible for immigration decided to meet at least twice a year towards the end of each Community Presidency. These **meetings continued** until June 1993, after which new arrangements were introduced by the Treaty on European Union.

¹ COM (85)03 10.

² *QJ C* 186 of 26.7.85.

³ **Policies on immigration and the social integration of migrants in the European Community, Brussels, 1990 SEC(90) 1813 final.** See also, **The Developing Immigration and Asylum Policies of the European Union, adopted conventions, resolutions, recommendations, decisions and conclusions, Guild Elspeth, Kluwer Law International, The Netherlands, 1996, p.14.**

During this period, numerous working groups were created and two parallel processes were initiated almost simultaneously: **the Schengen Group and Intergovernmental Co-operation between the Member States.**

The European Council meeting in Rhodes in December 1988 set up the Group of Co-ordinators to discuss questions relating to the free movement of persons and, in particular, security issues and to co-ordinate the work of several negotiating groups (the Trevi Group, the Ad hoc Immigration Group, the Mutual Assistance Group, the Council, European Political Cooperation, the Pompidou Group).

All these initiatives, taken prior to the entry into force of the **TEU**, on matters concerning immigration, asylum, external and internal border controls, illegal immigration, drug trafficking, combating crime and terrorism, were intergovernmental, and outside the Community framework'.

However, this in itself was ironic, as the cooperation was at least partly in response to a Community imperative that of the creation of the Internal Market, regulated by Community law, Article 8a of the EEC Treaty (Article 7a EC Treaty). The pure intergovernmental approach of this period excluded the Community institutions. The European Parliament and the Commission were not heard, and there was no control by the European Court of Justice.

The so-called Palma document, approved by the Madrid European Council in June **1989** and, on which the discussions were based, is one of the principle instruments of the intergovernmental cooperation,. It contained a **list** of flanking measures considered necessary to realise the objective of the free movement of persons within the Community. **As** such, it distinguished between essential and desirable measures concerning action at external borders, internal frontiers and, inside the territory of the Community, combating drug trafficking and terrorism, admission to Community territory, granting of asylum and refbgees status, visa policies and judicial co-operation in criminal and civil matters. The document also identified the competent fora and working groups for dealing with these matters, demonstrating its faith in intergovernmental working groups and organisations to implement the various measures.

In 1991 the Commission issued a Communication on Immigration² in which it summarised four major problems confronting Community Member States. Specifically these are: **1)** abuse of the **asylum** procedure for economic purposes; **2)** management of the effects stemming from migration pressure; **3)** control of migration flows and; **4)** integration of legal immigrants. In order to counter migratory pressures, the communication recommended the reinforcement of the association and cooperation agreements with countries of emigration. The Commission also expressed the opinion that the internal market itself implied elimination of the condition of nationality for the exercise of certain rights. Finally, the Communication recognised the importance of integrating legally resident third-country nationals into the whole of society, and suggested that such persons be given access to employment in other Member States and be entitled to participate in Community

¹ **The Coordinators Group was set up to discuss questions relating to the free movement of persons and, in particular, security issues and coordinated the work of several negotiating groups. The Trevi Group was also set up in 1975 to coordinate measures to combat terrorism, security and policing. One of its projects was the creation of a European Information System, modelled on the Schengen Information System (SIS). The ad-hoc Group on Immigration dealt with the subject of asylum, controls at external borders and visa matters, and drafted the Dublin Asylum Convention of 15 June 1990 determining the state responsible for examining applications for asylum lodged in one of the Member States of the European Communities.**

² **Commission communication to the Council and the European Parliament on Immigration (SEC (91)1855 final).**

exchange programmes for students, young workers, teachers and others. Since the signature of the TEU in 1991¹, the Member States have been attempting to approximate the rules on immigration of foreign nationals. In 1993 and 1994, the Home Affairs ministers adopted the following in the area of admission policy: 1) the Resolution on family reunification adopted by the Immigration Ministers in Copenhagen on 1 June 1993²; 2) Resolution of 20 June 1994 on the admission of third country nationals to the territory of the Member States for employment³; 3) Resolution of 30 November 1994 on limitations on admission for the purpose of pursuing activities as self-employed persons⁴; 4) Resolution of 30 November 1994 on admission for study purposes⁵; 5) a Resolution on the status of third-country nationals residing on a long-term basis in the territory of the Member States adopted by the Council in 1996⁶; and 6) a "Joint Action" on visas for school pupils⁷.

These texts are rather political than legal and have no legally binding effect. This applies both to the Resolution adopted before the Maastricht Treaty entered into force, and to those adopted after the Treaty on European Union took effect. All the Resolutions in question include many exceptions and frequent references to specific national factors. Their interpretation and the procedures for "transposing" them into national legislation, are left entirely to the Member States' discretion. The result tends to be an image of the differences which already exist from one Member State to another, rather than a first step in developing a common approach.

The Commission's 1994 Communication on Immigration and Asylum Policies' and the White Paper on social policy envisaged several new measures to benefit permanently resident third country nationals. These included proposals for action on migration pressure, controlling migration flows, and strengthening integration policies to benefit legal migrants. The introduction of common visa regulations and border control measures for third country nationals are considered as essential elements of action to control immigration and to promote the integration of legal immigrants. It was also suggested that third country nationals be enabled to move around freely within the Union on the basis of a residence permit which would replace any existing visa requirement. Moreover, proposals have been made regarding the health-care cover for third

¹ Prior to the EU Treaty and based on Article 118 EC Treaty, the Commission introduced, in 1985, a prior Communication and Consultation procedure on Migration Policies in relation to non-Member Countries (Decision of 8 July 1985, OJ L 217/25). After its annulment by the Court of Justice because it provided for cultural integration of third country citizens for which no Community competence was found to exist, the Commission enacted the Decision again, without the objectionable elements (Decision of 8 July 1988, 88/384/EEC, OJ L 183/35). The decision implicitly acknowledges that third country nationals live under a special regime which is not that of the chapter on freedom of movement.

² Resolution on the harmonisation of national policies on family reunification, SN2828/1/93 WGI 1497 REV1.

³ OJ C 274, 19.9.1996, p.3.

⁴ OJ C 274, 19.9.1996, p.7.

⁵ OJ C 274, 19.9.1996, p. 10.

⁶ OJ C 80, 18.3.1996, p.2.

⁷ OJ L 327/1 of 19.12.1994.

⁸ Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies Brussels, COM (94) 23 final, 23 February 1994.

country nationals when travelling in the EU, the right to go abroad to obtain necessary medical treatment in another Member State and job opportunities in other Member States, where no EC nationals or local third country nationals are available'.

In the Resolution of 18 October 1996 laying down priorities until the end of June 1998², the Council called for concentration on the legal status of third country nationals legally resident in a Member State, family reunification and issues related to the crossing of the external frontiers of the Union (visas, Convention on the European Information System, Convention on crossing of external frontiers).

In 1996, an intergovernmental conference was convened in order to review the Treaty on European Union and examine those provisions of the Treaty for which revision is envisaged, bearing in mind the Union's objectives³. After a series of negotiations, the final text of the new Treaty (Treaty of Amsterdam) was signed on 2 October 1997. The new Title IV thus created on Free movement of persons, asylum and immigration gave a boost to the issues relating to immigration, free movement for third country nationals, asylum and the crossing of external borders as these subjects were now to be dealt with under the First Pillar⁴.

The special **case** of refbgees has also been under consideration and the question arose of whether refbgees with recognised status should be given rights under the Treaty'.

¹ Communication on Immigration and Asylum Policies (COM (94) 23, 23 February 1994), White Paper on European Social Policy (COM (94) 333, 27 July 1994). The Commission proposed that full **free** movement of **third country nationals** should be granted later, along with the extension of movement rights to the selfemployed. The Commission also suggested that Member States extend rights of permanent residence to third country residents and their spouses and children, and supported full **equal** treatment in access to employment and **social** benefits. It intended to monitor agreements with third countries to check their implementation.

² OJ C319, 26/10/1996, p.1.

³ Article N **TEU**. The Corfu European Council (June 1994) established a Reflexion Group to prepare for this conference. The Group consists of representatives of the Ministers of Foreign Affairs and the President of the European Commission. Two representatives of the European Parliament participate in the Group's work. These institutions were invited to prepare reports on the functioning of the Treaty on European **Union before** the work **of** the Reflection Group began (Draft report of the Council on the functioning of the Treaty on European Union, Brussels, 1995-5082/95; European Commission, Intergovernmental Conference 19%; Commission report for the Reflection Group (Luxembourg, 1995)). Both reports come to the conclusion that extremely limited **use has** been made **of** the new instruments provided for in article K.3 of the **TEU**. The reports offer as possible explanation the continuing differences of opinion on the **natural** and legal effects of such instruments. The Commission's report **goes** further in discussion of the slow process entailed in the adoption and implementation of conventions, particularly **as** there are no established, binding deadlines. It also points to the fact that most decisions must be taken unanimously, which **has** proved **to be** a major source of paralysis.

⁴ See further the relevant chapter on the Treaty of Amsterdam and the new Title.

⁵ Declaration of 25 March 1964, OJ L 1225 of 22.5.64. **A** similar declaration was issued in 1985 concerning activities covered by freedom of establishment or freedom to provide services, OJ 1985, C 210/2 of 21.8.85. These declarations were not based on the EEC Treaty and do not constitute acts of secondary legislation. **They** were adopted **as** purely political statements in the exercise **of** national powers and do not confer any enforcement **rights**.

Refugees legally residing in a Member State are also excluded from free movement, but are to be granted special favour when they take up employment, establish themselves as self-employed persons or provide services.

14.2. Residence rights and access to employment for third country nationals

Although Article 48 EC refers to free movement for workers and not free movement of EU citizens, the Court has explicitly confirmed the view that this Article only covers EU and EEA citizens'. Nationals from non-Member States do not possess Community rights of residence or access to the labour market except in cases where one is the spouse of an EC national. Different national laws regulate their admission and residence within each Member State. At present no Member State is pursuing an active immigration policy. All States have, on the contrary, curtailed the possibility of permanent legal immigration for economic, social or political reasons. Admission for temporary employment may therefore only be considered exceptional circumstances². Consequently, third country nationals, legally residing in one Member State, are prohibited from taking up **gainful** activity and nationals of a large number of third countries are required to obtain a visa in advance from the authorities in each Member State they intend to visit or through which they intend to travel. Rights of initial access to the labour market and rights of movement and permanent residence are still a matter for individual Member States, subject to Third Pillar cooperation (Article K, EU Treaty)³. This means that, in general, they have to wait for an act of the Council granting them relevant rights.

The significant differences existing in the immigration policies of Member States reflect, to a great extent, their different socio-economic developments and needs. We should also take into consideration both the historical animosities and the traditional ties which lie behind Member State relations. Former colonial power, such as Portugal, Spain, France, the United Kingdom and the Netherlands, had (or *still* have) special obligations to citizens of their former colonies in terms of admission, residence and acquisition of nationality⁴. Additionally, countries such as Greece, Finland and Germany grant special residence rights to so-called ethnic Greeks, Finns and Germans. These persons are living in and have acquired the citizenship of another country, but they maintain **certain** attachments to their countries of origin. Many of them wish and are entitled to return to that country in the future. Other Member States, however, do not wish to open their doors so easily to nationals of those foreign countries, probably having their own preferences and priorities. Therefore, it seems difficult, if not unlikely, that common rules on the admission of aliens and exclusive Community rights of entry and sejour are going to be easily accepted and a delicate balance has to be kept.

¹ Case C-355/93 *Eroglu*, [1994] ECR I-5113.

² See also Council Resolution of 20 June 1994 on limitation on admission of third country nationals to the territory of the Member States for employment, *QJ C* 274, 19.09.1996, pp.3-6.

³ Existing secondary legislation under the EC Treaty, such as Dir. 68/360/EEC and Dir. 73/148/EEC, extends only to Union citizens and even the proposed new legislation (Monti Proposals) is not intended to affect the position as far as long-term residence and economic activity are concerned.

⁴ France, Portugal and Spain have always entertained particularly close relationships with the three Maghreb countries. Portugal plays a pivotal role in the Lusitanian world, and Spain is still considered as the *madre patria* by the Spanish-speaking countries of Latin America.

There are, however, certain cases where Community competence regarding third country nationals **arises**. In respect of conditions of residence of third country nationals on the territory of Member States, Community competence arises directly by virtue of the Social Policy protocol.

The Court of Justice has held that in order to give effect to the right to work or the renewal of a work permit, a right of residence must also be granted. These two aspects of a worker's personal situation are closely linked, the granting of authorisation to work necessarily implies right of residence¹.

There may also be a limited Community competence to regulate the legal status of third country nationals **as** part of the Community's social policy (Article 117 EC Treaty et seq.). In a decision of the Court of Justice², concerning a Commission decision to set up a prior communication and cooperation procedure on migration policies in relation to third country nationals, the exclusive responsibility of Member States to take measures with regard to migrant workers from third countries was recognised, based on considerations of public policy, public security and public health. However, the Court also concluded that immigration policy could fall within the scope of application of Article 118 EEC, to the extent that it concerned the impact of workers from non-Member States on the employment market, on working conditions in the community, social security, labour law, and basic and advanced vocational training.

Furthermore, specific provisions have been introduced in certain cases with regard to family members of Union citizens, employees of companies established in the EC³ and cases where action has been taken under a Community Agreement⁴.

At the national level, EU Member States are free to introduce their own national legislation on naturalisation of aliens. A person who has acquired the nationality of an EU Member State is a full EU citizen. The other Member States must accept this change of status and they are not allowed to engage in any discriminatory practices with regard to individuals who have acquired the nationality of one of the other States not by birth, but by virtue of an administrative decree.

A review of the EU policies over the recent years in the field of free circulation of persons leads to the impression that the EU **has** tried to increase freedom of movement for EU citizens, so it has resulted in a way in decreasing the free movement of third country nationals within the Union. Although the used to require a visa in order to leave a country have been suspended in most cases,

¹ Case 234191 *Kazim Kus v Landeshauptstadt Wiesbaden*, [1992] ECR I-6781.

² Joined cases 2811283 and 285185 *Germany, France, Netherlands, Denmark and UK v. Commission*, [1987] ECR-3203.

³ Their rights stem from the basic freedom to provide services. Within this framework, workers who are nationals of a non-Member country and are employed by an EC company have the right to enter and **reside** in a Member State other *than* the one in which they have obtained the right to work and reside, if **they** have to work there for that undertaking **as part** of the provision **of** services by this undertaking. The **rights** of third country **nationals** in *respect* of entry, residence and employment were specified by the **Court** of Justice **in** the *Vander Elst* judgement. The fact that immigration policy is primarily the responsibility of Member States should not limit the Community's power to determine the position of such nationals travelling from one Member State to another. See also below, "Employees of companies established in the EC".

⁴ Agreements with third countries are "acts of the Community" which may create directly effective rights **for** individuals which national **courts** have to enforce. See below, "Community Agreements with third countries".

it does not happen in the same way with the entry visas. Therefore, we have given the possibility to everyone to quit their country or any other country but without accompanying this right with the right of entry into the territory of another State. In this context, there is the right to emigrate but not the right to immigrate. Furthermore, we have to bear in mind that visa requirements have not been abolished for every third country national and there is a kind of discrimination and political preference in the policy of imposing a visa requirement for some nationals and not for others.

14.3. Resolution on limitations on admission of third country nationals to the Member States for employment¹

This Resolution aims to regulate temporary migration for employment purposes. Admission for employment will be the exception to the rule and, generally, such admission should only be permitted where a vacancy cannot be filled by national and Community manpower or by non-Community manpower lawfully resident on a permanent basis in that Member State.

This Resolution was adopted outside the ambit of the European Communities Treaties. The Resolution **does not regulate the issue of third country nationals lawfully resident on a permanent basis in the territory of a Member State**, but who have no right of admission and residence in another Member State. **Family reunion** for workers regulated by the Resolution **is also outside its ambit**. Furthermore, citizens of the Union, the European Economic Area and their family members, third country nationals admitted for family reunion purposes, third country nationals whose access to employment arises from Community Agreements with third countries, youth exchange and mobility schemes, *au pair*, the self-employed, asylum applicants, refugees, displaced persons, persons admitted on humanitarian grounds are all excluded from the scope of the Resolution.

Exceptionally, the admission of third country nationals is permitted in cases concerning a named worker of special requirements, seasonal workers, trainees, frontier workers and if key personnel are being transferred by their employer. Prior authorisation is needed and initial authorisation will be normally restricted to employment in a specific job with a specific employer. Such authorisation may be in the form of a work permit issued either to the employer or to the employee. Third country nationals must also be in possession of any necessary visa or residence permit. Seasonal workers are to be admitted for only six months out of every twelve and they are not permitted to change sector. Trainees may be granted one year's permission which is extendible and all other workers are to receive permits not exceeding four years' duration in the first instance. Students, visitors, trainees, service providers and their employees are in principle not to be allowed to stay for employment.

¹ *Council Resolution of 20 June 1994 on limitation on admission of third country nationals to the territory of the member States for employment*, OJ C 274, 19.09.1996, pp.3-6.

14.4. Resolution relating to the limitations on the admission of third country nationals to the territory of the Member States for the purpose of pursuing activities as self-employed persons'

Third **country** nationals should not be admitted under an independent economic activity category if the activity is of no economic benefit to the State or its regions. Persons who have free movement rights under Community law and the European Economic Area agreement and their family members, third country national family members of nationals of a Member State and such family members admitted for family reunion with third country nationals resident in the Member States, third country nationals with rights to employment stemming from bilateral and multinational agreement, third country nationals seeking employment and third country national students are all excluded from the Resolution's scope.

Self-employment is defined in reference to Article 58 EC Treaty and is intended to cover activities **carried** out in a personal capacity (it does not affect firms) or as principal of a business. Member States may also admit service providers. Any third country national already in a Member State who wishes to remain for **self-employment** must leave the territory and apply to come back in the new capacity. Family reunion for the self-employed is limited to spouse and unmarried children up to **16** or **18** at the Member State's option.

14.4.1. The opinion of the European Parliament

The European Parliament once again urged the Commission to be more active in regulating the rights of third country nationals in the Union and to propose binding measures. Furthermore, it has expressed its regret for the Council's decision to have recourse to a resolution to deal with questions relating to the entry into the European Union of self-employed third country nationals and not to have **based** its Resolution on an appropriate article of the Treaty on European Union. Finally, it **called** for the abolition of the provisions which hamper the integration of immigrants by preventing them from becoming self-employed once they have started work with an employer.

14.5. Resolution on the admission of third country nationals to the territory of the Member States of the European Union for study purposes²

The Resolution is not binding on the Member States nor is it intended to give rise to rights for individuals. The Resolution applies to higher education studies but not to school pupils, apprentices and language students. Nationals of Member States and the EEA States exercising Treaty rights, the **family** members of persons within these States, third country nationals admitted to a Member State for family reunion with either a national of the State or a third country national are excluded from its scope. Students must fulfil all the requirements applicable to foreigners as regards entry and stay, they must have a firm offer of admission to a State or State-recognised higher education institution or a comparable institution and the offer must concur with the requirements made by the competent immigration authorities, financial means to support studies and maintenance and, if required by national legislation, health insurance. The duration of residence is limited to the length of the **course**. At the end of the course of study, the third country national will, in principle, have to leave the territory of the Member State.

¹ **Council Resolution of 30 November 1994 relating to the limitations on the admission of third country nationals to the territory of the Member States for the purpose of pursuing activities as self-employed persons, OJ C 274, 19.09.1996, pp.7-9.**

² **Council Resolution of 30 November 1994 on the admission of third country nationals to the territory of the Member States for study purposes, OJ C 274, 19.09.1996, pp.10-12.**

Member States should not permit entry as students to persons who aim to take up employment or self-employment. In principle, students must not work but Member States may permit short-term or subsidiary employment. The income from such jobs must not be vital to the student's subsistence. National law applies both to the admission of family members and whether or not they are permitted to take up employment.

14.5.1. *The opinion of the European Parliament*

Parliament considers that some other categories of persons should also be excluded from the scope of the Resolution. These are: third country nationals admitted to Member States to pursue a self-employed occupation, refugees within the meaning of the UN Convention, persons enjoying refugee status under the terms of national law, third country nationals legally resident in a Member State who enjoy rights under a bilateral agreement, third country nationals enjoying rights of admission by virtue of Association Agreements, third country nationals and members of their families who go to a Member State to carry out an occupation as an employee and who are subject to the principles set out in the Resolution on limitations of admission of third country nationals to the Member States for employment, adopted in June 1994.

Moreover, it stressed the importance of establishing agreements with third countries on the mutual recognition of educational qualifications and the strengthening of university systems in developing countries through cooperation agreements.

14.6. Resolution on the **status of third country nationals residing on a long-term basis in the territory of the Member States'**

Third country nationals will be recognised as long-term residents if they provide proof that they have resided legally and without interruption in the territory of the Member State concerned for a period specified in the legislation of that Member State and, in any event, after 10 years' legal residence. The Member States will grant residence authorisation to third country nationals recognised as being long-term residents. A long-term resident and members of his/her family must have access to the entire territory of the Member State and they must enjoy the same treatment as nationals of that Member State with regard to working conditions, membership of trade unions, public policy in the housing **sector**, social security, emergency health care, compulsory schooling and the possibility of being granted non-contributory benefits. In the event that the long-term resident has been absent from the territory of the Member State for a period of more than six months, it is possible for the residence authorisation to be cancelled. Finally, long-term residents in the territory of a Member State should be able to obtain authorisation to engage in gainful activity, in accordance with the provisions of national legislation.

14.7. Joint Action concerning travel facilities for school pupils from third countries resident in a Member State²

The Joint Action is intended to abolish the need for a separate visa for third country national school pupils resident in one Member State and travelling as part of a school excursion and accompanied by a teacher for a short stay or transit through another Member State.

¹ **council Resolution of 4 March 1990 on the status of third country nationals residing on a long-term basis in the territory of the Member States, OJ C 080, 18.3.1996. pp.2-4.**

² **council Decision 94/795/JHA of 30 November 1994 on a joint action adopted by the Council on the basis of Article K.3.2.b of the Treaty on European Union concerning travel facilities for school pupils from third countries resident in a Member State, OJ L 327, 19.12.1994, pp.1-3.**

The Joint Action applies only in respect of students at general education schools where the state of residence confirms the legal residence of the student. There is no age limit for the students. Re-entry must be confirmed by the authorities of the state where the student resides.

A Member State will not require a visa of a school pupil who is not a national of a Member State but who is legally resident in another Member State and who seeks to enter its territory either for a short stay or transit if the school pupil's travelling as a member of a group of school pupils from a general education school, the group is accompanied by a teacher from the school in question, the school **pupil** presents a travel document valid for crossing the border in question.

The aim of the initiative was in response to an urgent and practical need. School children, having the nationality of a third country, were often stopped at an internal border when their teacher decided to take the whole class on a short trip to a neighbouring Member State. The growing number of third country nationals requiring entry visas for **an** EU Member State led the immigration authorities of many Member States to adopt an over-cautious attitude and to even refuse entry to school children not in possession of a necessary visa. This act is the first occasion on which the Member States have used their power under Title VI of the Treaty on European Union to **agree** a Joint Action. The European Commission has, however, argued that this matter falls within the competence of the Community (according to Article 100c, EC Treaty)' and **affirms**, **once** again, time its competence in matters concerning the freedom of movement of third country nationals residing in the Community². As this point relates to exempting third country nationals travelling inside the Community **from** visa requirements, the Commission is of the view that First Pillar legislative instruments should have been used here. The Council, on the other **hand**, takes the view that the matter is part of Member States' policy regarding nationals of third countries.

¹ *In an annex to the minutes of the meeting during which this joint action was adopted, the Commission declared that it fully supports the policy objective of the Decision regarding travel facilities for school children who are third country nationals residing in a Member State. However, given that the Decision affects freedom of movement within the Community of third country nationals lawfully residing in the Community, the Commission reserves its position on the legal basis selected by the Council. It hereby declares that the adoption of the Decision in no way prejudices the question of Community powers in this area as the Commission reserves the right to present proposals for Community legislation relating in particular to third country nationals for short periods. Commission Statement 81(94)1186.*

² *The Declaration also conforms to the Commission's Communication to the Council and to Parliament on the abolition of internal border checks, adopted on 8 May 1992, in which it defines Article 8a of the EEC Treaty (Article 7a of the EC Treaty) concerning the free movement of persons as referring to all persons, whether or not they are economically active and irrespective their nationality ; there is no objective legal reason to differentiate between nationals of Member States and nationals of non-member countries.*

14.8. Joint Action on a uniform format for residence permits'

The Joint Action harmonises the format of residence permits issued by the Member States of the Union to third country nationals and applies to residence permits issued to third country nationals other than family members of EU citizens exercising their right to free movement and nationals of EEA Member States and their family members.

Residence permit means any authorisation issued by the authorities of a Member State allowing a third country national to remain on its territory legally.

The term does not include visas, permits issued for a stay whose duration is determined by national law but which may not exceed six months and permits issued pending examination of an application for a residence permit or for asylum.

The document will be produced either as a sticker or as a stand-alone document. It will contain all necessary information and will meet high technical standards. Special technical specifications which will render the residence permit difficult to counterfeit or falsify will also be laid down by the Council. These specifications will be secret, unpublished and will be available only to bodies designated by the Member States as being responsible for printing and to persons duly authorised by a Member State². Furthermore, each Member State will inform the Council and the Commission of the competent authority or authorities for issuing residence permits.

14.9. Recommendation regarding practices followed by Member States on expulsion³

The Recommendation sets out a framework for the Member States' expulsion policies. Persons coming under the following three categories should generally be expelled, normally to the country of origin or to any other country to which the individual may be admitted:

- 1) those who have entered or remained unlawfully in a Member State;
- 2) those who are liable to expulsion on grounds of public policy or national security;
- 3) those who have failed definitively in an application for asylum and have no other claim to remain.

¹ **Joint Action 97/11/JHA, of 16 December 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning a uniform format for residence permits, OJ L 7, 10.1.1997, pp.1-4.**

² **Council Decision of 18 December 1997 on the technical specifications referred to in Article 2(1) of the Joint Action of 16 December 1996. See also Communication of the Council on uniform format for residence permits (OJ C 193, 19.6.1998 p.1) where specimens of the uniform format for residence permit are published.**

³ **London, 30 November-1 December 1992, SN 4678/92 WG11266.**

Such persons may only be allowed to remain on humanitarian grounds. According to the Recommendation, Member States must ensure that their policies and practice with regard to expulsion are fully consistent with their obligations under the 1951 Geneva Convention relating to the Status of Refugees, the 1967 New York Protocol and the 1950 Convention for the Protection of **Human** Rights and Fundamental Freedoms.

All persons threatened with expulsion should have the right to be represented and the right of appeal. The Recommendation also calls for the introduction of laws which would permit the confiscation of vehicles, **ships** or aircraft used by persons convicted of aiding illegal entry'. Although the Recommendation is not limited to third country nationals, expulsion of citizens of the Union from any one Member State is likely to be **an** intra-Community matter and therefore not **subject** to these provisions. However, the question arises of **Community** engagements in respect of the expulsion of third country nationals. These agreements with third countries may give rise to residence rights for third country nationals which have direct effect in the Member States'.

During the same meeting in London, the Ministers also recommended some guidelines regarding the transit of a person for the purposes of expulsion³. The Recommendation is designed to regulate Member States' practices in respect of third country nationals who are being expelled from the territory of one State through the territory of another Member State before reaching their final destination.

The Recommendation places an obligation on the sending State to obtain consent **from** the transit State to expulsion through its territory together with an assurance from the sending State that it has ascertained that, under normal circumstances, the continuation of the journey of the person expelled and his admission into the country of destination are guaranteed.

14.10. Recommendation concerning checks on and expulsion of third country nationals residing or working without authorisation⁴

The Recommendation seeks to establish some common standards in respect of measures to be taken with a view to ensuring that third country nationals do not remain beyond the period for which they have been admitted or given permission to remain and that they do not work without authority to do so.

¹ This **form of** carrier sanction is **an** extension **of** the existing sanctions (by way **of** fines) applied in most Member States to carriers **of** inadmissible aliens. Almost all Member States have introduced such legislation except Spain, Ireland and Luxembourg. **See also** Cruz A., *Shifting Responsibility-Carriers' Liability in the Member States of the European Union*, Pluto **Press** 1995.

² **For instance** the **Turkey/EC** Association Agreement 1963, Additional protocol 1970 **and** the Association *Council* Decision 1980 **as regards the** residence rights **of** Turkish workers **confirmed** by the jurisprudence **of** the European Court **of Justice**. International law recognises the right of States to admit or refuse **to** admit to their territory any alien subject only to obligations arising from international human rights instruments. However, international law does not recognise a State's right to refuse admission to or expel its **own** nationals (Article 13 UN Universal Declaration **of** Human Rights 1948; Article 12(4) International Covenant on Civil and Political Rights 1966). **See also** Guild Elspeth, *The developing Immigration and Asylum Policies of the European Union* Kluwer Law International, 1996, p.231.

³ London, **30** November-1 December 1992, 19579/92 IMMIG 2 **Annex F to Annex II**.

⁴ Brussels, **25** May 1993, [SN 3017/93 WGI 15161].

The general rule is that persons not entitled to free movement in conformity with Community legislation and found i) to have entered or remained unlawfully in Member States, or ii) to be liable to expulsion on grounds of public policy or national security, or iii) to have failed definitively in an application for asylum and to have no other claim to remain, should be expelled unless there are compelling reasons, normally of a humanitarian nature, for allowing them to remain. Member States are also permitted to expel persons who have been working in breach of immigration/aliens or related provisions and persons subject to immigration/aliens provisions who have been involved in the facilitation, harbouring or employment of illegal immigrants.

Checks will, in principle, be carried out in the cases of persons who are known, to be, or suspected of, staying or working without authority, including asylum applicants whose request has been rejected.

The Recommendation **excludes** from its scope nationals of **EFTA countries** who have free movement rights in the Union and also excludes **family members** of citizens of the Union and **EFTA** nationals who are exercising **Community** law rights in another Member State. No mention is made of persons protected under agreements between the Community and third countries.

15. CIREFI

One of the issues which has proved problematic in achieving any progress on common action in fields of immigration and asylum has been the lack of knowledge and concern of the Member States about what is actually going on in other Member States. The establishment of two separate centres for information, CIREA with responsibility for asylum¹ and CIREFI with responsibility for immigration was an early attempt to try to overcome the mistrust which, it was viewed, arose from this lack of knowledge.

At the 1992 London meeting, immigration ministers took the decision to establish the Centre for Information, Discussion and Exchange on the Crossing of borders and Immigration (CIREFI).

CIREFI is charged with gathering, exchanging, disseminating and compiling information and documentation on authorised and unauthorised immigration flows, genuine, forged or falsified travel documents, control procedures, legislation and policies on immigration and legislation and practices on carriers' liability and statistics.

¹ In Lisbon, in 1992, immigration ministers adopted the Decision establishing a clearing house for gathering and disseminating information, and compiling documentation on all matters related to asylum (Press release 7273/92 (Press 115)). This Centre for Information, Research and Exchange on Asylum (CIREA) is intended to develop greater informal consultation which will facilitate, through competent bodies, co-ordination and harmonisation of asylum practices and policies. CIREA will operate within the framework of the General secretariat of the Council of the European Communities, and the Commission will be fully associated with its work. Delegates from Member States are also to participate in the clearing house.

The Ministers adopted the Conclusions on the organisation and development of CIREFI in November 1994 and action within the framework of these Conclusions began on 1 January 1995¹. CIREFI is staffed by the General Secretariat of the European Council and is permanent. It was intended that, following the entry into force of the Treaty on European Union, CIREFI would be the primary institution in its field for exchange of information on an on-going basis between the Member States. **It does not have any decision-making power** and is intended to share staff with CIREA.

It appears from the decision that CIREFI was intended to provide a place in private where officials could exchange ideas and concerns within a structure away from the public. The only exception to the confidential rule was the admission of the Commission as an observer. According to Articles 11 and 12 of the Decision, only ministers, national authorities participating in the work of the clearing house, their officials and the Commission are to have access to information held by the clearing house. CIREFI is required to submit an annual report on its activities to the Council on Justice and Home Affairs.

There is no question of harmonisation and the CIREFI is excluded from giving instructions to the Member States. EUROSTAT has taken the lead in the collection of migration statistics, both in its series; 'Statistics in Focus' and its publication on migration statistics. Information for statistics may not only be collected by various government departments, i.e. interior ministries, labour ministries, social affairs ministries etc. but also from sources outside the ministries (i.e. the work of academics, institutes and non-governmental organisations).

15.1. The opinion of the European Parliament

The European Parliament, in its Resolution of 22 September 1995, pointed out that it should have been consulted according to Article K. 6 and should also have been granted further information on the role of the Centre. Moreover, it **called** for one observer appointed by the Commission and one observer appointed by the Parliament to be allowed to attend CIREFI meetings. It also expressed the view that the provisions governing the communication and handling of so-called personal data are imprecise and confusing and that proper steps should be taken to avoid duplication with other bodies in the collection of such data. Finally, Parliament asked for the proper definition of the Council's proposal in order to clearly set down the Member States' obligations, the relations of CIREFI with other similar intergovernmental or Community bodies, the conditions and restrictions on the communication of information and data and its protection by the Member States the practical arrangements for this purpose and, finally, the long-term and immediate objectives of CIREFI.

¹ In 1985 the Commission adopted a decision setting up a prior communication and consultation procedure on migration policies in relation to non-Member States (Decision 85/381, OJ L 217/22, 1985). This decision included an obligation on Member States to notify the Commission of **draft** measures both with regard to workers who **are** nationals of non-Member **countries** and to members of their families, including illegal entry, residence and employment, equality of treatment in living and working conditions, wages and economic **rights**, integration into the workforce, society and cultural life and their voluntary return to their countries of origin. The **aim of** the measure was to secure cooperation to facilitate the mutual exchange of information, the identification of problems of common interest and, in relation to these problems, to facilitate the adoption of a common position, particularly as regards international instruments relating to migration. It was also aimed at examining the possibility of Community or national **measures to harmonise** national legislation on foreigners. The Member States opposed the Decision and sought its annulment by the **Court of Justice**. The Commission finally withdrew the Decision and **left** third country immigration policy to Member States' competence.

16. External Frontiers Convention

The creation of an area without internal frontiers requires strengthened controls at the Community's external frontiers. Controls **carried** out at these frontiers will be valid for **all** Member States. It is therefore essential for these controls to be as effective as possible, and for all Member States to be able to trust them.

The Convention on External Frontiers already has a long history. In 1990, an initial draft had been submitted to Ministers responsible for Immigration in the context of cooperation in the ad-hoc Working **Party** on Immigration.

The Commission invoked its right of initiative in December 1993 after the Treaty on European Union had come into force. The provisions on the crossing of the Member States' external frontiers and the implementation of the necessary checks had become a matter of joint interest pursuant to Title VI, Article **K.1**.

In a Communication to the Council and the Parliament on December 1993¹, the Commission submitted a proposal for a declaration based on Article **K.3** of the Treaty on European Union establishing the Convention on the Crossing of the External Frontiers of the Member States² which **was** essentially an attempt to revive the existing Draft Frontiers Convention³ drawn up by the ad-hoc Working Party on Immigration.

¹ COM(93)684 of 10.12.93.

² OJ C 11/6-15, 15.01.1994.

³ In the summer of 1989, the French Presidency submitted a draft convention **on** the crossing of external borders. The **draft** External Borders Convention covered the wider parts of the Schengen regulations. It **contained** the sections **concerning controls** at external borders, entry conditions, refusal of entry and visa **policy**. The **negotiations on** the text were **finished** under the Luxembourg Presidency in June 1991 when, suddenly, in the context of the geographical application of the Convention **in** Article 13 of the *draft*, **Spain** and **the** United Kingdom raised the problem of external border **controls** for Gibraltar. The question was how **controls** at the **port** and at the **airport** situated on the isthmus of Gibraltar should be organised. Both **sides** feared that the solution might have repercussions **on** the **status** of Gibraltar. For the last four **years**, successive Presidencies have **tried to** resolve the problem using formulae which had **been** applied in **other bilateral** or multilateral conventions concerning Gibraltar. Despite these efforts and **discussions** at several **European** Councils, a solution to **this particular** problem is not in sight.

The latter constitutes one of the pre-requisites to the removal of internal border controls and to the achievement of the free movement of persons, as foreseen in Article 7a of the Treaty of Rome⁷.

The proposal took over the text of the Convention in so far as it has been agreed in June 1991, and modified it as the Commission considered necessary. Essentially, it seeks to partially “communitarising”, in a way not envisaged by the TEU, an intergovernmental Convention of the type provided for by Article **K.3**. European Council meetings have repeatedly called for the signing of this Convention as soon as possible. At all events, many versions and revisions of the **original** text have appeared, all of them differing from their predecessors on different points and subject to numerous reservations from particular delegations. On 14 June 1995, the European Parliament received from **the** French Council Presidency the **REV2** version of a Draft Convention which had been forwarded by the Commission and which reflected the result of the proceedings of the German and French Presidencies in their efforts to resolve the situation. The Council Secretariat-General subsequently forwarded REV3¹ on 5 February 1996 and, most recently, version REV6. This version is in the form of a Council Act, drawing up the Convention on the crossing by persons **of** the external frontiers of Member States of the EU, to which the actual Convention is attached **as an** Annex. The **Act** recommends the adoption of the Convention by the Member States, in accordance with their respective constitutional rules. At the November 1996 Justice and Home **Affairs** meeting, the outstanding areas of disagreement continued to be the problems of territorial application and the role of the ECJ².

16.1. The contents of the Convention

The Convention on external frontiers has always been designated by the Council as necessary **flanking measures** to the achievement of the free movement persons and the removal of checks at internal frontiers, along with being an important instrument for European immigration law.

¹ **This proposal in fact contains many provisions quite similar to that of the Draft Convention on the External Borders. There are however, fundamental differences: in the Commission's text, the territorial application of the convention is left to bilateral negotiations between the UK and Spain to solve the disputed issue of Gibraltar. Moreover, the Commission proposed to make use of the option contained in Article K.3.2 and confer jurisdiction on the European Court of Justice over preliminary rulings on the implementation of the provisions of the Convention and to rule on disputes regarding its application. This point, in fact, is one of the reasons why any progress in the Council is blocked. The present UK Government is firmly opposed to further extending the ECJ's competence. A small number of other Member States, in particular Denmark and France, are believed to share the UK's reservations. As pointed out by the Irish Presidency, the large number of cases which come before national courts in the areas of asylum and immigration suggests that many applications for interpretation of provisions in this area by way of preliminary ruling would be submitted to the Court of Justice by national courts at the request of parties involved in such cases and this would lead to a considerable increase in the work-load of the court and delay national proceedings (Conference of the Representatives of the Governments of the Member States, 5.12.1996. CONF 2500/96, 140pp.).**

² **Council of the European Union, General Secretariat Press Release 12104/96 (Press 346) of 28-30 November 1996.**

The Convention contains a definitions section and rules concerning the crossing of external frontiers and surveillance of external frontier controls and their nature and includes specific arrangements for airports. There are special provisions for controls on persons not entitled under Community law and for third country nationals residing in a Member State. The creation, organisation and operation of the computerised information system will be the subject of the Convention on the European Information System. Accompanying measures include provisions on the responsibility of carriers to ensure persons coming from third countries have valid travel documents.

Two important implementing measures require mention. Article 27 of the Draft Convention provides that the Convention shall be subject to the European Convention for the Protection of Human Rights and Fundamental Freedoms and to the Geneva Convention of 28 July 1951, as amended by the New York Protocol of 31 January 1967, relating to the Status of Refugees and without prejudice to Member States' more favourable constitutional provisions on asylum.

The Draft Convention appears to be postulated on the Commission's Communication on the abolition of Border Controls within the Internal Market. According to the Commission, once a person, who is not a national of a Member State, has been allowed to cross the external frontier and has been admitted by a Member State, he should also be allowed to move freely within the Community since there should be no internal border controls (subject, however, exceptions such as that provided for under Article 12(2) of the Draft Convention).

16.2. Substance of the Convention

According to Article 1 of the Convention, **External Frontiers** are defined as:

- (i) the land frontiers of a Member State without any common border with another Member State, and maritime frontiers;
- (ii) airports, save as regards internal flights;
- (iii) seaports, save as regards internal connections within a Member State and regular ferry links between Member States.

The External Frontiers Convention basically lays down the rules for the crossing of external frontiers by **third country nationals**. Only on a few points does it also apply to citizens of the Union and to the category of those classified as entitled under Community Law. It requires Member States to set minimum standards for checks at external frontiers and to cooperate for the purpose of making such checks uniformly effective. The crossing of external frontiers will only take place at **authorised crossing points** permanently controlled by the competent authorities of the Member States in accordance with national law. All persons crossing an external frontier, including those entitled under Community law, will be subject to control, under conditions which permit their identity to be established by examination of their travel documents. The Convention also includes specific arrangements for checks at **airports**.

The Member States will ensure that passengers on flights from third states, who transfer to internal flights, will be subject to entry control at the airport at which the external flight arrives and, by the same token, passengers on internal flights, who transfer to flights bound for third States, will be subject to a departure control at the airport from which the external flight departs'.

¹ **Article 6.**

Persons, not entitled under Community law may enter the territories of the Member States, for a **short stay**, if they carry with them a **valid travel document**, are in **possession of a visa**, where applicable, **valid for the length of their stay**, do **not represent a threat to the public policy, national security or international relations** of Member States, **their names are not included in the joint list of persons to whom entry is refused** and they have **sufficient means of subsistence**, both for the period of the intended stay or transit and for them to return to their country of origin or travel to a third State.

Rules for **short-stay entry** by third-country nationals are also established. These provisions, however, apply **only where an external frontier of the European Union is crossed**. Journeys from one Member State to another are **not covered**.

For third country nationals with the **right of residence** in one Member State, the principle laid down is that of the equivalence of residence permits and visas issued by the Member States, viz. holders of such residence entitlements are **not as a rule required to obtain a visa for a short stay in another Member State**¹. In exceptional cases the same rule may also apply to a person who holds a provisional residence permit issued by a Member State and a travel document issued by that Member State². A Member State may depart from these provisions for urgent reasons of national security, though taking into consideration the interests of the other Member States.

Persons who intend to stay in a Member State other than for a short time (more than three months) will enter that State under the conditions laid down by its national law and access shall be restricted to the territory of that State..The possibility for entry by other third country nationals is created of **issuing a uniform visa** which is then valid in all Member States.

In addition, a joint list of persons to whom the Member States are to refuse entry to their territories is to be drawn up on the basis of national notifications³. A person may also be refused entry if his name appears on the national **list** of persons who are not to be admitted to the territory and in all circumstances in which a national of a Member State may be refused entry to another Member State⁴. This indicates that Member States will retain the power to establish a national list regardless of the joint **list**. The External Borders Convention requires an exchange of information on persons to whom entry into EU territory may not be granted'. Information exchange on data contained in the joint list will be computerised. The creation, organisation and operation of this computerised information system will be the subject of a separate Convention, the **Convention on the European Information System**. The Convention is to include guarantees for the protection of individuals with regard to the processing of personal data. The joint list may be **consulted** by the competent authorities of the Member States which are concerned with processing visa applications, frontier controls, police checks and the admission and regulation of the stay of persons who are not Member State nationals. Hence the Convention can only become operational after an Information System has been created at EU level.

¹ Article 8.1.

² Article 8.2.

³ Article 10.

⁴ Article 7.2.

⁵ Article 13.

Member States will undertake to progressively harmonise their **visa policies**. Conditions are provided for the issue of uniform visas, the prior consultation of central authorities before the issue of a **uniform visa, multiple-entry uniform visas, national visas, long-stay visas, extension of stays and visas with restricted territorial validity**. A Member State will require person applying to stay for a short time within the territory, and who holds a uniform visa, to be issued with a visa by its own authorities.

A uniform visa will be issued on the basis that the travel documents presented upon application for a visa are recognised by all Member States, are valid in all Member States and allow for the return of the traveller to his country of origin or his entry into a third country¹. The uniform visa will state the maximum length of stay and may be valid for one or more entries. The total length of stay cannot exceed three months in a six-month period starting on the date of entry. The uniform visa **may** be a transit visa and the transit period may not exceed five days². However, these provisions will not prevent a Member State from issuing a visa, the validity of which is restricted to its own territory, to the holder of a uniform visa in the course of any one six-month period. Furthermore, Member States are not prevented from authorising a person who is not a national of a Member State holding a uniform visa to remain in their territory for more than three months³. The Member State which is the main destination will normally be responsible for issuing the visa⁴. On humanitarian grounds, in the national interest or by reason of international commitments, a Member State may issue a person, who does not meet the conditions laid down in the Convention, a visa valid only in its own territory or in the territory of more than one Member State⁵, and there are also other cases in which visas with restricted territorial validity (one or several Member States) *can* be issued. A visa may only be refused on the grounds of a serious threat to **public order, public security or public health**.

Visas for stays of more than three months will be national visas issued by each Member State in accordance with its national law, permitting its holder to travel in transit through the territory of the other Member States⁶. However, one should bear in mind that these long-stay visas are rarely granted since EU Member States ceased to apply an official immigration policy for third country workers in the mid seventies and all have introduced stricter rules on acceptance of third country nationals within their territories.

¹ Article 19.

² Article 21.

³ Article 23.

⁴ Article 22.

⁵ Article 24.

⁶ Article 25. Greece, the Netherlands and the UK have expressed reservations on the provisions for long-stay visas. Greece has also expressed reservations on the new wording of Article 24 which permits a Member State, on humanitarian grounds, to issue a person with a visa valid only in its territory or in the territory of more than one Member State.

16.3. Accompanying measures

The so-called accompanying measures include **carrier sanctions**, the **illegal crossing of an external frontier** and **compensation for financial imbalance** resulting from the obligation to expel individuals where that expulsion cannot be effected at the expense of the person concerned or of a third party¹.

16.3.1. Carrier sanctions

The Member States are required to adopt provisions under national laws and regulations making transport firms (airline, rail and shipping companies and overland coach transporters) responsible, subject to penalties, for taking all necessary measures to ensure that persons carried by them are in possession of valid travel documents and visas, and that they are not liable to be refused entry. Failure to comply with the rules will result in the imposition of sanctions against the carrier. When persons carried by them are refused entry to the territory of a Member State, carriers are to be required to return them at their own expense and to bear the cost of accommodation until their departure. Such penalties are already enforced in various Member States. They are also a component, in a different form, of the Schengen Implementation Agreement and of legislation in force in the Schengen States.

In relation to penalties on carriers, there are two particular problems:

- a) Access for refugees to a safe-haven country;
- b) duties properly incumbent on State institutions passed on to private firms.

It is in the nature of their situation that refugees can experience difficulty in submitting the necessary documents. Without a valid passport, they have no means of applying for an entry visa. Article 31 of the Geneva Convention on refugees acknowledges this situation when it stipulates that States may not penalise refugees on the grounds of illegal entry and thus implicitly recognises that refugees can be compelled to resort to illegal entry. Penalties against carriers are often **justified** on the grounds that the Chicago Convention on Civil Aviation requires this obligation of its signatory States².

16.3.2. Illegal crossing of the external frontiers

In the event that a person crosses the external frontiers without being in possession of a residence permit or does not fulfil the conditions of residence in a Member State, he will normally be required to leave the territory of this Member State without delay and either go to the Member State which has issued him with a residence permit or to another Member State where he will be guaranteed admission. If that person does not leave voluntarily or there are reasons of national security or public policy that require his immediate departure, then he will be expelled to his **country** of origin or any other country according to the national legislation of the Member State concerned. Member States can also conclude bilateral agreements between themselves on the readmission of persons who are not entitled to be readmitted under Community law.

¹ **Articles 14-16 of the Convention.**

² **Annex 9 to that Convention contains a stipulation that carriers should be responsible for the prompt return of persons not having right of entry and that they should take measures at the place of boarding to determine that their passengers are in possession of the required documents.**

16.3.3. Compensation for financial imbalances

Member States will compensate each other for any financial imbalances which may result from the obligation to expel a person who has illegally crossed the external borders, where such expulsion cannot be effected at the expense of the person concerned or a third party.

16.4. Open questions

Lack of agreement between Member States continues to persist on three fundamental provisions of the Convention. These issues must be resolved:

16.4.1. Voting arrangements for the adoption of measures implementing the Convention'

There are **as** many different proposals on the procedure for adopting the implementing measures as there are draft versions of the Convention. According to the latest version, the implementing measures of the Convention will be adopted by the Council on the initiative of the Commission or a Member State. Parliament's opinion **called** for decisions expressly provided in the Convention to be adopted by the Council by a two-thirds majority. All other decisions would require **unanimity**. The Council may even have been persuaded by Parliament's proposal, for in the newer version of the Council text there are provisions for decisions to be adopted by a two-thirds majority, at least for part of the implementing provisions already laid down in the Convention.

16.4.2. The competence of the ECJ²

In the latest version of the Convention the Court of Justice is to be empowered to hand down preliminary rulings on specific matters concerning interpretation of the Convention. It will also have jurisdiction in disputes concerning implementation of the Convention, on application by a Member State or the Commission. However, there is not yet full agreement on this the British and Spanish delegations are fundamentally opposed to any jurisdiction being given to the European Court of Justice. The external frontiers is an area where European Court of Justice jurisdiction seems necessary, both in terms of its being empowered to hand down preliminary rulings on interpretation of the Convention and on resolving disputes between Member States. This will be the best way of securing uniform interpretation of the External Frontiers Convention. The problems associated with primacy of certain instruments³, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Geneva Convention on the Status of Refugees, also make it desirable to have a uniform judicial authority. Discussions continue on whether or not the jurisdiction of the ECJ should be included in the Convention.

Under the provisions of Article K.3.2(c) TEU, attribution of jurisdiction to the Court is possible, but not obligatory and once decided upon, is extremely important. It is assumed that the Court will interpret and settle disputes which may arise within the Conventions concluded under these provisions. Thus, the Court would be able to safeguard the application of the general principles of Community law such as equality and non-discrimination, legal certainty, legitimate

¹ **Article 26.**

² **Article 29. Article K.3.2(c) in fine provides for the possibility of giving a role to the Court of Justice if the respective Convention expressly stipulates this. The reason for this is that a consensus could not be found at the 1991 Intergovernmental Conference to make interpretation of Conventions by the Court compulsory. Since there has to be unanimity, the varying post-Maastricht attitudes about proximity or distance of the Third Pillar to the First Pillar have prevented this problem from being solved.**

³ **Article 27.**

expectation, *ne bis in idem*, the right to a fair hearing, proportionality and the respect of human rights principles. It could also be expected that the Court would create common standards on several issues, such as imposing an objective standard for the definition of a threat to public policy (notably lacking in Article 10 of the Draft Convention) whereby the list of persons to be refused entry is established. This would be of crucial importance in ensuring a uniform implementation of the Convention and avoiding variations in the application of this principle from one Member State to another.

16.4.3. Territorial extent of the Convention'

The External Borders Convention will only apply to European territory. The Faeroe Islands, the Channel Islands and the Isle of Man are excluded from the scope of the Convention. The Convention will not affect either the logistic arrangements for persons moving between Italy and San Marino, the Vatican and Campione d'Italia, between the UK and Ireland and Jersey, Guernsey and the Isle of Man and will not affect the special status of Mount Athos in Greece.

A central reason for the long-running debate on the Convention and the failure to reach agreement is the British-Spanish conflict over Gibraltar. This conflict looks unlikely to be resolved since it concerns no less an issue than that of national sovereignty over Gibraltar. Since the Treaty of Utrecht in 1713, Gibraltar has been British-controlled territory and it has been a British colony since 1830. The British view is that it will remain so for as long as the local population wish. Spain, however, claims the return of Gibraltar on grounds of decolonisation and territorial integrity. The conflict has led to intense confrontations in the past and Spain has several times blockaded access to Gibraltar. Moreover, Gibraltar is a free-trade zone and not fully integrated into the European Union. The European customs system does not apply to it.

Until now, the UK and Spain have failed to reach an agreement on the territorial scope of the Convention with regard to Gibraltar. Both parties insist resolutely on their respective positions: the United Kingdom insists that the Convention must apply to Gibraltar, whereas Spain wants Gibraltar to be initially excluded from its application.

16.5. Opinion of the European Parliament

The European Parliament adopted its resolution of 21 April 1994 on the proposal for a decision based on Article K.3 of the Treaty on European Union establishing the Convention on the crossing of the external frontiers of the Member States².

The European Parliament had taken the view that a substantial part of the visa rules, in particular the provisions on a **uniform visa** and national visas, should be removed from that Convention and drawn up pursuant to Article 100c. Moreover, it regrets the fact that a uniform visa is to be available only for short stays of up to three months' duration and not for longer-term residence and considers that these provisions do not go along with a situation, in which internal border controls will no longer exist. The coexistence of uniform visas and national visas also poses fundamental problems in relation to the removal of checks at the Community's internal borders. Free movement has to be implemented for third country nationals, legally staying in the European Union, as well as for Community citizens.

¹ **Article 30.**

² **OJ C 128, 9.5.1994, p.351.**

On the other hand, some provisions of the draft Convention are welcomed by the European Parliament. Thus, Article 8 exempts a third country national who is the holder of a residence permit issued by another Member State from the visa requirement. This is particularly important in the case of long-term residents or *a fortiori* second or third generation migrants who otherwise might have to face long bureaucratic delays and possibly humiliating interrogations and obstacles before being entitled to move for a short period through the territory of the Union, even though they may have lived a large part, or indeed, all of their life in the Union.

Regarding Article 14 of the Draft Convention on the responsibility of carriers to check their passengers travel documents, the European Parliament has expressed the view that it is contrary to the aims and the spirit of the 1951 Geneva Convention relating to the status of refugees, which prohibits states from imposing penalties because of illegal entry by refugees who come directly from a territory where their freedom is endangered. The application of Article 14 will in fact oblige carrier personnel to pre-screen any third country national, to see whether he might or might not be admissible and to take the decision on whether a person is a genuine asylum-seeker¹.

Finally, it calls on the UK and Spain to provisionally agree to exclude Gibraltar from the scope of this Convention. The Convention **can** be extended to include Gibraltar as soon as fundamental agreements have been reached on this question. It also considers it essential for the European Court of Justice to be empowered to hand down preliminary rulings and be given jurisdiction on conflicts between the Member States.

17. Visa Policy in the Community

Decisions on granting visas and the conditions governing this are a key aspect of national sovereignty and an instrument of the Member States' policy for controlling migration flows and combating illegal immigration. Therefore, such decisions were primarily determined at intergovernmental level, merely by measures which did not stem from Commission proposals but from separate agreements between the various governments. A positive step was, however, taken by the European Council in Madrid in June 1989 where it was decided to draw up a Convention among the Member States of the European Union on the crossing of External Frontiers, and to begin harmonising Member States' visa policies.

In May 1992, the Working Party on Visa Practices tabled proposals on ensuring cooperation among participating States, focusing primarily on the issue of transit and short-stay visas and calling on States to encourage cooperation between their diplomatic and consular authorities. The Commission included these ideas in its proposal on controls on persons crossing external frontiers.

¹ Regarding the objections of the EP on passport checks carried out by certain airline companies, see also the European Parliament's Resolution of 11.3.94 on the incompatibility of passport checks carried out by certain airlines with Article 7a of the EC Treaty, **OW C 9113 16 of 28.3.94**. In this Resolution, the EP expressed the opinion that carriers should not be put in the position of deciding who **may** exercise the right of free movement and of applying for asylum under the various Treaties and Conventions and that the exercise of these rights should be a matter for the competent authorities of the Member States only. Furthermore, it pointed out that passport checks by carriers relating to carriers' liability legislation must be distinguished from identity checks relating to security, which should in principle be the same for travel within each Member State as to elsewhere in the Union. Therefore, it called on the Commission to examine carriers' liability legislation and its associated penalties, such as that in the United Kingdom, France and Italy, to see if it was in breach of any existing Community legislation in so far as travel within the Union was concerned. Finally, it urged those Member States which had adopted legislation on carriers' liability to repeal such legislation and to specify that identity checks relating to security should be the same for domestic travel as for travel elsewhere in the Union.

The most substantial change in this field was brought about by the Maastricht Treaty with Article 100c which imposed on the Council the obligation to determine, by 1. January 1996, the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States and also to take the necessary measures for the establishment of a uniform format for visas. This Article gave for the first time, specific competence to the Community in the field of immigration. It constitutes a bridge between the EC Treaty and the Third Pillar of the EU Treaty in the sense that the Council, voting unanimously, can decide to take further measures on matters falling within the field covered by Article K. 1 of the EU Treaty after national ratification. One of the subjects of Justice and Home Affairs cooperation, which was at the same time an important element of the compensatory measures, was transferred to Community law which, once adopted, would acquire precedence over all agreements in intergovernmental cooperation in that area, including Schengen.

The Commission made use of its new competences immediately after the entry into force of Maastricht and tabled three proposals:

- * Draft Regulation on the visa list,
- * Draft Regulation on the visa format and,
- * Draft Decision on the basis of Article **K.3** about the External Borders Convention'.

However, Article 100c creates a number of difficulties. These arise from the fact that it does not communitarise the visa policy as a whole but regulates **only two**, though important, issues of visa policy². In the field of entry and free movement of third country nationals, the Community does not have exclusive competence³. **Article 100c only covers the formal requirements for entry of third country nationals into the territory of a Member State.** The rest, in particular the legal conditions under which visas are issued and the harmonisation of conditions of entry, is confined to intergovernmental co-operation under Article K. 1. This underlines the intention of the Member States to transfer to the Community only a limited part of their sovereign rights.

¹ COM(93)684 final.

² These two **aspects** had previously been covered by the External Borders Convention. The consequence of this was that the respective provisions had to be taken out of the External Borders Convention and placed in the new Commission proposal.

³ The Commission proposal opted for total harmonisation by 30 June 1996 (Article 1, para. 2). Furthermore, the commission was of the opinion that a common visa list was valid for all Member States and Article 2 of the draft Regulation provided for this by means of mutual recognition of such a visa.

Furthermore, Article 100c was destined from the very beginning to be deprived of any real effect on account of long-staying third country nationals due to the persistent reluctance of many Member States to allow the European Commission some say in matters concerning third country nationals, including those who have established themselves permanently in a Member State and Convention refugees¹.

One of the corner stones of a common visa policy is the **mutual recognition** by Member States of visas issued by other Member States. Without this essential ingredient, a common visa policy is deprived of its meaning. In the case of Schengen, the validity of the uniform visa is recognised by **all** parties and enables its holder to transit through the territories of the other Contracting Parties in order to proceed to the territory of the Contracting Party which issued the visa, except under **certain** specified conditions relating to asylum-seekers and persons on the national reporting list of the Member State of transit².

17.1. Council Regulation No **23**17/95

This determines the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States. After months of negotiations it was successfully adopted on **25** September 1995³.

It requires nationals of third countries on a common list to be in possession of a visa when crossing the external borders of the Member States⁴.

The text of the Regulation, as adopted by the Justice & Home Affairs (**JHA**), ignored the amendments put forward by the European Parliament and also excluded an important provision included in the Commission's proposal, namely the former Article **2**, which stipulated that a

¹ On the **subject** of Convention **refugees**, it should be recalled that a positive declaration was made in their favour on the occasion of the 128th session of the Council, held in **Brussels** on 25 March 1994, during which the Council gave its approval **of** the Regulation on freedom **of** movement for workers within the Community and of the Directive on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families. **At** this meeting, the representatives of governments of Member States of the EEC **declared** that the entry into their territories **to take up** activities as employed **persons** of refugees recognised **as** such within the meaning of the 1951 Convention **and** residing in the territory **of** a Member State **of** the Community must be examined with particular consideration, especially to grant to these **refugees** on their territories a treatment as favourable as possible (OJ C 1225/65 of 22.05.1964). Since then, even the possibility of allowing Convention refugees to travel within the Community without entry visas, let alone the proposal of allowing Convention refugees, let alone the proposal of allowing them to take up **paid** employment in another Member States, **has** been firmly opposed by a number **of** Member States.

² The reason for the very great difference in the levels of achievement between the Fifteen and the Schengen Group is **quite** obvious. The Schengen Group came to a common agreement way back in June 1985 to attain the objective **of** abolishing checks at their internal borders, and initiated negotiations on **how** to realise this ambition. On the other hand, the EU Member States have been divided on the interpretation to be given to Article 7a EC Treaty every since the signing **of** the Single European **Act** in February 1986.

³ The delay was due *inter alia* to the reluctance of Italy to include the Federal Republic **of** Yugoslavia (FRY: Serbia-Montenegro) in the common list attached to the Regulation.

⁴ OJ L 234, 03.10.1995, p.1.

Member State shall not be entitled to require a visa of a person who seeks to cross its external frontiers and who holds a visa issued by another Member state, where that visa is valid throughout the Community.

Member States will determine the visa requirements for nationals of third countries not on the common list, as well as that for stateless persons and recognised refugees'. Moreover, it is stipulated that the provisions of this Regulation will be without prejudice to any further harmonisation between individual Member States, going beyond the common list determining the third countries whose nationals must be in possession of a visa when crossing their external borders². **Via** is a document which is valid for an intended stay in that Member State or in several Member States of no more than three months in all and for transit through the territory of that Member State or several Member States, except for transit through the international zone of airports and transfers between airports in a Member State.

The list has been derived from the practice of States established under the Schengen Implementation Convention. The final list adopted comprises 101 countries³, including three which are not recognised by all the Member States, namely Taiwan, the former Republic of Macedonia and the FRY. Compared to the **list** which was presented on 10 December 1993 by the European Commission, **28** States have been taken out⁴.

Despite the call by the European Parliament that the process of determination of those third countries needing a visa should be based on clearly understood, objective and publicly stated criteria, the final list gives rise to the belief that political factors played an important role in determining the choice of countries on the list⁵.

On 15 December 1995, the European Parliament brought an action against the Council of the European Union before the European Court of Justice calling for the annulment of this Regulation. In its complaint, the European Parliament claimed that its right to participate in the Community legislative process had been infringed as a result of the Council's failing to consult it a second time before adopting the regulation, the final text of which included substantial amendments in relation to the Commission's proposal. The European Court of Justice, in its judgment of 10 June 1997⁶, held that the requirement provided by the Treaty to consult the

¹ Article 2 **of** the Regulation.

² Article 6 **of** the Regulation.

³ **Press** Release 9977/95 (**Press** 262).

⁴ Essentially **small islands** and archipelagoes in the West Indies and in Micronesia, almost all members **of** the British Commonwealth, but also South Africa, Botswana, Lesotho, Swaziland, Namibia, Zimbabwe and **Belize**. On the other hand, ~~three~~ countries have been added, namely the FRY, the former Yugoslav Republic **of** Macedonia and Peru.

⁵ **As** a matter of fact, besides Arab countries extremely rich in oil, are very **poor** States, like Laos, Mongolia, **Nepal**, etc., **countries** which hardly export clandestine immigrants or asylum-seekers. On the other **hand**, the list excludes the member's Visegrad Group (Hungary, Poland, Czech Republic and **Slovakia**) but includes Taiwan, a country with a GNP per inhabitant which largely exceeds even that **of** Portugal or Greece. Besides, it is valid to ask why Peru is the only **South** American country on the list, and is not joined by any Central American State. It is certainly not the poorest South American country, nor **can** it be affirmed that clandestine immigration from Peru to the European Union is greater than that **from Brazil**.

⁶ **Case C-392/95 European Parliament v Council of the European Union**, [1997] ECR-3213.

European Parliament in the legislative procedure means that it must be consulted again whenever the text finally adopted, taken as a whole, differs in essence from the text on which the Parliament had already been consulted, except in cases in which the amendments substantially correspond to the wishes of the Parliament itself. Moreover, the Council had argued that even if the text finally adopted departed in substance from the text on which the Parliament was consulted, it was not obliged to consult Parliament again since it was quite aware of its wishes on the essential points in question. The Court rejected this argument and held that its acceptance would result in seriously undermining the essential participation of the European Parliament in the maintenance of the institutional balance intended by the Treaty. The Court therefore concluded that the fact that the Parliament had not been consulted a second time in the legislative procedure provided for by Article 100c EC Treaty constitutes an infringement of essential procedural requirements and that the Regulation must be annulled. However, the Regulation maintains its effect until the Council adopts a new regulation within a reasonable period of time.

17.1.1. *Opinion of the European Parliament*

The European Parliament in its Resolution of 21 April 1994¹, proposed several amendments and asked to be consulted again if the Council intended to make substantial modifications to the Commission proposal. Among the proposed amendments, Parliament insisted that the determination of the third countries on the negative list should be based on clearly understood, objective and publicly stated criteria and that Member States should not be able to impose visa requirements on countries which, for objective reasons, had been excluded from the list.

Furthermore, it included a definition of the different categories of visa referred to in the proposed Regulation and shortened the period in which the Member States could decide whether to require visas of nationals of third countries not appearing in the annexed list and called for consultation upon the annexed list. Finally, it proposed clarifying the conditions for the issue of visas and providing for a **right** of appeal in the event of refusal to grant a visa.

17.2. Council Regulation No 1683/95 of May 1995 laying down a uniform format for visas²

Article 100(3) provides for Community measures relating to a uniform format for visas. This provision **does not contain a harmonisation of the national laws on the conditions under which visas are issued in the Member States.** A comparison between Article 100c and Article K.1 shows that a common visa policy was not to be included in the Community structure. Therefore the regulation of the conditions of visa issue remains subject to intergovernmental co-operation.

Despite the usual objections from the British Government and threats of veto, Regulation No 1683/95, laying down a uniform format for visas, was adopted by the Council on 29 May 1995.

¹ Resolution of the European Parliament on the proposal of the Commission for a Council regulation determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States, OJ C 128, 1994, p.350.

² **Q L 164, 14.07.1995,p.1.**

The Regulation applies to all visas covered by Article 5 which defines a visa as an authorisation given by or a decision taken by a Member State which is required for entry into its territory with a view to:

- an intended stay in that Member State or in several Member States of no more than three months in all,
- transit through the territory or airport transit zone of that Member State or several Member States¹.

Member States are obliged, when they issue a visa as described above, to do so in conformity with uniform format specifications (*sticker*) as described in the Regulation. However, as there is no mutual recognition of visas issued by the Member States, progress so far is not very significant². A third country national wishing to transit a Member State, in order to go to another Member State which issued him with such a uniform visa, is not exempt from applying for a transit visa, if necessary, although the fact that they are in possession of a uniform visa (which, theoretically, can neither be counterfeited or falsified) will greatly facilitate their application for a transit visa³.

18. Joint Action on airport transit arrangements⁴

The Joint Action, as it is referred to in the preamble and Article 1, comes as an exception to the principle of free transit laid down in Annex 9 to the Chicago Convention on International Civil Aviation and requires an airport transit visa (AVT), i.e. an authorisation to which nationals of certain third countries are subject for transit through the international areas of the airports of Member States.

The airport transit visa will be issued by the Member States' consular services and the conditions under which it will be issued will be determined by each Member State, subject to adoption by the Council of criteria as to the preliminaries and issue of visas and after it has been ascertained that there is no security risk or risk of illegal immigration. As a precondition for issuing the transit visa, the application must be justified on the basis of the documents submitted by the applicant and, as far as possible, these documents should guarantee entry into the country of final destination, in particular by presentation of a visa if it is required. The Member States will issue the airport transit visa using the uniform visa format laid down in Regulation (EC) No 1683/95.

Each Member State will require a transit visa from nationals of third countries included in an

¹ The final text no longer contains the commission's proposal that the regulation *to be effective* [...] *should apply to all types of visa, since otherwise the uniform format would be supplemented by national visas and the uniform visa must be designed for use for different types of visa*. Here again the Member States demonstrate their unwillingness to give up their right to issue national visas to third country nationals and, in doing so, their bad faith in interpreting Article 100c.

² Article 100 c has left the Member States' discretion to refuse to recognise a visa issued by another State and this is contrary to the concept of an internal market which normally has to support the view of mutual visa recognition. Moreover, a uniform form for visas may serve a useful purpose only to the extent that visas issued by other Member States are recognised as mutually valid.

³ This does not, of course, apply to the Schengen Member States who have agreed to lift internal border checks and where the issue of a uniform visa allows its holder transit through the other Member States of the Schengen Area.

⁴ Joint Action 96/197/JHA of 4 March 1996 adopted by the council on the basis of Article K.3 of the Treaty on European Union on airport transit arrangements, OJ L 63, 13.3.1996, pp.8-9.

annex to the Joint Action. Exceptions may be provided for crew members of aircraft and ships, holders of a diplomatic, official or service passport, holders of a residence permit or equivalent document issued by a Member State and holders of visas issued by a Member State or State parties to the **EEA** Agreement. Each Member State may require **an** airport transit visa by nationals of countries not included on the joint list.

In an application dated 10 May 1996 to the ECJ, the European Commission called for the annulment of the Council decision *concerning* the afore-mentioned Joint Action. The Commission **argued** that, in making this decision, the Council had violated an essential procedural requirement stipulated under the said Article 100c¹. The ECJ, in its judgment², held primarily that it is the task of the Court to ensure that acts which, according to the Council, fall within the scope of Article K.3(2) of the Treaty on European union do not encroach upon the powers conferred by the EC Treaty on the Community (Article M of the EU Treaty). Therefore, the Court has jurisdiction to review the content of the Act in the light of Article 100c of the EC Treaty in order to ascertain whether the Act affects the powers of the Community under that provision and to annul the Act if it appears that it should have been based on Article 100c of the EC Treaty. Subsequently, the Court held that Article 100c(1) of the EC Treaty applied only to visas which permit their holders to cross the external borders of a Member State at such crossing points in order to stay or move within the internal market during the period and subject to the conditions prescribed by the visas. The airport transit visa concerns with the situation of passengers arriving on a flight from a third country and remaining in the airport of the Member State in which the aircraft landed in order to take off in the same or another aircraft bound for another third country. Therefore, an airport transit visa presupposes that the holder will remain in the international area of that airport and will not be authorised to move within the territory of that Member State. The Court concluded that an airport transit visa does not authorise its holder to cross the external borders of the Member States and therefore does not fall within the ambit of Article 100c EC Treaty.

On 16 July 1998, the **Visa** Group of the Council, presented a Draft Joint Action on airport transit

¹ Several questions **arise** here, **among** which the following three are of major importance: firstly, the question **of** whether there is **Community** competence on matters related to airport transit visas (**ATV**); **secondly**, the question of the competence **of** the **ECJ** to rule on **an** act adopted by the Council within the framework **of** the so-called Third pillar under which issues **of Justice** and Home Affairs are dealt with, bearing in mind that **by** virtue of Article L of the Treaty on **European Union**, the Court is not competent (under the Third Pillar), except in the **case** of a convention where such competence is explicitly recognised; **thirdly**, the question **as** to whether mere presence in the so-called international zone of an **airport of** a Member State implies having crossed a external border. In the matter of the first question, the Commission does not **see** why it is **necessary** to make a distinction **between** entry visas **and** transit visas, on the one **hand**, and the **ATV**, on the other. Since the **said** Article 100c confers on the **Community** competence in the field of visa **policies**, the Commission believes that it is quite illogical that **Community** competence **be** limited to the determination of the third countries whose nationals require short-stay visas and transit visas, and that the system of **ATV** be reserved for the Council acting within the framework **of** the Third **Pillar**. The third issue concerns the notion of extraterritoriality of **airports**. The Commission is of the view that a person who **has** landed at an **airport of** a Member State is physically present on its territory and that the concept of an international zone **has** no extraterritorial status. This is also the view held **by** the **European Court of Human Rights**, a view that was clearly and unambiguously upheld for the first time **on** 25 June 1996 when it handed down a ruling on a case concerning the detention of four **Somali** asylum-seekers for 20 days **in** the so-called international zone (part of the Hotel Arcade) at Orly **Airport in Paris** (*Amuur v France* (17/1995/523/609), ruling of June 1996).

² *Case C-170/93 Commission of the European Communities v Council of the European Union*, [1998] ECR -2763.

arrangements, amending the Joint Action of 1996¹. According to a new provision, the Member States will not require an airport transit visa for holders of residence permits issued by a Member State or by a State which is a party to the Agreement on the European Economic Area and for the holders of residence permits issued by Canada, the Principality of Monaco, the Republic of San Marino, Switzerland, the State of the Vatican City, Japan or the USA with the guarantee of an absolute right of return. However, the Member States can suspend the application of this provision for a period that will not exceed the six months, after having informed the Council, and for reasons connected to important national political issues.

19. Draft Joint Action concerning a uniform format for forms for affixing visas issued by the member States to persons holding travel documents which are not recognised by the Member States drawing up the form or to persons holding no travel documents²

The ~~draft~~ joint action is based on Article K.3 of the EU Treaty, contrary though to the European Parliament's opinion which argued that it should have the form of a directive, based on Article 100c of the EC Treaty³.

The term forms for affixing **visas** means the document granted by the authorities of a Member State to a person holding a travel document which is not recognised by this Member State or to a person holding no travel document on the basis of which the competent authorities of this Member State grant a visa of the format established by Council Regulation No 1683/95 which lay down a uniform visa format. This form only establishes a uniform format. In exceptional humanitarian circumstances, the form set out in Annex B will only be valid for entry into the territory of the issuing Member States, which will be obliged to readmit that person if he is in possession of the form and in the territory of another Member State without authorisation.

The technical specifications which render the formats difficult to counterfeit or falsify will be laid down by the Council, will be secret and will not be published. Each Member State will designate a single body having responsibility for printing the uniform formats and each Member State will inform the Council of the competent authority or authorities for issuing the uniform documents.

20. Dublin Convention

The abolition of border controls reinforces the fear that internal migration and asylum seekers denied asylum in a first State will lead to multiple applications for asylum and an uncontrollable influx of illegal immigrants. In the summer of 1989, the French Presidency submitted a Draft Convention to the ad-hoc Immigration Group on the responsibility for the processing of asylum applications. This draft was to a large extent a copy of Articles 28-38 of the Schengen Convention. In June 1990 the Convention on the right of asylum and the status of refugees was signed by all the Member States of the European Community (**Dublin Convention**)⁴.

¹ Draft Joint Action of the Council 10225/98 on airport transit arrangements, Brussels, 16 July 1998.

² Report 10224/98 - C4-0525/98 - 9810914 (CNS), Brussels 13 October 1998.

³ See the European Parliament's amendments, Report on the *draft* Joint Action concerning a uniform format for forms for affixing visas issued by the Member States to persons holding travel documents which are not recognised by the Member States drawing up the form or to persons holding no travel documents, A4-0408/98, PE 228.360/fin.

⁴ OJ C 254, 19.8.1997.

The Convention establishes the principle that a single Member State is responsible for considering applications for asylum and lays down the rules for determining which country will consider a request for asylum in a given case.

However, major deficiencies in the European asylum field were highlighted. The Convention does **not** provide for harmonisation of the law of asylum, **it aims at co-ordination rather than harmonisation**. The Dublin Convention came into force on 1 September 1997 and set aside the provisions concerning uniform processing of applications for asylum in all Signatory States contained in the Schengen Convention.

21. Family members of Union citizens

21.1. Right of entry and residence for family members

Articles 48, 52 and 59 EC Treaty confer the right of free movement only to the economic subjects to which they refer. They do not cover the right of free movement for the family members of workers. It is in accordance with secondary Community legislation on the free movement of persons that members of a EU migrant worker's family have the right to accompany or join the migrant worker'. The same rights are extended to members of the family of the self-employed and those providing or receiving services², the retired persons³, those of independent means⁴ and student⁵. This right of entry and residence in the territory of another Member State is also extended to Union citizens' family members who are not a Member State nationals.

The family members covered by this right are:

- the spouse of the Community worker and their descendants who are under the age of 21 or are dependants;
- dependent relatives in the ascending line of the worker and his spouse.

The three directives show some differences concerning the right of family members to follow these categories of persons to another Member State. Whereas Directives 90/364 and 90/365 consider that the right of residence "can only be genuinely exercised if it is also granted to members of the family", Directive 90/366 limits students' right of residence to "the spouse and their dependent children", both in the Preamble and in Article 1. In Article 2, however, the term "member of the family" is used again.

Therefore, family members, irrespective of their nationality, have the right to settle with a worker who is a national of one Member State and who is employed in the territory of another Member State on condition that he has available suitable housing for his family⁶.

¹ **Regulation 1612/68 (OJ L 257/2, 1968), Directives 68/360/EEC (OJ L 257/13, 1968), 73/148/EEC (OJ L 172/14, 1973), 90/364/EEC (OJ L 180/26, 1990), 90/365/EEC (OJ L 180/26, 1990), 93/96/EEC (OJ L 317/59, 1993).**

² **Directive 73/148/EEC, OJ L 172/14, 1973.**

³ **Directive 90/365/EEC, OJ L 180/26, 1990.**

⁴ **Directive 93/96/EEC, OJ L 317/59, 1993.**

⁵ **Directive 93/96/EEC, OJ L 317/59, 1993**

⁶ **Article 10§3 of Regulation 1612/68, 1968.**

The elimination of obstacles to the free movement of workers will require ensuring the worker's right to be joined by his family and the conditions for the integration of that family into the host country'.

However, these provisions have obvious **limitations**. A family member who is a national of a third country for which the Member State he/she intends to visit requires a **visa**, will continue to be required, prior to his/her departure, to take the necessary steps to obtain a visa from the Member States concerned, even if he/she is lawfully resident in the territory of another Member State. If the family members are citizens of a Member State they are not required to hold an entry visa and are also themselves entitled to be issued with a Residence Permit for a national of a Member State of the EEC. If they are not EU citizens, they will receive a residence permit with the same validity as that of the worker.

It is important also to note that **the rights of the family members are derivative and not independent of the right of free movement of Community workers**. Their existence depends both on the right to freedom of movement possessed by the Union citizen from whom they are derived and on the existence of a **family** relationship. The right of free movement and residence for family members **only** follows the right of the economically active family member. **They would only enjoy an autonomous right of free movement to, and of residence in, another Member State if they were to become economically active themselves in the host State and if they were EC nationals**². Where a national of a Member State is pursuing an activity as an employed or self-employed person in the territory of another Member State, his family members have the right to take up any activity as an employed person throughout the territory of that same State, even if they are not nationals of any Member State³. The Court has stressed that this provision does not confer an independent right of residence on the members of a migrant worker's family but is conditional upon the requirements of Article 10 of the Regulation being met'. Any kind of employment activity is included, even the medical profession. Article 12 of the same Regulation expressly confers on workers' children equal access to education. However, this is not the only provision which family members can rely on in this respect. Article 7 of the same Regulation implies similar rights. Article 12 covers all types and levels of educational arrangements,

¹ The right to family life appears consistently in many human rights' conventions and it is **qualified** for consideration as a norm of international law. Among the conventions which protect family life are found: 1) the **European convention of Human Rights** (Article 8, which requires states to respect the family and private life of all **persons** within their jurisdiction); 2) the European Social Charter (Article 19(6), which includes the obligation to **facilitate** reunion of a foreign worker's family); 3) the European Convention on **the Legal Status of Migrant Workers** (Article 12 requiring admission of spouses and **unmarried**, minor, dependent children subject to available housing); 4) **ILO Convention 143** (Article 13 requiring states to facilitate reunification of families including **spouses**, dependent children and parents); 5) Universal Declaration of **Human Rights** (Articles 12 and 16 including the right protection of family life and to marry and **start a family**); 6) International Covenant on Civil and Political Rights (Article 17 protecting the individual from interference with privacy or family); 7) UN Convention on the Rights of the Child.

² See *Case C-147/91 Ferrer Luderer*, [1992] ECR I-4097, where the Court **confirmed this** condition with regard to freedom of establishment. It held that the Treaty rules in question and the related provisions of secondary **Community** law could only be invoked by a national of a Member State who intends to **establish** himself or herself in another Member State or by a national of the same Member State who finds himself or herself in a situation which presents a connecting factor to one of the situations covered by Community law.

³ Article 11 of Regulation 1612/68, 1968.

⁴ Case 267/83 *Diatta v Land Berlin*, [1985] ECR-567, para. 21

vocational or general, including university courses, and grants and similar facilities are also included. The Court has also interpreted Article 12 of Regulation 1612/68 to mean that where grants are available to the children of nationals to study abroad, these must also be made available to the children of migrant workers, even if the studies abroad are to be in the State of which the child is a national¹.

The workers themselves and the other family members not covered by Article 12 can claim educational rights under Article 7 of Regulation 1612/68.

Moreover, members of a worker's family residing with him in the territory of a Member State are entitled to remain there permanently if the worker has acquired the right to remain in the territory of that State after he **has** ceased working. The same also applies after the death of the worker or in the case of divorce².

The Union citizen on whom family members seek to base their derived rights must not only be entitled to exercise their own right of free movement but must actually have exercised it, so that the *case* will have a "**Community dimension**"³. Therefore, for example, Dutch citizens living in the Netherlands cannot bring their parents in the country to reside with them because the children have never **left** the Netherlands in order to work in another Member State⁴. A national of a non-Member State married to a worker having the nationality of a Member State cannot rely on the rights conferred by Regulation N° 1612/68 when that worker has never exercised the right to freedom of movement within the Community. Any discrimination which nationals of a Member State may suffer under the law of that State fall within the scope of that law and must therefore be dealt with within the framework of the internal legal system of that State⁵.

In the *case State of the Netherlands v Ann Florence Reed*⁶ the **ECJ** gave a definition of the term "spouse". An English **unmarried** couple, living together in a stable relationship for five years, came to the Netherlands where the man took up a temporary post with a subsidiary of a British **firm**. His companion, **being** unable to find work, applied for a residence permit as the man's companion, which was rejected. The ECJ, interpreting the word "**spouse**" in Regulation 1612/68, stated that: "[...]developments in social and legal conceptions must be visible in the whole of the Community; such an argument cannot be based on social and legal developments in only one or a few Member States. There is no reason, therefore, to give the term "spouse" an interpretation which goes

¹ Case C-308/87 *Di Leo v Land Berlin*, [1990] ECR I-4185.

² Article 3 of Regulation 1251/70, OJ L 142/24, 1970, Sp. Ed., p.402.

³ **Cases 35 & 36/82** *Morson & Jhanjan*, [1982] ECR-3723.

⁴ *Singh case*, note *supra*. **Mr Singh** was an Indian national and had married a British national. During their marriage both had been employed for two years in Germany and returned to the United Kingdom afterwards in order to **start** a business. After a divorce decree was pronounced against him, British **authorities** cut short his leave to remain. Mr Singh stayed beyond the time limit and a deportation order **was** pronounced against him. He challenged **that** order, holding that he had a Community right as the spouse of a British citizen who herself had a Community right to set up a business in the UK. The **Court** held **that** Article 52 and Directive 73/148 require a Member State to grant leave to enter and reside in its territory to the spouse, of whatever nationality, of a national of that State who **has** gone with that spouse to another Member State in order to **work** there **as** an employed person (as provided by Article 48 EC) and returns to establish himself or herself (in the **sense of** Article 52 EC) in his or her State of origin.

⁵ Joined **Cases C-64/96 and C-65/96**, *Uecker & Jacquet*, [1997] ECR I-3171.

⁶ **Case 59/85**, *The Netherlands v Reeds* [1986] ECR-1283.

beyond the legal implication of that term, which embrace rights and obligations which do not exist between unmarried companions". **As** any interpretation by the Court would be **directly binding** on all Member States, and should take into account the situation in the whole Community, the Court held that: "in the absence of any indication of a general social development which would justify a broad construction and in the absence of any indication to the contrary of the Regulation, it must be held that **the term "spouse" in Article 10 of the Regulation refers to a marital relationship only**". However, the **Court** went on and addressed the non-discrimination issue. Article 7(2) provides that in the host State a worker who is a national of another Member State must "enjoy the same social and tax advantages as national workers". **As** the Court had already pointed out that this phrase should not be interpreted restrictively, it held that: "in the same way it must be recognised that the possibility for a migrant worker of obtaining permission for his unmarried companion to reside with **him**, where that companion is not a national of the host Member State, *can* affect his integration in the host state and thus contribute to the achievement of freedom of movement for workers. Consequently, that possibility must also be regarded as falling within the concept of a social advantage for the purposes of Article 7(2) of Regulation 1612/68".

The result of this case is that **Member States which grant foreign unmarried companions of their nationals the right to reside in their territory cannot refuse the same right to companions of nationals of other Member States under Article 7 and 48 EEC and Article 7(2) of Regulation 1612/68.**

The importance of this decision lies also in the fact that Member States can also grant rights of residence to **companions of workers who are of the same sex**, depending on the national legislation of the host country. The question that remains is whether the partner of a lesbian or gay man qualifies under the term "family members" or "spouse" of the worker. However, even if partners of lesbian or gay workers etc. are denied the status of "spouse" under Community law, **they may invoke the right to follow their partner to another Member State if that State grants this right to such foreign partners of its own nationals.** In combination with the principle of non-discrimination laid down in Article 6 EC, nationals of other Member States in that State have the right to be accompanied by their partners as well.

In the 1990 series of directives concerning senior citizens, students and others, there is no equivalent of the "social advantages" criteria of Article 7 of Regulation 1612/68, on the basis of which companions may reside with the person directly entitled to freedom of movement under these directives.

Although the ECJ has not yet revised its rather strict interpretation of the term "spouse" in Regulation 1612/68, it has nevertheless broadened its meaning in other respects. The ECJ has taken a formal view concerning the **dissolution of marriage.** **As** long as it has not been terminated by a competent authority, it has to be considered as still existing, even if the spouses live permanently under different roofs, and even if they intended to divorce.

Thus a marriage, though formally not yet dissolved yet for all practical purposes dead, can still be the basis for a dependent right of the spouse of a worker'. The Council Resolution of 4 December 1997² on measures to be adopted for combatting marriages of convenience sets out a number of factors which may provide grounds for believing a marriage to be one of convenience, such as lack of appropriate contribution to the responsibilities arising from marriage³.

Family members with derived rights of entry and residence within the Community also have a **right to equal treatment**. This includes social and tax advantages under Article 7(2) of Regulation 1612/68/EEC. However, family members must be compared with the members of the family of national workers, not with the national workers themselves. **As** their rights are "derived" and not independent, they are **only** entitled to benefits (such as social security or unemployment benefits) which would be available in a purely "national" situation to the family of a national of the host state. **They are not entitled to the benefits in their own right**.

In 1988 the Commission proposed an amending regulation to Regulation 1612/68⁴. The new Article 10 also includes, apart from the persons already mentioned in the old Article, any other member of the family dependent on or living under the roof of the worker or the spouse in the country **from** which they come. The age of the employees' descendants would no longer be relevant. In the Explanatory Memorandum, the Commission states that one of the objectives of the revision is to cover all descendants and relatives in the ascending line of the worker and his spouse and the dependent collaterals. The aim of the Commission was to take into account the developments which had occurred in **ECJ** case-law in the field of the rights of the spouse and the unmarried partner of the Community worker'.

In 1995 the Commission proposed the abolition from Directives 68/360/EEC and 73/148/EEC the provisions whereby borders within the Community may only be crossed on production of a valid identity document ("Monti proposals"). This would have as a consequence the abolition of border controls at internal borders for the families of employees or self-employed persons (see further point **24.3**).

¹ In *Diatta*, a Senegalese national, married to a Frenchman who lived and worked in West Berlin, was refused prolongation of a residence permit because she lived separately from her husband and intended to divorce him. The **ECJ** considered that the object of the Regulation was to facilitate the freedom of movement of workers under Article 48 EEC and Article 10 of Regulation 1612/68 was instrumental in establishing this freedom. It concluded therefore that "having regard to its context and the objectives which it pursues, that provision cannot be interpreted restrictively. In providing that a member of a migrant worker's family has the right to install himself with the worker. Article 10 of the Regulation does not require that the member of the family in question must live permanently with the worker. A requirement that the family must live under the same roof permanently cannot be implied". See also, case C-370/90 *Singh*, [1992] ECR I-4265.

² OJ C 382/1, 1997.

³ Statewatch, January-February 1998, p.6.

⁴ COM (88) 81 E final SYN 185, OJ C 100/6, 21 April 1989.

⁵ This proposal, which has twice been amended by the Commission (OJ C 119/10, 1990 and OJ C 177/40, 1990) and reviewed by the European Parliament (OJ C 68/88, 1990) and the Economic and Social Committee (CES 404/89 fin.) has not yet been acted on by the Council.

21.2. Opinion of the European Parliament

The European Parliament has reviewed the proposal put forward by the Commission to amend Regulation 1612/68 on freedom of movement for workers within the Community'. The European Parliament has proposed the introduction of two new paragraphs into Article 10 of the Regulation in order to include, among those categories having the right to install themselves with a worker, persons with whom the worker lives in a de facto union recognised as such for administrative purposes. "The right to install themselves referred to in paragraph 1 above shall also cover the person with whom the worker lives in a de facto union recognised as such for administrative and legal purposes, whether in the Member State of origin or the host State, and their dependent offspring".

21.3. Resolution on the harmonisation of national policies on family reunification²

The Resolution was adopted within the ambit of the Third Pillar and, therefore, the principles set out in the Resolution are not binding on Member States nor do they afford grounds for action by individuals.

It applies only to family members of non-EC nationals who are lawfully resident in the territory of a Member State on a basis which affords them an expectation of permanent or long-term residence. Third country nationals present in the territory of a Member State on a short-term basis (i.e. students and persons **admitted** for employment for a fixed term) are outside the scope of this Resolution³. Member States reserve the right to require non-European Union nationals to be lawfully present in their territory for certain periods of time before family members may be reunited with them⁴.

Admission should normally be granted to **spouses, children** between **16** and **18** years old and **children adopted** by both residents'. **Other family members** (children not otherwise qualifying, parents, grandparents and other relatives) are only to be admitted where there are compelling reasons to justify their presence⁶. In order to qualify for admission for the purpose of family reunification, children must not have married or have formed an independent family unit or be leading an independent life. Authorisation for family members to stay may be conditional upon continuing to fulfil the admission criteria⁷. Member States may reserve the right to impose a waiting period of lawful residence before family reunification may be applicable. In accordance with national legislation in each Member State, family members may be authorised to stay on a personal basis, independently from the person whom they joined, and be authorised to work.

¹ OJ C 68/88, 19 March 1990. The Commission's proposal is to be found in COM (88) 815 final SYN 185.

² Ad hoc immigration group, Copenhagen, 1 June 1993 [SN 2828/1/93 WGI 1497. REV 1].

³ Principle 1 of the Resolution.

⁴ Principle 3 of the Resolution.

⁵ Principle 2 of the Resolution.

⁶ Principle 10 of the Resolution.

⁷ Principle 11 of the Resolution.

The Member States reserve the right to determine whether a marriage was contracted solely or principally for the purpose of enabling the spouse to enter and take up residence in a Member State, and accordingly to refuse permission to enter and stay’.

Family members will not normally be admitted to the territory without a visa or other prior written authorisation for family reunion purposes. The application must normally be made while the family member is outside the Member State and will not be issued unless the person fulfils all the criteria of entry and stay’. Family members must in principle have valid travel documents³. There is in addition a national security or public policy provision permitting exclusion⁴. There is no reference to procedural safeguards or rights of appeal. Furthermore, Member States reserve the right to make the entry and stay of family members conditional upon the availability of adequate accommodation, sufficient resources and sickness insurance’.

The Resolution is not **binding** upon the Member States and does not afford grounds for action by individuals. The limited harmonisation measures and restrictions contained in the Resolution have been the subject of criticism⁶.

21.4. Resolution on measures to be adopted on the combatting of marriages of convenience⁷

A marriage of convenience means a marriage concluded between a national of a Member State or a third country national legally resident in a Member State and a third country national, with the sole aim of circumventing the rules on entry and residence of third country nationals and obtaining for the third country national **a** residence permit or authority to reside in **a** Member State.

Factors which may lead to the conclusion that it is a marriage of convenience are as follows: matrimonial cohabitation is not maintained; lack of an appropriate contribution to the responsibilities arising from the marriage; the spouses had never met before the marriage; the **spouses** are inconsistent about their respective personal details and they do not speak a mutually comprehensible language; a sum of money has been handed over in order for the marriage to be contracted; the past history of one or both of the spouses contains evidence of previous marriages of convenience or residence anomalies.

¹ **Principle 4 of the Resolution.**

² **Principle 14 of the Resolution.**

³ **Principle 15 of the Resolution.**

⁴ **Principle 17 of the Resolution.**

⁵ **Principle 16 of the Resolution.**

⁶ **See Boeles P. & Kuijjer A., *Harmonisation of Family Reunification*, Meijers H et al. The argument is mainly that the provisions contained in the Resolution are more restrictive than the relevant provisions in the European Convention on Human Rights and the European Social Charter.**

⁷ **Council Resolution of 4 December 1997 on measures to be adopted for combating marriages of convenience, OJ C 382, 16.12.1997, pp.1-2.**

When there are suspicions that a marriage is one of convenience the residence permit issued only after the competent national authorities have made necessary verifications. In the event that it is proved to be a marriage of convenience, the residence permit will be withdrawn. However, the third country nationals have the opportunity to contest or have reviewed the decision ordering the withdrawal of the residence permit.

22. Employees of companies established in the EC

Where a company, based in the European Community (a company or **firm** which complies with Article 58 of the EC Treaty), provides services in another Member State, and thus exercises its own right to provide cross-frontier services, it may be entitled to use its employees even if they are **not** Union citizens.

According to the case law of the Court of Justice, it would be contrary to Article 59 EC for the host State to require the employer to obtain work permits or to pay social security contributions where they had already been paid in the home State'. The Court, however, deliberately did not extend this principle to include the right of initial immigration into the Community for third country workers, or even the right of free circulation from Belgium into France. The Court stressed both **that the workers were legally resident in Belgium and had work permits there, and that entry visas had been granted to these workers to enter France**. The Court decided that these workers only derived rights as company employees and were not granted individual rights to work in another Member State. Thus, right of entry was not at issue. The emphasis the **Court** places on the temporary nature of the provision of services suggests that the principle should not be extended to cases where the employer operated in another Member State in a permanent way. Member States are not precluded from insisting that their mandatory labour legislation concerning, for example, **minimum wages**, must be extended to those workers who are, thereby, temporarily employed on their territory². This last point relates to the principle of equal treatment. In the light of these observations, it will be seen that, although important, the derived rights of employees of Community undertakings are rather limited in scope and must be seen essentially **as** a corollary to the freedom to provide services enjoyed by the employer rather than as a distinct right of access to employment.

23. Community Agreements with third countries

The **EC** Treaty provides for the conclusion of International Agreements which contain provisions relating to the movement of persons and services.

¹ **In case C-43/93 *Vander Elst***, [1994] **ECR** I-3803, a Belgian construction company was working in France using Moroccan workers who were legally employed and had work permits in Belgium (the home State of the company providing **services**). The Court stated that Community law did not preclude Member States from applying their legislation or collective labour agreements entered into by both sides **of** industry relating to minimum wages to any person who was employed, even temporarily, within their territory, no matter in which **country** the employer was established, **just** as Community law did not prohibit Member States from enforcing **those** rules by appropriate means.

² Case C-113/89 ***Rush Portuguesa***, [1990] **ECR** I-1417. The Court of **Justice** held that in providing services, an **undertaking may** engage its entire **staff**, irrespective of the nationality of individual members, provided that the project which is being **carried out** is **of** limited duration and entailed the departure **of** the persons involved upon its closure. It stressed that any restriction placed on a provider of services with regard to the **staff** he may **use** would put **him** at a disadvantage with regard to national undertakings which also might employ third **country** nationals. However, in the judgement, there was no reference to the rights of the workers concerned during their stay in the country where the contracted activity was to be performed.

Article 238 of the EC Treaty allows the Community to conclude association agreements with one or more States or international organisations. These agreements, together with the decisions of the Association Councils which give effect to the agreements, form an integral part of the Community legal order and the Court has jurisdiction to give preliminary rulings concerning their interpretation. Article 136 of the EC Treaty provides a basis for Community action in relation to the association of Overseas Countries and Territories (OCT). This has not resulted in an agreement with the OCT, but in unilateral action, initially by the High Contracting Parties to the EC Treaty and subsequently by Council Decision. Though not an international agreement, it is closely linked to the Lomé Convention, since many of the OCT countries are also ACP States.

Article 235 of the EC Treaty may also provide a partial basis for international agreements. Partnership and Co-operation Agreements with the Ukraine and Russia have, as far as Community powers are concerned, been based on **Articles 113 and 235** of the EC Treaty. These Agreements are “**mixed agreements**”, concluded both by the Community and the Member States; they cover areas of exclusive Member State competence. These areas include those covered by the Maastricht Treaty provisions on Co-operation in the fields of Justice and Home Affairs. Thus, provisions in the Agreements relating to illegal migration are covered by such cooperation¹.

The Court will have jurisdiction in relation to “**mixed agreements**” where the provisions in question fall within a field covered by the EC Treaties. A provision of such an Agreement or decision of a Council of Association may have direct effect, giving rights to individuals which national courts must protect, **when the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measures**².

Agreements with third countries are “acts of the Community” which create special, privileged links with a non-member country which must, to a certain point, take **part** in the Community system³. They may also create directly effective rights for individuals which national courts have to enforce. However, clauses in international agreements equivalent to those in the Treaty of Rome will not automatically **be** awarded an identical interpretation. Interpretation depends upon the nature and purpose of the agreement⁴. The **Court** may interpret provisions of international agreements granting workers’ rights and rights to social security within the EU, as well as Association Council decisions granting such rights⁵.

¹ See further John Handoll, “Free Movement of Persons in the EU”, Ed. John Wiley & Sons, London, 1995.

² Case **12/86 Demirel v Stadt Schwdbisch Gmund**, [1987] **ECR-3719**, para. 14.

³ **Ibid.**

⁴ Case **181/73 Huegemunn**, [1974] **ECR-449**; Case **104/81 Kupferberg**, [1982] **ECR-3641**; Case **270/80 Polydor**, [1982] **ECR-329**; Case **12/86 Demirel**, [1987] **ECR-3719**.

⁵ Case **C-18/90 Keziber**, [1991] **ECR I-1 19**; Case **C-192/89 Sevince**, [1990] **ECR 1-346**

23.1. Association Agreement on the EEA

The most important Association Agreement is the Agreement on the European Economic Area, which extended the EC free movement rules to the EFTA countries, encompassing the EC Member States and the EFTA States. It was signed in May 1992 and came into force on 1 January 1994¹. With the accession of Austria, Finland and Sweden to the EU in January 1995, the EEA Agreement now regulates the relationship between the EU Member States and Norway, Iceland, and Liechtenstein which entered the EEA in May 1995.

In the EEA Agreement there is **no** provision corresponding to Article 7a of the EC Treaty creating the internal market. Therefore, the abolition of internal border controls implied in Article 7a of the EC Treaty is not required by EEA law between the EFTA countries themselves or between these countries and the EC Member States.

The substantive **rules** in the EEA Agreement and the acts based on this agreement are binding on the Contracting **Parties** and form part of their internal legal order².

As a general rule of the EEA Agreement, **any** discrimination on grounds of nationality is prohibited³.

As far as **free movement of people** is concerned, the EEA Agreement reiterates EC Treaty provisions and secondary legislation on the **free** movement of workers, right of establishment and freedom to provide services.

Therefore, freedom of movement is to be secured among EC Member States and EFTA States. Such freedom is to entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment⁴. Such freedom shall entail the right, subject to limitations on grounds of public policy, public security or public health :

- a) to accept offers of employment actually made;
- b) to move freely within the territory of an EC Member State or an EFTA State for this purpose;
- c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment and
- d) to remain in the territory of an EC Member State or an EFTA State after been employed there⁵.

These provisions do not apply to employment in the public sector. Annex 5 contains specific provisions on the free movement of workers and refers to a number of Community acts relating to free movement of workers.

¹ OJL 1/3, 1994.

² Article 7 of the EEA Agreement.

³ Article 4 of the EEA Agreement. This provision is identical to Article 6 EC Treaty.

⁴ Article 28§2 of the EEA Agreement.

⁵ Article 28§3 of the EEA Agreement.

The **right of establishment** is ensured'. There will be no restrictions on the freedom of establishment of EC Member State or EFTA State national in the territory of any other of these States. **This** freedom is to include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for its own nationals by the law of the **country** where such establishment is effected. Activities connected with the exercise of official authority is excluded from the application of these provisions'.

Similarly, Articles **36-39** provide that there are to be no restrictions on **freedom to provide services** within the territory of the Contracting Parties in respect of EC Member State and EFTA State nationals established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.

A number of other Association Agreements concluded by the Community also include provisions on the free movement of persons. Amongst these, the most significant is the EC/TURKEY Association Agreement. The Agreements with Algeria, Morocco and Tunisia also contain provisions on cooperation in the field of labour. Furthermore, a number of Europe Agreements with Eastern European States have been concluded, or are to be concluded, on the basis of Article **238**. Article **238** also forms the basis for Community participation in the Lome Convention, between the EC and African, Caribbean and Pacific ("ACP") States.

23.2. EEC - Turkey Association Agreement

This was signed in September **1963**, envisaging the eventual accession of Turkey to the EEC, and contains provisions granting freedom of movement to Turkish workers, in stages, between 1 January **1975** and 1 January **1987**³. This objective has been spelt out more completely in the **Additional Protocol of 1970**. Under Articles **36** of the Protocol, freedom of movement was achieved by progressive stages through Decisions of the Council of Association. Article 12 of the Agreement and Article **36** of the Protocol have been held to be merely "programmatic"⁴.

Turkish workers have never been able to benefit from these provisions which, according to the European Court of Justice, merely "**serve to set out a programme and are not sufficiently precise and unconditional to be capable of governing directly the movement of workers**". Therefore, they "**do not constitute rules of Community law which are directly applicable in the internal legal order of the Member States**" but depend on the implementing decisions of the Association Council. Such implementing decisions have been concerned with the rights of Turkish workers already legally resident and employed within the Community without conferring rights of first entry into the Community. Free movement has therefore not only been denied to Turkish workers but also to Turkish nationals in general, since Turkey is on the common list of countries attached to the regulation on visas⁵. However, the three Baltic States, which only signed

¹ Articles 31-35 of the EEA Agreement.

² Article 32 of the EEA Agreement.

³ Article 12 of the Association Agreement with Turkey envisages eventual free movement of persons between the *community* and Turkey following the principles of Articles 48, 49 and 50 of the EC Treaty. Furthermore, Article 36 of the Additional Protocol to the 1963 EEC-Turkey Agreement, signed in Brussels on 23 November 1970, and concluded, approved and confirmed by Regulation 2760 of the Council of 19 December 1972, (QJN C 113, 1973, p.17).

⁴ *Case 12/86 Demirel v Stadt Schwabisch Gmund*, [1987] ECR-3719, para.23.

⁵ *Ibid.*

association agreements in 1995, have been excluded. The relevant provisions in the Agreement itself, and its Additional Protocol of 1970, are not directly effective because they express a general objective rather than a firm, unconditional obligation'. The Association Council has taken two Decisions on the basis of Article 36: Decision no. 2/76 and Decision no. 1/80.

Decision 1/80 of the Association Council contains detailed provisions on employment and free movement of Turkish workers. This Decision essentially grants to Turkish workers free access to employment within a Member State after four years' legal employment in that State. The Decision is therefore based on rights acquired through periods of legal residence. It does not affect the Member State's initial decision to grant a residence and/or work permit, nor does it impose any obligation on any other Member State, no matter how long a Turkish worker has been in the Community. No right of free circulation to other Member States is granted either. There is no definition of the term "**worker**" in the Decision, but in the light of Article 12 of the Association Agreement which expressly invokes Article 48 of the **EC** Treaty, the term should be interpreted in accordance with the case law on the definition of "**workers**" under that provision.

The fact that **entry** into the Member States **remains a matter for existing national law** has repeatedly been accepted by the European Court of Justice. For example, in the *Kus* case, the European Court ruled on the rights of residence of a Turkish worker in Germany, based on Decision 1/80 of the Association Council. The Court accepted that, under current law, the different approaches of the Member States' national laws could give rise to differences in the treatment of Turkish nationals within the Community: "Decision 1/80 does not encroach on the power of the Member States to **regulate the entry of Turkish nationals into their territory** and the **conditions of their first employment**. Article 6 of the Decision only regulates the situation of **Turkish workers who are already duly registered as belonging to the labour force of the Member States**"².

Whenever provisions in the Decisions uphold the right, in clear, precise and unconditional terms, of Turkish workers to enjoy free access to any paid employment of their choice³, after a number of years' legal employment in a Member State, as well as standstill provisions regarding the introduction of new restrictions on access to employment of workers legally resident and employed in the territory of the Contracting States, then these provisions have been held to be directly effective.

¹ In the *Demirel* case, the Court held that Article 12 of the 1963 Agreement and Article 36 of the Additional Protocol essentially served to set out a programme and were not sufficiently precise and unconditional to have direct effect.

² Case C-237/91, [1993] 2 CMLR 887, para. 25. See also case C-355/93 *Eroglu v. Land Baden-Württemberg*, judgement of 5.10.94, para. 10.

³ Article 2(1)(b) of Decision No. 2/76 and the third indent of Article 6(1) of Decision No. 1/80. This means that Turkish nationals who satisfy the requisite conditions may directly exercise the right which these provisions confer upon them, Case C192/89 *Sevince v Staatssecretaris Van Justitie*, [1990] ECR I-3461.

Although Decision 1/80 only expressly confers the right to work, this has been held by the Court to encompass a **right of residence**'. It is clear that the latter also depends on continual employment; a Turkish national, who becomes incapable of work through illness or accident, correspondingly loses the right of residence under the Decision and is therefore dependent on the national law of the State concerned. The Court took the view that "**the provisions of Article 6(2) merely ensure the continuation of the right to employment and necessarily presuppose fitness to continue working, even if only after a temporary interruption**". Former workers who have reached retirement age are also excluded; in the same way as those who are incapacitated, they have "**definitively ceased to belong to the labour force of a Member State**". The Court has thus made it clear that, just as the relevant provision of the EC treaty, Article 48(3), required implementation through legislation such as Regulation 1251/70/EEC, so the right of Turkish nationals to remain in a Member State as employees (for however long) will require further implementing Decisions of the Association Council.

This last point illustrates very clearly that, although rights of residence under the Turkish Association Agreement are among the most extensive of all Community Agreements, they are still firmly tied to the exercise of **economic activity (actual employment)** and are very far from matching the general rights of residence and employment in the Community.

Decision 1/80 also grants certain rights to **members of the family** of legally resident Turkish workers, which have been held to be **directly effective**³. However, neither the Ankara Agreement, nor Decision 1/80 or the Additional Protocol grant further rights of family reunification. Members of the **family who have been authorised to join the worker have a right to employment** (subject to Community preference) after a three-year period of legal residence, and an unrestricted right to employment after legal residence of five years. In addition, **children** of Turkish workers who have completed a course of vocational training in a Member State have the right of access to employment in that State, irrespective of the length of their period of residence, as long as one of their parents has been legally employed in that State for at least three years⁴. The term "**vocational training**" was given the same interpretation as in the EC Treaty'. Although the Decision does not define "members of the family", it can be assumed that in the absence of any restrictive provision, the term will be defined in accordance with Article 10 of Regulation 1612/68/EEC.

¹ In case C-237/91 *Kus*, [1993] 2 CMLR 887, the Court pointed out the close link between the right to employment and the right of residence: "the provisions in question necessarily imply - since otherwise the right granted by them, to the Turkish worker would be deprived of any effect - the existence, at least at that time, of a right of residence for the person concerned". In the *Sevince* case the right of residence had been implied for those legally employed for four years; in *Kus* this was extended to those with only one year's employment.

² *Case C-434/93 Bozkurt*, [1995] ECR I-1492.

³ Article 7 of the Decision.

⁴ Article 7§2. Furthermore, in *Eroglu v. Land Baden-Wurttemberg*, the Turkish daughter of a Turkish long-term legally employed worker in Germany, who had a residence permit for the purpose of studying in Germany, was able to rely on this directly effective provision.

⁵ *Case 293/83 Gravier*, [1985] ECR-593.

As regards conditions of work and remuneration, Article 37 of the 1970 Additional Protocol to the EEC/Turkey Agreement provides that the rules applied to workers of Turkish nationality employed in the EC shall not be discriminatory on the grounds of nationality between such workers and workers who are nationals of other Member States of the Community.

However, the exclusive competence of the Member States in this field was challenged, when the power of the Commission to regulate the legal status of certain categories of third country nationals was examined by the Court of Justice.

In the Demirel case, the Court rejected the argument that the EEC Treaty does not provide for a competence to regulate the entry and stay of nationals of States associated with the EEC. Article 238 EEC is interpreted **as** implying a competence to extend market freedoms to nationals of associated States.

23.3. Euro-Mediterranean Partnership Agreements

A Euro-Mediterranean Partnership Agreement has been signed with Algeria¹, Morocco² and Tunisia³. The provisions concerning workers are limited to questions of equality of treatment in relation to conditions of **work and social security**⁴ and the relevant provisions also have direct effect. They do **not** contain any provisions in relation to entry into the Community or access to employment. The provisions of the Agreements do not affect rights or obligations arising from bilateral agreements between the Member States and these countries where these agreements provide for more favourable treatment.

23.4. Europe Agreements

The Europe Agreements are Association Agreements concluded with some of the States of Central and Eastern Europe: Bulgaria⁵, the Czech Republic, Estonia, Hungary⁶, Latvia, Lithuania, Poland⁷, Romania⁸, the Slovak Republic and Slovenia. These Agreements have been concluded taking into account the process of adjustment to the conditions of a fully-fledged market economy and are seen **as** allowing the participation of these States in European integration, with the eventual goal of full EU membership. The Agreements deal with each of the four freedoms; however, their provisions on the movement of workers **are rather limited**. Title IV contains provisions on movement of workers, establishment and supply of services. In contrast with the EC Treaty itself or the EEA Agreement, **there is no mention of "freedom" in a common area**. At the most, reference is made for firms, which already benefit from the right of establishment,

¹ OJ L 263/2, 1978.

² OJ L 264/2, 1978.

³ OJ L 265/2, 1978.

⁴ Article 38 of the Agreement with Algeria; Article 41 (1) EEC/Morocco Agreement. Case C-18/90 *Office national de l'emploi (Omen) v Kziber*, [1991] ECR I-199; Case C-58/93 *Yousfi v Belgium*, [1994] ECR I-1353.

⁵ OJ L 358/3, 1994.

⁶ OJ L 347/2, 1993.

⁷ OJ L 348/2, 1993.

⁸ OJ L 357/2, 1994.

to have the right to employ, in the territory of a Member State, directly or through one of their branches, nationals of their country of origin, provided that they already form part of their key personnel'. No rights of entry into the Community are given, the prerogatives of the Member States in controlling immigration are maintained, and existing bilateral arrangements preserved. Indeed, some of the Associated States are included on the list of third countries whose nationals require a visa when crossing the Member States external frontiers². Nothing in the Agreement prevents the Parties **from** applying their laws and regulations regarding entry and stay, work, labour conditions and establishment of natural persons and supply of services, provided that this does not impair the benefits accruing to any **Party** under the terms of a specific provision of the Agreement³. The Agreements provide that, subject to conditions applicable in each Member State, the treatment of these workers will be **free of discrimination** as regards working conditions, remuneration or dismissal⁴. The legally resident **spouse and children** of such a worker (with certain exceptions) shall have access to the labour market of that Member State during the worker's authorised stay of employment. The notion "children" is to be defined in accordance with the national legislation of the host country.

In a joint declaration annexed to the Agreement, the concept "**conditions and modalities applicable in each Member State**" is understood to include Community rules where appropriate. The Member States keep their competences as to the entry into and stay on their territories of workers and their family members. The powers of the Association Council are limited to making recommendations (not decisions) for improvements to the movement of workers during the second stage of the Agreement. The Europe Agreements do, however, contain more extensive provisions in relation to equality of treatment for those in legal employment.

23.5. Partnerships and Cooperation Agreements

A series of Partnerships and Cooperation Agreements have been concluded with many of the States of the former Soviet Union (Russia, Ukrainian, Kazakhstan, Kyrgyzia, Moldova, Belarus). They do **not** encompass free movement of persons as such: the long term objectives of the Agreements cover (inter alia) the future establishment of a free trade area (without any firm deadline), "**as well as conditions for bringing about freedom of establishment for companies, of cross border trade in services and of capital movements**". Unlike the Europe Agreements, there is **not even** a chapter on "**Movement of Workers**". The EC - Russia Partnership and Cooperation Agreement expressly states that (apart from limited rights under the "key personnel" provision and limited rights **as** service providers) **no rights are given under the Agreement to enter or stay in the Community**. However, it contains provisions concerning the **equal treatment** of these workers (subject to the laws, conditions and procedures applicable in each Member State), as regards working conditions, remuneration or dismissal, as compared to the Member States' own nationals.

¹ See, "Employees of companies established in the EC", point b.

² Regulation 2317/95, OJ L 234/1, 1995. The list in the Annex includes Bulgaria and Romania.

³ Article 58§1 of the Agreement with Hungary.

⁴ Articles 37-43 of the Agreement with Hungary.

Family members are to be defined in accordance with the host country national legislation'. The conclusion **is** that questions of initial immigration of third country nationals into the European Community are still within the competence of Member States, subject to coordination and common action under the Treaty on European Union. The EC will have competence where the operation of the internal market is **affected**, as where family rights are linked to an exercise of the right of free movement by a Union citizen.

23.6. The Fourth ACP/EEC Convention

The Fourth ACP/EEC Convention contains **no provisions on movement of workers**². There are, however, two Joint Declarations relevant to free movement :

- the Joint Declaration on ACP migrant workers and ACP students in the Community and
- the Joint Declaration on workers who are nationals of one of the contracting Parties and are legally resident in the territory of a Member State or an ACP State.

Each Member State **shall** accord to workers, who are nationals of an ACP State, legally employed in its territory, treatment **free from any discrimination** based on nationality, as regards working conditions and pay, in relation to its own nationals.

In conclusion, it **can** be said that those third country nationals who have been allowed entry into one Member State then have a limited right to travel within the Community. The only Agreement to grant directly effective rights of entry into the EC is that of the EEA. There is no a general right of **free** circulation under Community law at present for third country nationals even if they legally resident in one Member State, unless they have a derived right as a family member or are moving between countries operating the Schengen Agreement.

24. The "Monti Proposals"

According to the present situation within the European Union, a third country national who is lawfully in the territory of one Member State can travel to a point in the internal market situated in another Member State only under the conditions and in accordance with the procedures laid down by that other Member State. In particular, the nationals of a large number of third countries are required to obtain, in advance, a visa from the authorities in each of the Member States they intend to visit or through which they intend to pass.

This situation was not changed by either the Directives adopted at the beginning of the nineties, which refer **only to Union citizens**, nor with the Regulation determining these third countries whose nationals must be in possession of a visa or by the Convention on controls on persons crossing the External Frontiers of the Member States (External Borders Convention) as these instruments concern **only the crossing of Members States' external frontiers**.

Hence a third country national who needs a visa to cross an external frontier of a Member State will be able to cross that frontier-if the other entry conditions are met-on the strength of a residence permit or a visa issued by another Member State.

In the case of travel within the Community, a comparable measure is lacking. If this situation remains unchanged, a person who is a national of a third country, for which the Member State he intends to visit requires a visa, will continue to be required, prior to his departure, to take the

¹ **Family members are not included in the EC/Ukraine Agreement.**

² **The Convention was signed on 15 December 1991, OJ L 229/3, 1994.**

steps necessary to obtain a visa from another Member State, even if he is a member of the family of a Union citizen. This state of affairs is quite illogical: on the one hand, under the instruments referred to above, a person could enter the territory of a Member State on the strength of a residence permit or a visa issued by another Member State if he comes directly from a third country; on the other hand that same person would not be entitled to enter the territory of the Member State in question if he were lawfully coming from another Member State of the Union.

As a direct consequence of the disparity between national laws and the lack of coordination between them, some intra-Community trips **are** not made. Thus, one of the objectives of the internal market, that consumers should be able to obtain goods for their own use from wherever the terms seem to be the most favourable to them, is not fully operated. In view of the large number of third country nationals lawfully resident in the Community, this situation is bound to have a strong economic impact. The same applies to the provisions concerning free movement of services within the Community. **As** it is often easier for a third country national who lives in a Member State to visit his home country rather than another Member State, the tourist industry undoubtedly suffers as a result.

The current situation is also an obstacle to the provision of services by Community businesses and companies employing third country nationals. When such a business has the opportunity to provide a service in a Member States other than that in which it is established, it will either have to suffer the consequences of the visa requirement or not to be able to have the work carried out by those of its employees it would normally have sent. Either way, it will come up against an obstacle to its freedom to provide services.

The lack of coordination between Member State laws on the entry of, and short stays by, third country nationals in their territory is one of the main reasons why controls on persons at internal frontiers are being maintained for the time being in respect of such nationals and, consequently, in respect of Union citizens.

In its work programme for 1995, the Commission announced its intention of presenting three additional proposals with a view to attaining the objective set out in Article 7a of the EC Treaty in the field of the free movement of persons. On July 1995, the Commission adopted the three proposals **en bloc**. These proposals constitute part of the body of legislation aimed at ending controls on persons at the Union's internal borders and, together with the other measures already adopted or still being discussed, they will enable that objective to be attained without restriction.

The background to the submission of these proposals was the initiation of legal proceedings by the European Parliament in **1993** against the Commission under Article 175 of the EC Treaty, as a result of the latter's failure to submit proposals concerning the free circulation of individuals in the European Union as provided for in Article 7a of the EC Treaty.'

¹ **Case C-445/93, European Parliament v European Commission, [1994] QJ C 1/24.**

The three proposals for Directives are:

- Proposal of the Commission for the right of third country nationals to travel within the Community - COM (95) 364 final
- Proposal of the Commission for a Council Directive on the elimination of controls on persons crossing internal frontiers - COM (95) 0347
- Proposal of the Commission for a European Parliament and Council Directive amending Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families and Directive 73/148/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services - COM (95)348 final

In putting forward these proposals, the Commission has paid due regard to the legitimate expectations of both the European Parliament and citizens of the Union. **As** the Commission has also pointed out on several occasions, the completion of the internal market requires, in principle, that all **persons** who are lawfully in one part of that market should have the right to move to other parts, and that such movement should not be subject to controls when the internal frontiers of the market are crossed.

Distinction must be made between **external and internal frontiers for third country nationals**. The external frontier is governed by the Member States' immigration laws, which unfortunately are not yet harmonised or coordinated. It is within the **internal frontiers** that the proposals provide for a limited right to free circulation.

24.1 Proposal for a Council Directive on the right of third country nationals to travel in the community

The object of the proposal is to harmonise national provisions concerning the right of third country nationals lawfully resident in a Member State to travel and to remain within the territory of the other Member States of the Union for the purposes of a short stay or transit, without being required to obtain a visa from that State.

In the absence of this Directive, an individual could cross an internal frontier into a Member State if he possesses a visa or residence permit issued by another Member State. Once this Directive is implemented, third country nationals can cross frontiers without being checked. They must, however, fulfil the requirements set out in the national legislation of the Member State they enter.'

The right to travel must be granted **only to third country nationals who do not already have a right of entry and residence (whether short or long duration) in the territory of another Member State**, Union citizens' family members, whatever their nationality, already have a right of entry and residence when they accompany the Union citizen to whom they are related. Other third country nationals are covered by agreements between the European Community and its Member States and third countries which already confer on them a right of entry and residence. Therefore, the Directive provides that its provisions are without prejudice to rights of entry and

¹ The Directive is based on Article 100 EC Treaty (since its content is covered by the powers of the Community, the proposal cannot form the subject matter of a Council measure under Article K.3.

residence already conferred on certain categories of third country national.' Under this Directive, third country nationals who are related to Union citizens will have an independent right of entry for a short stay. Under Community law as it now stands, Member States may impose a visa requirement on family members who are third country nationals. By the present proposal, in conjunction with existing Community law, Member States will no longer be able to impose a visa requirement on family members holding a residence permit issued by a Member State.

It should be stressed that this proposal for a Directive concerns **only entry into and movement in the territory of the Member States by persons who are already lawfully in the territory of a Member State.**

The proposal is without prejudice to national/Community provisions on third country nationals' rights of establishment or access to employment. The proposal does not give third country nationals the right to seek/take up employment in the Member States and **it would not affect the first entry into the Community of a non-Union national** or the decision of a Member State to authorise him to remain in its territory for a long stay or to permit him access to the labour market or to selfemployed activity. Its provisions will govern the case of a third country national who is legally resident in "X" Member State but who wishes to travel to "Y" Member State. At present this type of journey is governed by different national provisions, (even for a short period in the territory of a Member State), most of which require third country nationals to obtain visas before travelling, even though the third country national is legally present on the territory of another Member State. Accordingly, the Commission's proposal requires Member States to grant third country nationals legally present on the territory of one Member State (the proposal does not apply to illegal immigrants) the right to travel to another Member State, provided they satisfy certain criteria.

"Right to travel" is the right to cross **internal** Community borders and to remain in the territory of a Member State for a short stay, or to travel onward, without the person concerned being required to obtain a visa from the Member State or States in whose territory the right is exercised²; the crossing of external borders is governed by the External Frontiers Convention and by the Visa Regulations. This definition makes it clear that the right to travel is exercised without the persons concerned being required to obtain a visa from the Member State or States in which they wish to exercise the right.

The Directive defines the terms **"residence permit"**, **"visa"** and **"third country national"**. Accordingly, residence permit means any document or authorisation issued by the authorities in a Member State which permits a person to reside in that Member State, and which appears on the list referred to in Article 3(4)³. **"Visa"** means a visa that is valid throughout the Community and which is mutually recognised for the purpose of crossing the external frontiers of the Member States⁴.

¹ **Article 1(2) of the proposal.**

² **Article 2(1) of the proposal.**

³ **Article 2(2) of the proposal.**

⁴ **Article 2(3) of the proposal.**

The mutual recognition of visas applies only to visas valid throughout the Union, i.e. visas issued in accordance with the issue criteria harmonised by the External Frontiers Convention'. "**Third country nationals**" means any person who is not a citizen of the Union within the meaning of Article 8(1) of the EC Treaty. Therefore, the concept also covers stateless persons.

Third country nationals who hold a residence permit issued by one of the Member States can travel in the territories of the other Member States for a **maximum period of three months** and must meet the following criteria:

- must be in possession of a valid residence permit and a valid travel document;
- must have sufficient means of subsistence, both to cover the period of the intended stay or transit and to enable him to return to the Member State which issued the residence permit, or to travel to a third country into which he is certain to be **admitted**.³

A person who exercises his right to travel may be expelled if he does not meet the above mentioned requirements or if he represents a threat to **public order or public security** in the Member State in which he exercises his right to travel, or to its international relations⁴.

Persons subject to a visa requirement in **all** Member States can exercise their right to travel on the basis of a visa valid throughout the Union issued by a Member State. Another Member State cannot require such a person to be in possession of a visa issued by its own authorities, in order for him to be able to cross internal frontiers and stay for a short time in its territory. Such persons can travel during the period of the length of stay permitted by their visas. The conditions ~~for~~ exercising the right to travel are the same **as** those **imposed** on persons holding residence permits⁵.

Third country nationals who are exempted from visa requirements by **all** Member States can travel in the territories of all the Member States for a **total of not more than three months within a period of six months from the date of first entry**⁶. **Those who wish to remain in a Member State for a total of more than three months within a six-month period are as a rule obliged to apply for a residence permit.**

Third country nationals, on whom only **some** Member States impose a visa requirement, will have their right to travel without a visa restricted only to the territories of those Member States which have exempted them from the obligation to hold a visa.

¹ The External Frontiers Convention provides for various types of visa depending on the extent of their territorial validity: there are visas valid for the whole Community; and there are visas whose territorial validity is limited to the territory of the Member State which issued them. Such visas may be issued for humanitarian reasons to a person who no longer meets the requirements for the issue of a uniform visa. ~~By~~ its very nature, such visas do not justify the granting by the other Member States of the right to travel.

² Article 2(4) of the proposal.

³ Article 3(1) of the proposal.

⁴ However, as a result of the abolition of controls at the internal frontiers, compliance with the requirements of Article 3(1) cannot be verified at these frontiers. The verification *can* only take place when the competent authorities carry out inland controls.

⁵ Article 4(1) of the proposal.

⁶ ~~This restriction stems~~ from the duration of a short stay as defined by the laws of most Member States and by the Visa Regulations and the External Frontiers Convention.

If such persons have obtained visas, the right to travel extends to the territories of all the Member States, on condition that the right to travel extends to the territories of all Member States. The length of stay in the territories of the Member States which require a visa is limited to that permitted by the visa¹.

The right to travel is granted **as** an accompanying to the opening up of internal frontiers. However, the abolition of controls on persons at internal frontiers does not mean that Member States may not retain or introduce in their territories a system for checking on the presence of persons in their territories. Therefore, Member States may require persons exercising the right to travel to report their presence in their territories¹.

The External Frontiers Convention does not confer a right of entry into the territories of the Member States to persons holding a visa issued by one of the Member States still to be recognised by the others. A visa does not confer a right of entry; when crossing the external frontiers, the visa holder is subject to a control designed to ensure that all the conditions for access to the territory are met. If that is not the case (e.g. if he does not have sufficient means of subsistence), the visa is annulled and its holder is turned back. On the other hand, this Directive confers a right to travel—albeit subject to certain conditions—on third country nationals who are lawfully in the territory of a Member State for a short stay. The persons concerned will have to undergo a thorough control, in accordance with the External Frontiers Convention, when they enter the Union.

According to the Commission's explanatory memorandum, this Directive would be a considerable step forward in the treatment of non-Union nationals who are lawfully resident in a Member State and who wish to travel in the Community, and of non-Community members of the families of Union nationals. The fact that a considerable number of people will be able to travel freely within the European Union without being subject to formalities, will give a boost to the tourist industry and to the cross-frontier purchase of goods.

Although a right to travel is being granted to third country nationals, a number of important conditions attached to it concerning e.g. residence permits and reporting obligations, have not been harmonised. Article 5 holds that third country nationals exercising their right to travel may be required to report their presence in Member States' territories. Moreover, the Member States decide what documents they regard **as** equivalent to residence permits. The Commission will then publish **a** list of the documents in the Official Journal of the European Communities.

The sole effect of eliminating controls at frontiers as envisaged in this proposal is to give concrete form to "the right to travel". However, it is not clear from Article **3** whether such nationals may spend consecutive periods of three months in all Member States of the EC. The right to residence, however, remains subject, if not to being in paid employment, then certainly to taking out adequate sickness insurance and having a sufficient income.

The abolition of controls at the internal frontiers does not automatically grant the right to cross the internal frontiers to everyone wanting to do so. Pursuant to the EC Treaty, it is common practice to lay down conditions and rules which often depend on the purpose for which frontiers are crossed.

Member States are still able to record migration movements and, to some extent at least, pursue their own policies in respect of third country nationals. The reporting requirements can be seen

¹ **Article 4(3) of the proposal.**

² **Article 5 of the proposal. It is clear that, in the light of the objective of Article 7a of the Treaty, Member States may not require the persons concerned to report their arrival at internal frontiers.**

as resulting from a desire to monitor the movements of third country nationals. But there must be a requirement associated with the objective. Unless national security is at risk, such registration is only necessary if a third country national will be spending more than one month in one place.

It needs to be stressed that the Commission's proposals have nothing whatsoever to do with immigration policy. **In all cases they are concerned with short stays, where either a visa is granted or there is no need for a visa, or there is an existing right of residence within the Community.**

24.1.1, Opinion of the European Parliament

The EP approved the proposal with its Resolution of 23 October 1996¹, subject to amendment². The European Parliament insists that the **free** movement of persons is laid down by the Treaty and therefore it cannot be made dependent on accompanying measures. The European Parliament stresses that the registration of third country nationals exercising their right to travel should not be subject to more stringent requirements than those applying in comparable situations to EU citizens. Therefore, it specifies that the maximum duration of "**stay for a short time**" means a stay of not more than six months. The initial proposal of the Commission to make the right of third country nationals to travel within the Community conditional upon the existence of sufficient means of subsistence, was rejected by the European Parliament in plenary session. A further amendment concerns the right of visa holders to travel. According to the EP, the existence of different categories of visa holders complicates the measure and it therefore suggests deletion of that category of third country nationals who are subject to a visa requirement in a number of Member States only. The European Parliament restricts the obligation of the persons who travel to register in the territories of the Member States only to those third country nationals who intend to stay more than one month and reside at a **fixed** address during this period. The EP also specifies that the Member States shall readmit persons to whom they have issued the last known residence permit and the most recent valid visa. Finally, the Resolution reiterated that Member States undertake to adhere strictly to the provisions of the European Convention on the Protection of **Human** Rights and Fundamental Freedoms and not to expel to another Member State persons who should be afforded protection in their State on the basis of the Convention.

24.1. Proposal for a Council Directive on the elimination of controls on persons crossing internal frontiers

The scope of the Directive would be to establish the general rule that all persons, irrespective of their nationality, shall be able to cross Member States' frontiers within the Community at any point without such crossings being subjected to any frontier control or formality³. However, **only frontier controls and formalities** are banned. The elimination of controls will not affect the exercise of the Member States' general powers of law enforcement, conferred to the competent authorities by each Member States' national legislation over the whole of its territory, including a possible obligation for individuals to possess or carry certain documents⁴. These powers must be exercised without discriminate between domestic and cross-border traffic: powers to impose

¹ OJ C 306/62, **18.11.96**.

² **The EP adopted the report** drafted by Mr. Milan Linzer on the Commission proposal by 352 votes to 31, with 92 abstentions, on 23 October 1996.

³ **Article 1.1.**

⁴ **Article 1.2.**

controls or penalties which were exercised only on the occasion of, or in connection with, the crossing of an internal frontier would be contrary to Article 7a EC Treaty'. A Member State, faced with a serious threat to public policy or public security, is permitted to reinstate frontier controls for a maximum period of 30 days. It is obliged, however, to immediately notify the Commission and the other Member States. In the case that the threat lasts more than the initial period of thirty days, the Member State concerned may maintain the controls for a renewable periods of thirty days maximum, after consultation with the other Member States and the Commission'.

A "**Member State's frontier within the Community**" for the purposes of the Directive would be defined as the Member States' common land frontiers, the airports for intra-Community flights and the seaports for intra-Community sea crossings³. The concept of common land frontiers covers rail or road terminals for links by bridge or tunnel between Member States, despite the fact that such terminals are not always close to the frontier and may be located some distance inland.

"**Frontier control or formality**" means any control applied, in connection with or on the occasion of the crossing of an internal frontier, by the public authorities of a Member State or by other persons under the national legislation of a Member State. It also applies to any formality imposed on a person crossing an internal frontier and to be fulfilled on the occasion of such a crossing⁴. The public authorities are not, for example, entitled to require persons crossing an internal frontier to produce travel documents or to question them on the purpose of their journey, their means of subsistence, etc. Member States must repeal any national measures which require persons such as carriers to apply controls in connection with crossing an internal frontier⁵. These objections only concern frontier controls applied under the rules on carrier liability and not the other identity checks which could be performed by carriers, e.g. on the use of travel tickets issued to a named individual and also in domestic transport. Nor does this Directive preclude checks performed on persons boarding means of transport by Member States or by carriers with a view to ensuring the safety of persons and goods during transport.

However, the Commission, in its explanatory memorandum, wishes to make the date of entry into

¹ For example, a check on identity papers or travel documents (in a Member State where such checks fall within the remit of the police) carried out a few miles inland of the internal frontier, at a point on a motorway where there were no entrance or exit roads between it and the frontier, would thus be discriminatory and would have to be regarded as a frontier control in disguise.

² Articles 2.1. and 2.2. The existence of a general risk (e.g. that of illegal immigration) is not sufficient to justify reliance on the safeguard clause. The other accompanying measures normally provide an appropriate response to such risks.

³ Article 3.1. The definition of intra-Community flights is that given in Article 2(3) of Council Regulation (EEC) no. 3925/91 of 19 December 1991 concerning the elimination of controls and formalities applicable to the cabin and hold baggage of persons taking an intra-Community flight and the baggage of persons making an intra-Community sea crossing. The definition of intra-Community sea crossing has been taken from Article 2(5) of Council Regulation (EEC) No 3925/91.

⁴ An example of such a formality would be the obligation on persons taking intra-Community sea crossings to complete boarding or landing cards.

⁵ The objections expressed in the Directive against rules on carrier liability are levelled only at their application to intra-Community travellers and not at their application to travellers coming from non-Member countries. The Convention on the crossing of external frontiers regards this system of penalties as a necessary accompanying measure, imposing on Member States the obligation to introduce penalties for carriers who convey, by air or by sea, non-Community nationals not in possession of the requisite travel documents from a non-Member country to their territory..

force of the abolition of intra-Community controls dependent on the prior implementation of a number of other, third pillar lateral measures. These "**accompanying measures**" are considered essential in order to maintain a high level of security in the area without internal borders and the Commission would like them to be implemented as soon as possible. They include 1) the **Dublin Convention** of 15 June 1990, determining the State responsible for examining applications for asylum lodged in one of the Member States, 2) the **draft External Frontiers Convention**, 3) the **proposal for a Regulation determining** the third countries whose nationals must be in possession of a visa when crossing the Member States external borders, 4) the **Council Regulation** laying down a uniform format for visas, and 5) the **draft Convention on a European Information System**.

For all these accompanying measures, unanimity is required, making their adoption even more problematic. 31 December 1996 was set as the deadline for the Member States to transpose the Directive. At this time, among the accompanying measures that have been adopted are the two 'Visa Regulations' and the Dublin Convention. As far as the External Frontiers Convention is concerned, this has been blocked because of the disagreement between Spain and the United Kingdom over **Gibraltar** and the issue of the Court of Justice's competences in the interpretation of the Convention's provisions.

Furthermore, the political unwillingness of some Member States to eliminate internal borders controls has made adoption of the Directive even more unlikely. The British Government has already said that it will vote **against** the proposal, therefore rendering the adoption of the Directive impossible, since its legal basis is Article 100c, where unanimity is required for adoption².

Moreover, France, a member of the Schengen Convention, has invoked Article 2 of the Schengen Agreement, maintaining internal border controls with Belgium, due to drug traffic from The Netherlands and Belgium. Therefore, it seems unlikely that France will lift internal border controls.

24.2.1. *Opinion of the European Parliament on the proposal of the Commission for a Council Directive on the elimination of controls on persons crossing internal frontiers*

In its Resolution of 23 October 1996, the European Parliament approved the fundamental principle of the elimination of controls on persons crossing internal frontiers independent of their nationality and with no distinction being made or discrimination being shown regarding benefit to the right of **free** movement of persons, whether they be citizens of the Union or legal residents³. The Resolution reiterated that Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this directive as soon as possible after their adoption at national level and not later than 31 December 1996. Moreover, Member States shall inform immediately the Commission, the European Parliament and the other Member States of the measures which they adopt with a view to the free movement of persons, in addition to those actions taken to reinstate controls at their frontiers within the Community in the event of a real and serious threat to public policy or public security. The European Parliament is also of the

¹ Council Regulation 2317/95 (OJ L 234/1 of 3.10.1995) and Council Regulation 1683/95 (OJ L 164/1 of 14.07.1995).

² According to the article 100c: "The council, acting **unanimously** on a proposal from the Commission and after consulting the European Parliament, shall determine the third countries whose nationals **must** be in possession of a visa when crossing the external borders of the Member States".

³ OJ C 347/61 of 18.11.96.

opinion that the Commission must report on the application of the directive to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, no later than one year after the implementation of the directive and every two years thereafter.

- 24.3 Proposal for a European Parliament and Council Directive amending Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families and Directive 73/148/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and provision of services

This proposal is designed to bring existing legislation on the rights of entry and residence of different categories of Union citizens into line with the abolition of internal frontier controls and Article 7a EC Treaty.

Directives 68/360/EEC and 73/148/EEC have already abolished most of the restrictions on movement and residence within the Community for Member State nationals and their families as regards both taking up and pursuing employment as well as establishment and the provision of services. However, the second sentences of Articles 2(1) and 3(1) of these Directives did not affect the Member States' right to require an identity card or passport to be shown by persons entering their territory. This proposal therefore aims to remove from the above-mentioned Directives the provisions whereby internal borders may only be crossed on production of a valid identity document. However, according to Article 3.3 of the proposed Directive, Member States may require persons concerned to be in possession of a valid identity card or passport, if necessary bearing a visa, when they exercise their right of free movement. Although the creation of frontier-free area means that crossing internal frontiers no longer gives rise to the need to produce an identity document, the exercise of the right of free movement nevertheless presupposes that the person concerned is in possession of a valid identity document, which is notably required for the issue of a residence permit.

The abolition of border controls at internal borders applies not only to employees and self-employed persons and their families, but also to all other beneficiaries of freedom of movement, such as pensioners and students, since the Directives that cover these persons' refer specifically to Articles 2 and 3 of Directive 68/360/EEC.

24.3.1. *Opinion of the European Parliament on the suppression of identity controls at internal frontiers*

In its Resolution of 23.10.96², the European Parliament deleted the amendment proposed by the Commission in Article 3(3) of both Directives, which stated that:

"Member States may require the persons referred to in Article 1 to be in possession of a valid identity card or passport, if necessary bearing a visa, when they exercise their right of free movement",

and it proposed the insertion of a new paragraph 3a, reading:

"The provisions of this Directive must be interpreted as meaning that family members are granted the same rights, whether they are citizens of the Union or citizens of a third country".

¹ **Directive 90/346/EEC of 29.06.1990 (OJ L 180, 13.7.1990,p.26); Directive 90/365/EEC of 29.06.1990 (OJ L 180, 13.7.1990,p.28); Directive 93/96/EEC of 29.10.1993(OJ L 317, 18.12.1993,p.59).**

² **OJ C 347/59 of 18.11.96**

25. Recent Commission initiatives

25.1. "Veil Report"

The **High** Level Panel on free movement, chaired by Mrs Simone Veil, was set up by the Commission **in 1996** with the aim of finding out the remaining obstacles faced by European Union citizens in the exercise of their right to free movement, residence and work within another Member State of the Union and also obstacles based in the exercise of the rights accompanying the right to move freely, i.e social rights, rights of family members, their tax and financial status and cultural rights.

The **Final** Report of the High Level Panel (known also as the "Veil Report") on free movement of persons was presented to the Commission on 18 March **1997**. In addition to the obstacles it uncovers, it includes 80 recommendations for initiatives which should be taken in this field in order to make it easier for people to enjoy their rights in practice.

According to the information given on the number of people moving around the Union, there are about **5.5** million European citizens resident in another Member State, a considerably small percentage of the **370** million **EU** citizens overall. There are additionally about 12.5 million third country nationals established on a long-term basis within the Member States.

As a general conclusion, the report emphasises that over the last decades, free movement of persons **has** become to a large extent a reality'. However, the Panel Group admitted that, almost 25 years after the end of the transitional period in **1970** there are still a number of restrictions and obstacles to free movement within the Community. The report specifies that many of the difficulties encountered by migrant workers do not arise from the rules directly governing the free movement of persons but also from other reasons. It considers that problems also arise from obstacles in fields of Community competence different from this type of free movement (i.e. free movement of goods and services, social security, taxation), from the incorrect transposition of Community legislation into the different national legal systems and to the different attitudes which each Member State shows in issues related to society, i.e. a person's civil status. Mrs Veil, in presenting the results of the Report to the European Parliament, specified that the High Level Group reached the principle conclusion that it would be more practical and more sufficient to have recourse to mutual recognition of diverse national practices rather than try to harmonise them through a directive*.

¹ "Veil Report", p.89.

² Agence Europe, 25.9.1997, p,12.

25.1.1. Obstacles to the right of free movement

Existing obstacles have been reported as mainly concerning the following:

- a. **Right of entry and residence:** internal border checks have not been entirely removed; there is bureaucracy and waste of time, with all the costs that these entail, in issuing residence permits; the Member States requests to issue temporary residence permits for the category of Union citizens which resides in their territory for an undetermined period of between three months and one year; the problem that some Member States overlook the fact that the issue of a residence permit is only a formal expression of the right of residence and therefore treat with expulsion Union citizens who neglected to ask for a residence card; the requirement of proof of sufficient resources although, by virtue of well-established case law, the activity of an EC worker has only to be real and affective and the remuneration can always be supplemented by social security benefits in the host Member State; problems arising due to the language in which the documents needed for issue residence permits have to be submitted.
- b. **Access to employment:** the lack of information on available jobs in other Member States, insufficient Community legislation regulating the different professions, the reluctance and obstruction of some Member States to fully implement the relevant Community Directives adopted regulating specific professions, obstacles regarding access to and employment in the public sector, **insufficient** existence of a general Community system of recognition of diplomas and **qualifications** especially in relation to diplomas acquired by Community citizens in non-EC countries, unharmonised national legislations regarding labour, social protection and taxation systems; inadequate knowledge of foreign languages both by workers and employers.
- c. **Social rights and family status:** lack of common conditions for payment of benefits; there is no harmonisation of schemes and there are still many pre-retirement benefits which are not transferable, the cross-border health system is rather inadequate; third country nationals and special schemes for civil servants are still not covered by Regulation 1408/71; social assistance benefits are not exportable; the term "spouse" does not cover the case of unmarried couples; obstacles still exist on the issue of family reunification and the application of Community legislation in the area of social advantages; finally, many problems arise from incorrect application of Community law.
- d. **Taxation and financial status:** primarily there are obstacles related to direct taxation and the elimination of the double taxation situation; the existence of gaps in the network of bilateral agreements, interaction between tax and social security systems, indirect discrimination in cross-frontier situations, problems also arising due to the requirement lawfully imposed by the Member States for declarations regarding the importation or exportation of capital.
- e. **Cultural rights:** problems arise in different fields of Community competence concerning the cultural rights of EU citizens. Regarding the right of **free** movement, problems arise in the case of artists, in the field of education and vocational training and the free movement of researchers, trainees and voluntary workers. These obstacles mainly occur due to the fact that the exercise of the right to move freely depends on the possession of adequate resources and health insurance.

25.1.2. The Veil Report and third country nationals

The Report mainly focuses on the right of EU citizens to move and be resident within the Member States of the Union. The rights of third country nationals are not covered to a great extent, since they lie outside the competences of the Community, though mention has been made of certain categories of third country nationals who have some kind of link with Community law, i.e. third

country nationals who are family members of EU citizens, workers for a Community **firm** supplying services, refugees, stateless persons and third country nationals associated with the Community through an external agreement.

Family members of EU citizens still face problems regarding their right to live together with their spouses, to initially enter the territory of a Member State, to remain within the territory of the Member State where they were hitherto resident in the event of a divorce and their right to take up a professional activity **as** a self-employed person in the host Member State. Recommendations made aiming at improving the situation of family members include the extension of the right of residence to other members of the family, such as descendants over 21 years old, and to relatives in the ascending line who are not dependent on the spouses (subject though to the condition that the family group had already been formed in the home Member State), the abolition of visa requirements **as** a precondition of entry into the Union for family members, the recognition of an individual right of residence for a divorced third country national spouse and the recognition of the right of **family** members to take up a self-employed activity in the Member States where their spouse is working.

Third country nationals recruited by a Community company to work in another Member State **has** become a common phenomenon'. The Group has made clear that the aim of the Report on this issue is not to create new rights for this category of third country nationals but, based on Article 59 EC Treaty and established case law of the Court (Case Vander Elst v Office des Migrations Internationales, **C 43/93** [1994] **ECR** I-3803), to urge the Commission, on the one hand to clarify the position and the situation of these workers and, on the other hand, to take action in order to reduce the obstacles which their employers (Community established companies) face while they exercise their right of providing services in a different Member States from that of their establishment.

The Veil Group **has** also looked at the current situation of **refugees and stateless persons** who live within the territory of one of the member States. It has been admitted that the steps already taken towards integration of these persons into the Community's legal order are rather precarious and it suggests that, for the purposes of applying the EC Treaty, these persons must be assimilated as nationals of the Member States in which they reside².

¹ The **Report** only refers to third country nationals who are employed on a regular basis by a Community **firm** in the Member State **of** its establishment and who **are** temporarily seconded to another Member State in connection with the supply of **services** by their employer. This situation was also the subject **of** recent community legislation, the Directive on the secondment of workers within the framework of provision **of services** (**Directive 96/71/EC of 16.12.1996, OJL 18, 21.1.1997, p.1**). The **Directive applies to workers** whether they are Community or third country nationals.

² Among the legal **steps** taken so far towards the assimilation **of** refugees **and** stateless persons **as** nationals of the Union, it is worth pointing out Declaration 64/305, adopted by the representatives of the Governments **of** the Member States in 1964, whereby they considered that admission into the territory of a Member State of refugees with the aim of pursuing an activity as employed persons must be given especially favourable consideration. In addition, from the social security point **of** view, their assimilation **has been** facilitated by the inclusion into Regulation 1408/71/EEC **of** the clause that social security will **be also** available to refugees and stateless persons and the members of their families and their survivors. With the same **aim**, Directive 85/384/EEC on the recognition of diplomas in the field of architecture includes a statement by representatives of the Member States expressing their will to give especially favourable consideration to the **case** of refugees, established within the territory of a Member State, who take up **an** activity **as** selfemployed persons mainly in order to accord these persons the most favourable treatment possible.

Migration matters in principle fall within the competences of the Member States and thus the Veil Report does not make an extensive study of the **general situation of third country nationals lawfully residing in a Member State**. However, reference is made to the right of third country nationals lawfully established in one of the Member States to travel freely within the Union. Finally, the Report recommends an either partial or complete extension of Regulation 1408/71, in the field of social security to third country nationals who are lawfully resident and insured in one of the Member States.

25.1.3. Recommendations made in the report

The 80 recommendations made in the report include, among others, the following initiatives:

- improvement of information about and for people moving around the Union;
- a new type of residence card of 1 year's duration for EU citizens staying for more than 3 months (but less than 1 year) in another Member State;
- free movement rights for EU citizens should be more in line with the concept of "citizenship" by eliminating excessive delays and costs which amount to discrimination against EU citizens from other Member States;
- access to employment in another Member State must be facilitated;
- employment in the public sector of the Member States must be opened up for citizens of other Member States;
- modernisation of social rights (Regulation 1408/71), supplementary pensions and social advantages;
- modernising rules applying to family members of EU workers;
- more emphasis on language training and cultural exchanges;
- greater equality of treatment in taxation;
- improvement of the situation of third country nationals resident in the Union;
- more efficient protection of the individual's rights through new means of redress, improvement of existing remedies and creation of a new right to information;
- issues related to freedom of movement of persons should be brought under the responsibility of a single Commissioner.

The Veil report, in its conclusions, considers it essential that all existing Commission proposals concerning free movement of persons, currently pending before the Council, should be adopted and implemented by the Member States. Moreover, it asks for improved co-operation between Member States in overcoming existing obstacles and problems, particularly in relation to frontier regions, information of the public, training of officials and improvement in the judicial protection of individuals. Finally, it points out that effective application of the right to move freely requires the involvement of all interested parties, i.e. national, regional and local authorities, professional bodies and social security bodies.

¹ "Veil Report", pp.89-90.

25.2. Action Plan for the Single Market.

The Action Plan for the Single Market was adopted by the Commission on **4 June 1997**¹ and submitted to the European Council of Amsterdam on 16-17 June 1997. The Action Plan's objective was to improve the functioning of the Single Market by 1 January 1999 (date of the introduction of the Euro), to create more jobs and generate more growth. The Action Plan sets out four "Strategic Targets" which are of equal importance and must be pursued in parallel.

- Firstly, the aim is to make rules more effective, to enforce common rules and to simplify the rules at Community and national level;
- Secondly, to deal with key market distortions like tax barriers and anti-competitive behaviour;
- Thirdly, to remove sectoral obstacles to market integration, mostly through the creation of a European Company Statute and the adoption of measures in the services sector;
- Finally, to create a Single Market which functions for the benefit of citizens.

These actions will be implemented according to a three phases for action in the period before 1. January 1999 which include an immediate implementation of actions (phase 1), adoption of existing proposals by the earliest possible date (phase 2), and attaining the maximum possible agreement on remaining measures by 1 January 1999 (phase 3).

In the field of **free** movement of persons within the Union, the Action Plan's targets consists of four major issues which have to be regulated.

- The elimination of internal border controls on individuals, which currently represent the most important failure of the Single Market. The Action Plan therefore urges the Council to reach an agreement on the necessary flanking measures to be taken. These measures are mainly covered by the three Monti proposals on the elimination of frontier controls which are still pending before the Council.
- The updating of the rules on the right of residence of EU citizens and their family members, including improved arrangements in respect of right of residence for short-term residents. It is essential to adapt the right to reside and remain in another Member State to today's mobile society by adopting provisions in respect of all categories of Community nationals residing in other Member States. In this respect, the Action Plan required the Commission to complete the necessary proposals and forward them to the Council during the course of 1998.
- The protection of workers' social rights through consultation with social partners on the information and consultation of workers at national level.
- The promotion of labour mobility within the Union by a package of measures including supplementary pensions, social security arrangements for people who move within the Union, extension of the scope of family reunion, and improvement of the **EURES** database on job opportunities in the Union. Regarding **EURES**, the Commission has urged the Member States to integrate it **fully** into their public employment **services** and to reinforce cooperation between employment services.

¹ CSE(97)0001, **final**, 4 June 1997.

² The commission already published a White Paper, in June 1997, on sectors and activities excluded from the working time Directive 93/104/EC concerning certain aspects of the organisation of working time (COM(97)0334). See also European Parliament Resolution of 2.7.1998 on the Commission's White Paper on sectors and activities excluded from the working time Directive (Minutes adopted on 2.7.1998, p.70).

The European Council, in its conclusions of the Amsterdam summit on **16-17** June 1997¹, **reaffirmed** the importance it attaches to a well functioning internal market as an essential element of the overall strategy to promote competitiveness, economic growth and employment throughout the Union. It welcomed the Commission's initiative concerning the Action Plan and it endorsed its overall objective, i.e. to take action for the removal of the remaining obstacles to the creation of a well functioning Single Market. It agreed on the point that one of the primary actions to be taken is to make existing rules for the Single Market more effective. Finally, it urged the Council and the European Parliament in a first phase to reach early agreements on the measures suggested **and**, in a later phase, for the **Council** to take the necessary steps, on the basis of further proposals made by the Commission, to reach agreements on actions aimed at improving the functioning of the Single Market by 1 January **1998**.

25.2.1. Opinion of the European Parliament

The EP has welcomed the Commission's Action Plan initiative as an important step towards further developing the European internal market into a European domestic market by the year 2000². It has therefore asked for **all** necessary measures to be taken for the achievement of free movement of persons and the definitive abolition of passport controls between Member States. Furthermore, it considers that it **is** indispensable for the joint security of external borders that the Member States finally conclude the External Borders Convention. Lastly, it stressed the **importance** of a uniform European system of data protection and the introduction of a simplified and uniform procedure for securing the external borders.

25.3. Proposal for a Convention on rules for the admission of third country nationals to Member States

On **30** July **1997**, the Commission adopted a proposal for the establishment of a Convention concerning the admission of third country nationals to Member States³. The principle aim of the Convention is to bring together the legal texts which have already been adopted by the Union in the form of recommendations, resolutions or joint actions regarding the free movement of third country nationals in the Member States⁴.

¹ Conclusions of the Presidency of the Amsterdam European Council, 16-17 June 1997.

² European Parliament's Resolution on the Communication from the Commission on the Action Plan for the Single Market, Minutes adopted 20.11.1997, PE 264.020, pp. 64-67.

³ COM(97)387 final of 30.07.1997.

⁴ Commissioner Anita Gradin, *Agence Europe*, No 7027 of 31 July 1997, p. 5. See also *Immigration News Sheet*, No. 173/97, August 1997, p.1. The Commissioner has also pointed out that there are about 13 million third country nationals residing in the territory of the Union and, additionally, another million enter the EU every year, either as immigrants or asylum seekers. It is therefore important for all Member States to apply the same criteria for immigration and for third country nationals, already lawfully accepted within the Union for a considerable time, to have the chance to be eventually integrated into the State where they remain.

The Convention sets out

- common rules regarding the initial admission of third country nationals to the territory of a Member State for the purposes of employment, self-employment, study, training, non-gainful activity and family reunification;
- basic rights for long-term residents, including provisions relating to the possibility of accepting employment in another Member State.

The proposal for the Convention concerns those third country citizens who wish to remain in one of the Member States of the Union for more than three months. It does not create an automatic right of admission and each Member State remains free to decide on each individual case. Moreover, the proposal makes no reference to granting the right of Union citizenship to third country nationals as this remains the exclusive competence of each Member State'. The Convention, however, defines common rules which govern admission. **An** application for admission must be **submitted** while the applicant is outside the Member State which he wishes to enter. The provisions of the Convention do not concern asylum seekers, displaced persons and third country nationals who already enjoy right of residence in a Member State by virtue of Community law. Furthermore, it does not affect existing bilateral agreements signed by a Member State and a third country.

The Commission's proposal defines five grounds for admission: admission for the purposes of paid employment, admission for the purposes of pursuing **an** independent economic activity, admission for the purposes of study and vocational training, admission for other purposes and admission for the purposes of family reunification. However, different criteria apply to the various categories of grounds for admission.

Admission is permitted for the following purposes:

- **paid employment:** third country nationals must have already obtained a work contract of at least one year's duration before the initial admission. The first residence authorisation is limited to a period of four years. "Seasonal workers" can be admitted for a period of up to six months; they retain their legal domicile in a third country and are employed in the territory of a Member State under a fixed-term contract for a specific job. "Transfrontier workers" (third country nationals who are resident in the frontier zone of a third country), are employed in the frontier zone of a Member State and return to their residence or at least once per week) may be admitted for the purposes of paid employment to the frontier zone of an adjacent Member State.
- **independent economic activity:** third country nationals wishing to establish themselves in a Member State must have sufficient resources to undertake the activity for which the admission was granted. The initial residence authorisation is granted for two years and may be renewed.

¹ *Statewatch*, Vol 7, No 6, November-December 1997, p.21

- **study and vocational training**²: the third country national should first be admitted by a recognised higher educational establishment in a Member State. The period of residence is limited to the length of the course of study. Third country students are not permitted to be engaged in a gainful employment activity. If they want to remain in the country at the end of their studies, they must follow the initial admission procedure. Trainees may be admitted if they have a training agreement with a host institution, have enough funds to support themselves and are covered by social security.
- **other purposes**: third country nationals who do not engage in gainful activity may be admitted to a Member State if they have sufficient funds to support themselves, are covered by social security and have accommodation. The initial admission authorisation will be issued for at least one year and can be renewed.
- **family reunification**²: the persons covered by this provision are the third country national's spouse and children on the condition that the latter are below the age of legal majority in the Member State concerned. Family members may apply for residence authorisation in their own capacity if widowed, divorced or legally separated, have lost their parents due to death or have reached the age of majority.
- **long-term residence**³: can be granted to third country nationals who have been legally resident on a regular basis in a Member State for at least five years and hold an authorisation which permits residence for a total period of at least ten years. Third country nationals to whom long-term residence is granted will have access to the entire territory of the Member state and increased protection against expulsion. They will also have the same rights as Union citizens concerning access to employment, trade union rights, social welfare, housing, right of association and schooling. They may also apply for employment in another Member State.

Although the Convention would be an instrument of the Third Pillar, i.e. intergovernmental co-operation between the Member States and unanimity being required in the voting procedure, it is expected that as soon as the Treaty of Amsterdam is ratified, the legal form of the Convention will change into a directive⁴.

¹ Admission for study purposes has been justified on the base that "[...] it encourages better mutual understanding and reflects the tradition of openness in European culture while promoting the dissemination of knowledge". (Commission's explanatory memorandum to the proposal).

² "[...] family reunification is a matter of fulfilling international obligations and implementing individual rights to which all the Member States subscribe". (Commission's explanatory memorandum to the proposal).

³ "[...] security of stay and permanent residence for all those satisfying the stability criteria constitute the fundamental prerequisite for any successful integration", 1991, Commission's Communication for a common immigration policy (SEC(91) 1855 final, 11 October 1991). "The integration of migrants is an imperative dictated by the democratic and humanitarian tradition of the Member States and constitutes a fundamental aspect of any immigration policy". (Commission's explanatory memorandum to the proposal).

⁴ Mrs Gradin has, however, commented that this change in the legal form will most probably take time (Agence Europe, 31.7.1997, p.5).

25.4. Action Plan for the free movement of workers

The Commission has presented a Communication for an Action Plan for the reinforcement of free movement of workers within the European Union¹. Low mobility is considered to be one result of a number of factors, including high levels of unemployment, social and cultural barriers, practical obstacles to movement and lack of information on opportunities. The Action Plan is primarily based and built on the Veil Report, the Amsterdam Treaty and the Commission proposal for guidelines for Member States' employment policies for 1998². The Action Plan sets out a package of measures aimed at "[...] the overcome of the existing barriers to the free movement of workers, the improvement of prospects for mobility in the European Union [...] and the full and effective implementation of free movement of workers"³.

25.4.1. *The Action Plan's approaches*

a) To improve and adapt the existing rules concerning the following:

- **Right of residence:** Directive 360/68 on the restriction on movement and residence of workers and their families should be amended in order to improve the administrative situation of job seekers by giving them a reasonable period of time to seek work. This Directive should also provide for the accumulation of residence periods under short-term contracts in order to entitle workers to a long-term residence card.
- **Family reunion:** the right to family reunion should be extended to cover non-dependent children over 21 years of age, together with ascendant relatives who are not dependant and, furthermore ,unmarried partners of EU workers, provided that the legislation of the Member State concerned treats as a spouse the unmarried partner of a national worker.
- **Equal treatment on social and tax advantages:** Regulation 1612/68 on freedom of movement for workers within the Community should be amended in order to clarify that a migrant worker is entitled to the same treatment as national workers regarding any advantages of a social, economic, fiscal or cultural nature.
- **Equal treatment of the worker's family:** the existing case law which confirms that social advantages must be available to the migrant worker's family, should take the form of a legal text. The same should apply to the right of the worker's spouse to pursue an independent economic activity.
- **Frontier workers:** to adopt specific provisions concerning social security, taxation, social advantages and health care protection of frontier workers.
- **Social security:** to modernise and extend the scope of Regulation 1408/71 to cover, amongst other issues, special schemes for civil servants and to include students and other persons not yet covered.
- **Inclusion of third country nationals in the social security system:** to extend Regulation 1408/71 to third country nationals working and residing within the Community.

¹ COM(97) 586 final, 12.11.1997.

² COM(97) 497 final, 01.10.1997.

³ Point 3 of the Action Plan.

- **Supplementary pensions:** adoption of a Council Directive on safeguarding the supplementary pension rights of employed and self-employed persons moving within the European Union (Council Directive 98/49/EC of 29 June 1998, OJ L 209, 25.7.1998, pp.46-49).
 - **Education and training:** to adopt measures against the remaining obstacles (linguistic, cultural, administrative, legal) and the issues which could cause problems (qualifications and competences, social security, taxation, right of residence, work permits).
- b) To make the labour market more accessible to citizens by the following:
- **Improving information and access to jobs** through a rapid modernisation of the RES (Public Employment Service) and the EURES and the promotion of Internet-based services.
 - **Developing cross border co-operation**
- c) To develop the responsibility of and co-operation with national authorities and social partners.
- d) To improve knowledge and awareness of the right to free movement through existing and future information and communication activities.
- e) To develop innovative projects aimed at a greater geographical or occupational mobility.

The Commission's commitment is to "[...] ensure the full and effective implementation of free movement of workers so as to cement the rights of EU citizens, develop the European labour market and meet the new challenges".

The Commission has once more mentioned the importance of implementing this Action Plan in a subsequent initiative, the Commission Communication on the Social Action Programme 1998-2000². The Commission is planned to present a package of measures and relevant proposals by the end of 1998³.

25.4.2. *Opinion of the European Parliament*

The European Parliament, in its legislative resolution on the Action Plan, called once again for the Commission to gradually remove all existing discrimination in respect of the free movement of persons, the right of establishment and the right to family reunification between citizens of the Union and citizens of third countries permanently established within the Union. It also expected the proposals made by the Commission for amending Regulation 1612/68 to include all family members regardless of their nationality, as well as unmarried partners (at least in the Member States which already recognise this form of cohabitation for their own citizens). Moreover, it

¹ Communication from the Commission on an Action Plan for **free** movement of workers, p. 19.

² On 29 **April** 1998, the European Commission adopted its Communication on a new action programme for social affairs for the years 1998 to 2000. **In** this programme, the Commission sets out the actions it intends to take **during** 1998-2000 **concerning** the organisation of work, adaptation capacity, **use** of the possibilities offered by the information society, guarantee of health and safety at the workplace and social policy in connection with enlargement. See **also** *Europe Documents*, N° 2086/87 of 8 May 1998.

³ Proposal for a European Parliament and Council regulation amending Council Regulation (EEC) No 1612/68 on freedom of movement **for** workers within the Community; **Proposal** for a **European** Parliament and **Council** Directive amending Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States **and** their families; Proposal for a **European** Parliament and Council **Decision establishing** an Advisory **Committee** on freedom of movement **and** social security for Community workers **and** amending Council Regulations (EEC) No 1612/68 and (EEC) No 1408/71, COM(1998) 394 **final**, Brussels, 22.07.1998.

called on the Commission to take initiatives regarding improvement of the right of residence for job-seekers and workers on temporary and flexible contracts. Furthermore, Parliament called the Commission to urged the adoption of the proposals pending before the Council, especially that concerning amendment of Regulation 1408/71. The European Parliament also called upon the Commission to submit proposals as soon as possible regarding social security of workers, the Community's taxation policy, modernisation and extension of EURES in border regions, improvement of the Community system for the mutual recognition of diplomas and to clarify, according to existing well-established case law, which posts in the public sector justify any restriction of access to the public service pursuant to Article 48(4) EC Treaty. Finally, it welcomed the Commission's intention to improve knowledge and awareness of free movement and give the public more information on aspects of freedom of movement.

25.5. Amendments proposed for Regulation (EEC) 1612/68 and Directive 68/360/EEC

In response to the measures announced in the Action Plan for free movement of workers', the Commission presented two proposals for amending Regulation (EEC) No 1612/68 and Directive 68/360/EEC on the freedom of movement of workers². The revision relates to the conditions governing the residence of workers and procedures regulating freedom of movement. Among the reasons cited by the Commission for proposing a revision of the above-mentioned legislation is the existence, despite thirty years of the application of rules on free movement of workers, of a number of shortcomings and gaps in the relevant legislation. Furthermore, there is an indispensable need to bring the relevant legislation into line with the existing case law, developed over a period of 30 years, in order to strengthen the security and transparency of the law. The Commission also pointed out that the persistent obstacles to mobility of persons are not only due to burdensome administrative procedures related to the granting of the right of residence but also to problems connected with the recognition of experience and qualifications obtained in another Member State.

25.5.1. Regulation (EEC) 1612/68

As a contribution to the development of Community law occurred by the Treaty of Amsterdam, a new article is proposed which prohibits any discrimination based on race, religion, sex, age or disability wherever Regulation 1612/68 applies³. The geographical scope also of the two legal instruments is extended and covers any place at which the work is performed, even outside the territory of the European Union, as long as the employment relationship retains a sufficiently close link with the Union⁴. Article 1 also makes reference to job seekers and trainees, in this reflecting

¹ COM(97) 586 final, adopted by the Commission on 12 November 1997.

² Proposal for a European Parliament and Council Regulation amending Council Regulation (EEC) 1612/68 on freedom of movement for workers within the Community; Proposal for a European Parliament and Council Directive amending Directive 68/360/EEC on the abolition of restrictions on movement and residence within the community for workers of Member States and their families, COM(1998) 394 final, Brussels, 22.07.1998. These proposals also refer apply to the EEA since, under Article 28 of the EEA Treaty, EEA citizens enjoy the same right of free movement for workers. However, the proposals do not refer to self-employed and non-employed persons since these citizens are covered by other Community legal instruments.

³ Similarly, Article 13 of the Treaty of Amsterdam, prohibits any form of discrimination.

⁴ See also Case C-237/83 Prodest , [1984] ECR-3153 and Case C-214/94 Boukhalfa, [1996] ECR-2253.

way existing case law'. Concerning the principle of family reunification, the Commission expressed the view that "[...] the Regulation should be extended in order to allow family reunification in a way which is consistent with today's demographic and sociological patterns within the European Union". Therefore, Article 10(1) grants direct descendants and ascendants the right to install themselves with a worker who is national of one Member State and who is employed in the territory of another Member State, irrespective of whether they are dependants or not and irrespective of their age. Other members of the family who are dependants or who live under the worker's roof are also included. Moreover, the partner of the EU worker assimilated as the spouse may follow that worker where the host Member State recognises the situation of unmarried couples for its own nationals³. Reference is also made to the case of dissolution of the marriage. Article 10(4) provides for an independent right of residence for the family members, who do not have the nationality of a Member State, after a residence period of three years⁴. These family members will also retain their right to work in the host Member State. The initial right of the spouse and children to engage in paid economic activity is extended so as to also include the right to engage in self-employed activity and is further extended to all beneficiaries under the new Article 10. Furthermore, it is proposed that the right to education and training to be extended to all beneficiaries of family reunification and include both university and non-university education.

The new Article 7(2), concerning the social and tax advantages of a worker, is more detailed in its context as it refers to the financial, fiscal, social, cultural and other advantages of EU workers who have exercised their right to move in another Member State of the Union'. Moreover, the concept of the exercise of public law function, in Article 8(1), is replaced by the phrase "[...]which involves the exercise of public power and the safeguarding of the general interests of the State and the regional authorities"⁶.

Finally, the proposed Article 7a makes specific reference to the situation of frontier workers and the reinforcement of their legal security. It is therefore planned to introduce the provision that frontier workers will enjoy the same benefits as resident workers.

¹ See also Case C-292/89 *Antonissen*, [1991] ECR-745 and Case C-344/95 *Commission v Belgium*, [1997] ECR-1035, regarding job seekers. For judgements concerning trainees, see Case C-66/85 *Lawrie-Blum*, [1996] ECR-2121 and Case C-27/91 *Le Manoir*, [1997] ECR-5531.

² See Commission's Proposal, COM(1998) 394 final, p. 10.

³ This proposal is a reflection of the sociological developments in certain Member States and has already been recognised by the Court of Justice as an expression of the principle of equal treatment. However, this provision, in line with existing case law, does not oblige the Member States to recognise unmarried couples if such a possibility is not available under national legislation. See also Case C-59/85 *Reed*, [1986] ECR-1283.

⁴ This independent right of residence for the benefit of third country family members has its legal basis in Article 49 of the Treaty.

⁵ According to the case law of the ECJ, "social benefits" means all benefits which are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the Community. See also, Case 310/91 *Schmid*, [1993] ECR-3011 and Case 57/96 *Meints*, [1997] ECR-6689.

⁶ This is also the interpretation given by the Court to the term of public law function in Article 48(4) EC Treaty.

25.5.2. *Directive 68/360/EEC*

According to the Commission, one of the main objectives of amending the Directive is to facilitate job seekers' rights of entry and residence. Therefore, in Article 2(1) it is stated that freedom of movement also implies the right to leave the territory of the Member State in order to seek work or undergo vocational training in another Member State. The Member States should recognise a job seeker's right of residence without the need for a residence permit. This right of residence is automatically recognised for job seekers for a period of six months and is maintained after that period as long as the job seeker is actively seeking employment and has reasonable prospects of finding a job'.

The changes proposed to Regulation 1612/68, concerning the right to family reunification, are reflected in amended Article 4(3)(e) of Directive 68/360, which states that a document issued by the competent authority of the State of origin or the State whence the family members came, will testify that these family members are dependent on the worker or that they live under the same roof. In the same spirit of facilitating family reunification, a new paragraph is added in Article 3, according to which the Member States will allow family members who are nationals of third countries and normally resident in a Member State, to obtain the necessary visas or equivalent documents in the Member State in which they were residing or in the Member State in which these persons are to take up residence with the worker².

The proposed new Article 4a lays down the conditions under which the independent right of residence to family members in the event of dissolution of the marriage, provided by amended Regulation 1612/68, will be exercised. Article 4a therefore lays down the conditions of sufficient resources and health insurance for family members who are not economically active.

Regarding administrative procedures and documents, Article 9(3) lays down that the Member States will grant the residence permits according to existing procedures for national identity documents. The new Article 6(1)(b) stipulates that a residence permit valid for at least five years is automatically renewable for a period of ten years. Breaks in residence for medical reasons or for reasons of maternity, study or posting do not affect the right of residence. Moreover, it is proposed to limit the scope of expulsion measures, on the grounds of public order or public security, in cases where the person concerned is fully integrated in the host Member State and has special social, cultural, and family ties with the Member State of residence. Finally, with the view of promoting European citizenship, the Commission has proposed the replacement of the term "**Residence permit for a National of a Member State of the EEC**" by "**Residence permit for a Citizen of the European Union**".

¹ This provision is based on the existing case law of the Court. See Case C-292/89 *Antonissen*, [1991] ECR-745 and Case C-344/95 *Commission v Belgium*, [1997] ECR-1035.

² According to the Commission's explanatory statement, the aim of this provision is to prevent a situation where members of families who are already normally resident in a Member State are obliged to return to their country of origin to obtain a visa for residence purposes when moving with a worker from one Member State to another. It also points out that this approach does not run counter to the Commission's initiative about the possibility of proposing in the future, the total abolition of visas for the members of the family of Community workers (COM (1998) 394 final).

25.6. Proposal for establishing an Advisory Committee on freedom of movement and social security for Community workers'

Regulations **(EEC) 1612/68** and **(EEC) 1408/71** have each already established a tripartite advisory committee responsible for examining problems concerning the free movement of workers and the coordination of social security schemes. **This** Proposal for a Directive comes in response to the social partners' request for a review of the responsibilities and working methods of these committees (the Technical Committee on freedom of movement and the Administrative Commission on Social Security for Migrant **Workers**)².

The new Committee will take over the responsibilities of the two current committees and employment **will** be an essential area of responsibility. It will also retain full competence in all matters concerning mobility itself, including the coordination of social security schemes and the **specific** problems of particular professions, such as cultural. Furthermore, it will be competent to discuss and analyse matters concerning the situation in the European Union, of third country workers who are not family members of an EU worke?. Finally, members of the two already existing Committees will also sit on the proposed Advisory Committee.

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¹ Commission's Proposal for a **European Parliament and Council Decision** establishing **an Advisory committee** on freedom of movement **and** social security for Community workers **and** amending Council Regulations **(EEC) 1612/68 and (EEC) 1408/71**, Brussels, **22.07.1998, COM(1998) 394 final**. The Decision is based on Articles **49, 51 and 235** of the Treaty.

² The Commission, in its Communication concerning **an action plan for free movement of workers (COM(96) 448 final)**, **stated** its intention of proposing **such** a review and it **has** repeated this intention in its Communication **of 20 May 1998 "Adapting and promoting the social dialogue at Community level" (COM(1998) 322 final)**.

³ **This new** competence of the **Advisory Committee** comes in response to the **Treaty** of Amsterdam which **provides** for Community jurisdiction in matters concerning the rights **and** obligations of **nationals** of third countries residing in the **European** Union.

CONCLUSION

"[...] Free movement of workers will become a more important factor during the next 10-20 years than it has been during the last 30 years, both from an individual and from a labour point of view. The main reasons for this are demographic changes and the changing nature of working life. Moreover, the nature of the movement will be different from the movement of the 1960s and the 1970s. In the future people with skills and high skills will move more frequently, while unskilled workers will be less in demand. The increased participation of women in the labour market and the reduction of the gender imbalances will also have an effect on geographic mobility, as mobility in many cases concerns two people with separate careers. Removing remaining restrictions to labour mobility, improving information on job opportunities and strengthening the incentives to mobility would help tackling emerging skill shortages and enhance employment and economic growth¹".

In recent years, and especially after the entry into force of the **TEU**, issues falling into the field of free movement of persons, crossing internal and external borders, visas, and immigration, have been the subject of a number of legislative instruments. The European Commission and the Council have already adopted documents, papers, communications and other forms of legislation. However, the problem remains: the free movement of persons, although it constitutes one of the main principles of the European Community, is not yet totally and unconditionally applicable. This is due mainly to the fact that the majority of the legislative instruments i.e. Joint Positions, Joint Actions, Communications, Resolutions, adopted to implement it, do not legally bind the Member States. Furthermore, some of the binding texts, which would make an essential contribution to the scope of the free movement, have not yet been adopted and/or ratified by some or all of the Member States, i.e. the External Borders Convention.

The European Parliament has repeatedly expressed the opinion that the free movement of persons within the European Union is one of the main elements needed for achieving European integration. It has therefore strongly criticised the other two institutions for their reluctance and the time taken to adopt effective and binding measures which could bring into effect the various Community norms and harmonise the diverse national legislation. The European Parliament, referring to the vast number of strategic documents adopted by the Commission during recent years, has expressed its regret that these are either too "general" in nature or differ from the legislative propositions made initially. It has proposed to the Council and the Commission the implementation of all the recommendations made in the "Veil Report" concerning the free movement of persons. On visa policy, the European Parliament has asked the Commission to also take account of the security aspects of its proposal concerning the common list of countries whose nationals must have a visa on entering the territory of the European Union and furthermore to ensure that the abolition of visa requirements does not have the effect of facilitating trafficking in drugs and human beings in the European Union.

The Treaty of Amsterdam, by introducing a new title in the EC Treaty on "Visas, asylum, immigration, and other policies related to the free movement of persons", gave a boost to the creation of a European area where all EU citizens and legally resident third country nationals can move freely. However, the new Treaty has not totally regulated the issue and has certainly not

¹ COM(97) 586 final, 12.11.1997, pp.8-9.

solved all the problems. While welcoming the initiative of Member States to transfer to the Community framework issues of asylum policy, immigration, visas and provisions regulating the crossing of internal and external borders, the European Parliament has expressed its regret for the existence of various exceptions and restrictive clauses in the new title. The maintenance of the unanimity requirement in the Council for some of the measures which have to be taken in the field of immigration and the exclusion of the Court of Justice's competence with regard to national measures adopted in order to maintain law and order and safeguard internal security, are the main issues of disagreement with the European Parliament.

Finally, the initiative of integrating the Schengen *acquis* into the framework of the European Union was taken with the aim of unifying two independent, though complementary, legal instruments -the EU Treaty and the Schengen Agreements- into one, thereby eliminating the contradictory and/or overlapping provisions covering the same issues.

The European Parliament, in its opinion on the Treaty of Amsterdam, has called on the Council to take as soon as possible all the necessary measures in order to bring to Community level the areas of **free** movement, security and justice and to implement incorporation **of** the Schengen *acquzs* into the Community legal order. Finally, it has called on the governments of the United Kingdom, Ireland and Denmark to participate at an early stage in Community measures related to the field of **free** movement. Moreover, the European Parliament has expressed its opinion on the importance of the Schengen *acquis* to be defined in good time so as to enable the EU Member states to divide that *acquis* between the first and the third pillars as soon as the Treaty enters into force. Finally, the European Parliament considered it essential to be informed of the substance of the Schengen *acquis* and consulted on the draft decision integrating that *acquis* into the Treaty on Union and on the agreement with Norway and Iceland.

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