Report of the High Level Panel on the free movement of persons chaired by Mrs Simone Veil

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EXECUTIVE SUMMARY

The Panel's report contains a series of concrete measures to ensure that more people can take advantage of their rights to free movement within the EU. The main conclusion is that, apart from a few exceptions, the legislative framework to ensure free movement of people is in place, and that the majority of individual problems can be solved without changes in legislation. However, particular emphasis is put on the need for Member States to improve co-operation among themselves, notably in border regions, to ensure better training of officials and to devote more attention to the protection of individual rights. The report includes 80 recommendations to make it easier for people to use their rights in practice, which include :

- better information to raise people's awareness of their rights;
- a new type of residence card for people temporarily in another Member State;
- more flexible interpretation by Member States of rules on residence requirements;
- easier access to employment in other Member States;
- narrower definition of public service posts reserved for Member States' own nationals;
- a need to modernise social rights (regulation 1408/71);
- more flexible rules to allow regrouping of families;
- more emphasis on language training and cultural exchanges;
- greater equality in tax treatment;
- improving the situation of legally resident third country nationals;
- new means of redress for individuals with problems applying their rights and improved access to existing channels;
- a single Commissioner responsible for free movement of persons.

Free movement of people in the European Union began with labour, but has gradually evolved to cover self-employed people, students, pensioners and EU citizens in general. From the earliest legislation, free movement applied not only to workers, but also to members of their family. The European Community Treaty itself prohibits any discrimination on grounds of nationality between nationals of Member States. The main obstacles to transferring social security rights have been eliminated, and every EU national can be covered for emergency health care in another Member State. This has occurred as a result of a step-by-step approach in legislation and the case-law of the Court of Justice, which the report summarises. This progress widened the beneficiaries to free movement and removed real obstacles, or those that resulted from a restrictive interpretation by Member States. The inclusion of citizenship of the Union under Article 8 of the Maastricht Treaty has, in the words of the report, "pointed to a new objective : to extend, without any discrimination, the right of entry and residence to all categories of nationals of Member States."

The Panel's recommendations concentrate on the rights and responsibilities of European citizenship. On the one hand, European citizenship does not give rise to unrestricted rights. For example, people wishing to reside in another Member State must demonstrate that they have sufficient resources to support themselves and proper health cover. It would be unrealistic to propose that social assistance

benefits, in addition to social security, could be exported. On the other hand, the Panel does recommend protecting acquired rights to retain residence in another EU country and to extend residence rights for family members. It also seeks to extend the benefits of existing coordination efforts on social security to third country nationals legally resident in the EU. In the order in which free movement is experienced by a migrant, the main recommendations of the report are as follows :

1. Information about and for people moving around the Union should be improved. The number of EU nationals resident in another Member State is only 5.5 million out of 370 million. There are also 12.5 million third country nationals. But statistics are certainly incomplete and allow for insufficient analysis of trends in migration on which to base policy. Influences on free movement include factors such as high unemployment, the changing role of the family, the growth in the services sector and the ageing of the population. The Panel welcomes the impressive results so far from the Citizens First campaign, with requests for information for guides and fact sheets from over 450,000 people. This well-targeted practical campaign should be put on a permanent basis. It is also a way of finding out more about people's problems and where there are gaps in EU legislation or where it is not being properly understood or enforced.

2. A new optional 1 year residence card should be introduced for EU citizens staying more than three months, but less than a year in another Member State. This would be the first genuinely European card, issued by the Member State of origin, stating that the holder is covered by health insurance and has sufficient resources to cover his or her needs. This card would be optional. It would clarify for authorities in other Member States the rights of European citizens who are neither tourists nor seeking to establish themselves, such as students and trainees on exchange programmes, volunteers and artists. It would not give holders rights in other Member States, except social security coverage for emergency health care for the duration of their stay.

3. Free movement rights should be brought in line with the new concept of European citizenship. Excessive delays and costs which amount to discrimination against EU citizens from other Member States must be eliminated. Issuing temporary residence cards which limit access to social rights and therefore to acquiring a permanent right to stay, should be discouraged. The requirement to provide proof of sufficient resources should be made more flexible. A declaration of having sufficient resources, as in the case of students, could be sufficient. The Panel is also concerned about self-employed people having fewer rights to stay in their country of residence if they lose their business than redundant workers. The concept of European citizenship suggests that a piecemeal sectoral approach to residence rights should be replaced by consolidated legislation and in time treating all European citizens as equal.

4. Access to employment in other Member States must be facilitated. EURES (European Employment Services) should be developed in order to reach more citizens with more job offers across borders. It took a long time for the Community to adopt separate Directives for the recognition of qualifications of seven main regulated professions, but these work well (with the exception of diplomas acquired outside the Community which may be recognised by one Member State but not by another). Other professions come under the general system of recognition of diplomas based, not on harmonisation, but on mutual trust among Member States, which may impose additional requirements on applicants. People need the kind of information provided by the Citizens

First guides and fact sheets as to their rights, whilst mutual trust must be reinforced through co-operation among professional bodies and Member States authorities responsible for processing applications. The Panel recommends rapid adoption by the Council of the lawyers Directive, a new departure in this field. Success in recognising professional qualifications and diplomas must not hide the urgent need to develop European solutions - possibly through general legislation to enable recognition of professional experience and ensure that periods of working abroad in the EU are not detrimental to one's career.

5. Employment in the public sector should be opened up. In terms of the EC Treaty (Article 48 (4)) Member States may reserve certain posts for their own nationals. Despite the extensive case-law of the Court of Justice, there is little to encourage free movement of civil servants and hence national administrations to learn from each other. The public sector will remain relatively closed as long as there is no agreement proposed as to what constitutes a reserved post for a Member State's own nationals, and which State activities should be open to nationals from other Member States. The Commission should propose such an agreement to the Council. It should also act in order to ensure that the principle of mutual recognition is respected within the public sector.

6. Social rights need modernising, particularly for pensioners. Though the mechanisms to co-ordinate Member States' social security schemes in order to allow for free movement work well (Regulation 1408/71), there are areas where modernisation is necessary. In an earlier opinion (presented on 28 November 1996), the Panel already proposed solutions to allow people to preserve their acquired rights to private supplementary pensions when working in different Member States. Furthermore, with pension arrangements becoming more complex, the fact that pre-retirement benefits cannot be exported to other Member States is a gap in the rules which must be filled by adopting the outstanding Commission proposal. It is regrettable that the Council has still not adopted proposals first made 12 years ago by the Commission, which raises the question of whether unanimity should still allow Member States to block all progress in this field. Social security provisions not only concern people permanently working, living or retiring to other Member States, but also tourists, students or elderly people on short stays abroad, whose interests as European citizens could be taken into account to a geater extent. In particular, information for the public about health coverage with a multitude of different paper forms (E111, E112, etc.,) should be simplified through the development of interoperable "smart" national social security cards. In special circumstances, particularly in frontier regions, there should be some relaxation of limiting cross-frontier health care to emergency treatment.

7. Family rights should be amended to reflect social change. Freedom of movement is not complete unless citizens have the right to be joined by their family under favourable conditions for their integration in the host country. The appropriate Regulation (EEC/1612/68) provides that irrespective of nationality, the worker may be joined by his or her spouse, their children under the age of 21 and their parents. This definition of the family dependants has been carried over to the legislation on self-employed people, and other categories of the population. The report recommends filling two main gaps to allow families to remain together :

- There are no valid grounds for denying non-dependent children more than 21 years old, or relatives in the ascending line who are not dependent, the right to join their family in another Member State.

- The term "spouse" does not include an unmarried partner, which can give rise to problems. The report points out that the "family group" is undergoing rapid change and that growing numbers of people, often with children, form *de facto* couples. It recommends, on the basis of the case-law of the European Court, that if a Member State grants rights to its own unmarried nationals living together, it must grant the same rights to nationals of other Member States, and that a study should be made of practice in the Union.

8. More emphasis is needed on language training to facilitate free movement and cultural exchanges. Access to language skills in a multilingual Union is not just the key to removing barriers to free movement and helping migrants and their families to settle in their adopted country. It is also the key, rather than cultural policy as such, to increasing cultural exchanges. The addition in the Maastricht Treaty of new articles on culture, youth, vocational training and economic and social cohesion, give free movement of people, like European citizenship, more of a human and less purely economic dimension. The report reviews the contribution made by exchange programmes such as LEONARDO (training), SOCRATES (education) or KALEIDOSCOPE (culture) to free movement and the integration of people in other Member States. It notes that the only legislative requirement in this area - to teach languages to the children of migrant works - is not sufficiently applied. Promoting exchanges through EU educational training and youth programmes can lose effectiveness if the beneficiaries then run into difficulties acquiring residence in other Member States. The new optional one year residence card recommended above is one way to increase the freedom to learn from different European cultures.

9. Greater equality of tax treatment should be achieved. People taking advantage of free movement rights are faced with the paradox that whereas cross-border social security rights are governed by Community regulation, tax is governed by bilateral agreements. The two overlap and inconsistencies have to be reduced. Some gaps in bilateral agreements relating to double taxation have to be filled; the Panel's report also hints at the possibility of an internal market legal basis to eliminate tax barriers, and at any rate to improve co-ordination among Member States. There should be a common definition of residence for tax purposes. Individuals carrying out a professional activity in another Member State are frequently subject to a higher level of taxation than individuals in their country of residence. Binding Community legislation governing the taxation of frontier workers and other persons who are non-resident for tax purposes with a view to ensuring non-discriminatory taxation for such individuals should be drawn up. In cross-frontier situations, equality of treatment has also to be safeguarded with regard to taxing persons, special tax deductions or concessions. Particularly in parts of the Union where there are wide tax disparities each side of the border, the Panel found problems with company cars for frontier workers, or for people moving with their car to other Member States. Arrangements are necessary to avoid double taxation and for Member States to share revenue from vehicle registration tax on a pro-rata basis.

10. The situation of legally resident third country nationals can be improved irrespective of Member States' immigration policies. In this respect, the most important recommendation of the Panel's report is that consideration should be given to extending certain provisions of Regulation 1408/71 on the co-ordination of social security to all legally resident third country nationals. This would also make life easier for national administrations which have to apply an EU regime to EU nationals and bilateral arrangements to third country nationals. Concerning family members of a Union citizen, their status should be the same regardless of whether they are citizens of Member States or of third countries. The Panel want therefore to see the abolition of visa requirements, at least for those third country nationals members of the family of EU citizens. The Panel also recommends extending to third country nationals, the recognition of a right for non-dependent children and parents to join their family in another Member State, subject to the condition that the family group was already formed in the home Member State. Similarly, it is recommended that family members of all Union citizens should be able to take up an activity as self-employed and not just as employed workers, and that a right of residence be recognised for a divorced spouse who is a third country national.

11. It is vital that the rights of individuals are guaranteed. A key emphasis in the report is on making people more aware of their rights through campaigns such as Citizens First, and a possible new right to information in a revised Treaty. Better protection of citizens' rights lies in action at the level of Member States. Information about legal remedies is improving, but to whom do citizens' turn to protect their rights? The Panel would like to see focal points, providing information and active conciliations in Member States to solve problems when and where they occur. The report places emphasis on developing EU training programmes in this area, starting with the legal profession, but also including associations and informal advice services, and officials in Member States applying Community law on free movement. Better cooperation between Member States also lies among the key issues in this area. Finally the report recommends that the Commission should be more accountable to individual complainants and support the work of the Ombudsman, the Petitions Committee and individual MEPs.

12. Free movement of people should come under the responsibility of a single Commissioner. In order to remedy the division of responsibilities in the area of free movement of persons within the Commission, it is suggested bringing under a single Commissioner responsible for questions of free movement of persons, all the services dealing directly with those questions, including the treatment of complaints brought by individuals, giving both outside and inside the Commission a central point which is currently lacking. Progress in this area also suffers from the unanimity sometimes required at the Council.

INTRODUCTION

According to the mandate conferred by the Commission, the Panel's task was to identify the problems of a legal, practical and administrative nature still confronting citizens who settle or who plan to settle in another Member State of the Union, and to draw up a report for the Commission setting out proposed solutions. To this end, the Panel was invited to study how the current legal instruments are applied, the means of improving them or making their operation more effective and to examine, where appropriate, the need for new measures to supplement the current panapoly of legislation (see Annex I for details on the mandate).

I. GENERAL APPROACH

The general guidelines which the Panel followed in its deliberations reflect the development of the European Union, which is rich in positive experiences but also in setbacks and crises. As the Community completes its first half century, it faces not only new prospects but also challenges which cannot be ignored. The Panel was very aware of these complex circumstances : there are origins which must not be forgotten, achievements which must be defended, new impetuses which must be harnessed with an eye to "European Union", and a few disturbing prospects looming on the horizon.

While it is appropriate, with these different emphases, to recall the principal ideas which guided its deliberations, it is also necessary to point out that the total number of Community citizens currently established on the territory of a Member State other than their home State (5.5 million) is 1.5% of the total population of 370 million. Even if this number is not very high, the effects for the Union are important. It is incidentally appropriate to emphasize that there is a general need for further statistics on the mobility of persons within the European Union.

I. The economic origin of the principle of free movement

Among the principal ideas which guided the deliberations of the Panel, the first is a reminder of the origins of free movement. It must not be forgotten that the free movement of persons was conceived of originally as primarily an economic phenomenon. It was the mobility of human resources as a factor of production which inspired the chapters of the EEC Treaty relating to the free movement of workers, freedom of establishment and, to a certain extent, the freedom to provide certain services. From the beginning, however, there was the added idea of social protection, manifest above all in Article 51 of the EEC Treaty. All this was distilled at the time in the former Article 7. However, the latter provision, as a result in particular of the decisions of the Court, quickly became understood as the expression not merely of non-discrimination but of the recognition of the equality, in rights and in dignity, of all Community citizens in all fields covered by the Treaty. Nothing of this has been lost, particularly since it is in this original core that most of the positive rules on free movement are to be found.

2. Wider horizons as a result of the Treaty establishing the European Union

The Treaty establishing the European Union has widened horizons, in two ways. As far as the general objectives of the Union are concerned, there appear in the following order in the preamble and in Article B the ideas of democracy and respect for human rights, progress and economic and social cohesion, the free movement of persons and European citizenship. With a view to achieving these objectives, certain specific provisions were introduced into the Treaty establishing the European Community. The evident intention was that they should thereby benefit from the positive character of Community law and the resultant protection of the Court. These provisions include, as regards "principles", the free movement of persons, which is mentioned twice (Article 3(c) and Article 7(a)); the insertion of a new part of the Treaty, Part Two, devoted to citizenship of the Union (Articles 8 to 8e); and the introduction of new titles in Part Three, each devoted to new, or newly formulated, subjects - Social Policy, Vocational Training and Youth (Articles 117 to 122, 126 and 127), Culture (Article 128) and Economic and Social Cohesion (Articles 130a to 130e). The new dimension given in this way to the Union/Community, which is typified by the concept of “European citizenship”, common to both groupings, needs to be developed. This is the fundamental inspiration behind the whole of this report.

3. Free movement in the context of political and cultural pluralism

There is a political and human context to the free movement of persons, which is described in the following terms in the preamble to the Union Treaty : the deepening of the solidarity between the peoples of the Member States "while respecting their history, their culture and their traditions". Of all the rules of Community law, it is precisely the provisions relating to migration which are most closely linked to the historical complexities and multicultural nature of European society. Hitherto, this perspective has not received enough consideration in Community practice. A certain degree of attention has therefore been paid in this report to the cultural aspects of migration, despite the difficulty of adequately circumscribing phenomena which cannot be quantified using economic and social data.

II. METHODOLOGY

As the analysis, which was initially pragmatic, was carried out, certain questions of method recurred, with the result that it became necessary to lay down methodology relating to content and presentation of this report. It seems appropriate to present these options before discussing the substance of the problems examined. It will appear that these criteria are shaped both by the historical course of the European process and a vision of its future prospects.

1. Two basic questions : freedom of movement and national treatment

The subject of this report is set by the Treaties, as amended by the Treaty of Maastricht, and is based on two closely linked fundamental principles : the free movement of persons and national treatment. This dual principle is the starting point of any reflection on the subject.

The principle of free movement of persons runs through the EU Treaty from subparagraph 10 of the preamble, through Article 3, letters c) and d) of the EC Treaty, Articles 7A and 8A of the same Treaty, to the specific provisions of the Articles joined under Title III, dedicated in particular to the "free movement of persons", more specifically: Article 48 dealing with the free movement of workers, Article 52 with the freedom of establishment and Article 59 with the freedom to provide services. According to those provisions, the right of free movement comprises simultaneously the access to the territory of the Member States and the right of residence for the purposes enshrined. Once the beneficiary of the right of free movement has entered the territory of a Member State different from his country of origin, he benefits from the guarantee of Article 6 (previously Article 7) of the EC Treaty, according to which, within the scope of application of the Treaty, *"any discrimination on grounds of nationality shall be prohibited"*. The full impact of this provision, generally designated and understood as a non-discrimination rule among others, can only be seen, however, if it is stated in its positive form as *the principle of national treatment*. The nationals of each Member State must, within the material and personal scope of application defined by the Treaty, be assimilated to the nationals of any other Member State where they are present or are in permanent residence. This fundamental rule of assimilation is also reflected in a whole series of more specific Treaty provisions: Article 48 (2) for workers, Article 52 (2) for establishment, Article 60 (3) for the provision of services; in addition,and to a large extent, it has guided the Community's legislation and case-law.

During the course of this analysis, it was found that it was not so much the application of these principles in themselves which causes problems, since they refer to precise criteria of application, either positive or negative. The real difficulties derive more from what is usually called the "indirect obstacles" to the full achievement of free movement, and from the standard of reference defined by "national treatment".

2. Importance of the "acquis communautaire" in this field

The examination carried out by the Panel, the documents it received and the evidence it heard revealed the breadth of what has come to be known as the "acquis communautaire", in this field as well as in others. The Commission had good reason to launch an investigation currently into the free movement of persons, but this should not lead an observer to minimize the importance of what has already been accomplished at all levels - Treaties, secondary legislation and the case-law of the Court of Justice. It is important at the outset to take sufficiently accurate stock of the situation so that the points on which progress still seems desirable and even necessary can be properly identified.

(a) An initial set of rules has been enshrined in the *EEC Treaty* since the foundation of the Community. To this must be added the new provisions introduced by the *Maastricht Treaty on European Union*. Most of these have been incorporated in the EEC Treaty, known henceforth as the "Treaty establishing the European Community" (EC). The importance of this set of rules can be seen from the fact that most of the provisions have direct effect and that some of them can serve as a legal basis for later developments in secondary legislation.

(b) The second set of rules consists of a series of *regulations and directives* specific to free movement and the treatment of migrants established on the territory of the Member States. The reader is again referred to Annex 4 for a list of these instruments with their Official Journal references.

(c) Lastly, the problems associated with the free movement of persons have been the subject of several *decisions of the Court of Justice*. The list of relevant judgements is too long to be reproduced in full. For this reason we have confined ourselves to citing (in Annex 5) certain among the most significant judgements. This case-law, based in particular on the application of the principle of national treatment, shows that many of the problems encountered in practice can be resolved by bringing proceedings before the Court under Article 169 (failure to fill obligations), occasionally under Article 173 (action for annulment) and, particularly frequently, under Article 177 (reference for a preliminary ruling).

3. Persistent delays in the achievement of the free movement of persons

Despite this impressive situation, the work of the Panel revealed that, more than 25 years after the end of the transitional period in 1970, there still is a multitude of outstanding problems. This led to the consideration of what could be realistically proposed at this time and which could have a chance of success. The task of the Panel is to make its opinion known frankly and to formulate its suggestions, even if progress, according to the information supplied by the Commission, appears to be currently blocked by opposition from the Member States. Before examining these problems in detail in the different chapters, three more general observations are made, the first concerning the substance of the problem of the failure to fulfil obligations, and the others concerning the means of overcoming this unacceptable situation.

(a) To begin with, attention should be drawn to the general commitment made by the Member States in Article 5 of the EC Treaty that they will take "all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community", that they will facilitate "the achievement of the Community's tasks" and that they will abstain "from any measure which could jeopardize the attainment of the objectives of this Treaty". These commitments are not just standard clauses. They establish an obligation of loyal, positive cooperation on the part of the Member States, in the common interest, which is also their own interest as members of the Community. The provisions cited condemn the resistance and minimalist behaviour which would paralyse Community action in the long term.

(b) A second general observation concerns *means*. Consistent implementation of all the means available is essential, beginning with the conventional devices of regulations and directives. However, these instruments do not exhaust the possibilities. Attention should been drawn to the possibilities offered by Article 220 of the EC Treaty. This lays down that the Member States will, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals "the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals" (first indent) and "the abolition of double taxation within the Community" (second indent). It will be seen that several of the problems examined are amenable to this type of solution, which was created precisely in order to resolve, through mutual agreement, certain types of question which come partly under Community and partly undernational responsibility. Given the success of the Brussels Convention on Jurisdiction and the Enforcement of Judgements, adopted under the same Article, it is hard to understand why the Community and its Member States have not made use of this solution earlier.

(c) The course described seems particularly plausible, since Article K.1 of the Treaty on European Union covers several areas of common interest which relate to the subject examined in this report, and since Article K.3 of the same treaty introduces means which complement Article 220 of the EC Treaty. In mentioning this possibility, it should be emphasised, however, that there is a recent tendency which consists in shifting the solution of certain problems in the Community field towards the second and third "pillars" of the European edifice, where the means available are quite different from the precise, binding nature of the legislative instruments provided for by the EC Treaty, not to mention the control by the Court of Justice.

4. Abolition of the indirect obstacles to free movement

Analysis of the many difficulties encountered by migrants concerning freedom of movement and full recognition of their status shows that many of the problems do not come directly under the rules governing the movement of persons but under laws and practices relating to many other fields. Three groups are considered here, in descending order of their susceptibility to Community action : obstacles in fields of Community competence *other* than the free movement of persons; obstacles resulting from the disparity of national legislation in fields relating to free movement; and obstacles resulting from "societal problems" with regard to personal and family status, which are perceived differently in the various Member States.

(a) It is clear, and this is the simplest case, that certain practices resulting in obstacles or even *de facto* discrimination with regard to the movement of persons fall within fields where the Community is fully competent but which are *different* from the free movement of persons. Thus, certain practices in the field of, e.g., the free movement of goods and services, social rules, financial transfers and taxation etc. are a constraint as far as the free movement of persons is concerned. Several problems of this type have been examined in the chapters which follow.

(b) Practice has again shown that apart from the application of the principle of national treatment, taken by itself or in its various specifications, the free movement of persons is affected by obstacles resulting not from discrimination in the proper sense but from *disparities in national legislation*. Such diversity, in this field as in others, is not amenable to application of the principle of non-discrimination or national treatment. In certain fields, such as that of professional qualifications, it has been possible to find a remedy by applying the principle of mutual recognition. For the rest, obstacles resulting from substantial disparities in legislation can be abolished only by harmonizing national legislation. This raises a problem of definition as regards the Panel's work: while the Panel thought it ought to be strict with regard to discrimination proper and thought it could recommend unreservedly solutions based on the principle of mutual recognition, it has been more cautious as regards the possibilities of harmonization. The assumption is that harmonization affects the nationals of Member States as much as, if not more than, migrants. The process therefore gives rise to problems which are more complex than those resulting from the requirements of free movement or recognition.

(c) Other practices denounced as discriminatory by certain peolple, reflect "societal problems", especially as regards personal and family status, whose solution is clearly a matter exclusively, or at least primarily, for the Member States. Undoubtedly, the differences in attitude which the Member States show in this respect for their own moral, political or social reasons may result in restrictions on entry and residence for certain persons, or involve refusing various advantages, e.g. in social or tax matters; but it is not for the Community to push for a levelling of such practices under the pretext of free movement. It must be pointed out here that all the relevant chapters of the EC Treaty contain reservations relating to public policy which there is no question of circumventing in order to promote freedom of movement.

5. Free movement of persons in a context of underemployment?

Lastly, it was not possible to ignore a paradoxical aspect of the task of the Panel : can, and should, the free movement of persons be promoted at a time when there is a serious problem of underemployment? As far as principles are concerned, the answer is plain: underemployment should in no circumstances lead the authorities responsible to play down the problem of intra-Community migration. The free movement of persons is one of the basic freedoms of the Community, just as it is within the Member States, regardless of how developed the various regions may be. For the Member States, the days when one thought one could protect the employment and social advantages of nationals at the expense of migrants living precariously on the margin are over. In the Community, migration is independent of the economic and social short-term situation and it must be regulated in accordance with criteria which foster initiative, innovation and competitiveness. In such a context, the solution of employment problems calls for solidarity from all, but not for protectionist withdrawal.

III. STRUCTURE OF THE REPORT

Given the great diversity of subjects relating, immediately or remotely, to the problem of the free movement of persons, it was necessary first of all to classify the problems on a scale of importance and focus the deliberations on the major aspects of the subjects assigned. Analysis showed that, without omitting anything essential, the subject matter could be arranged to good effect under seven headings, namely:

- entry and residence;
- access to employment;
- social rights and family status;
- tax and financial status;
- cultural rights;
- the special situation of third-country nationals;
- protection of the rights of individuals.

Experience showed that these headings provided an appropriate basis for organizing the deliberations of the Panel and for hearing those who appeared before it. They also provided the structure of the report.

Chapter I: Entry and residence

INTRODUCTION

The freedom of movement of persons includes the right to enter, move and reside in another Member State and, in that context, prohibits all discrimination based on nationality. The right of entry and of residence is the core of the freedom of movement of persons. Limits or barriers to that right constitute direct obstacles to that freedom, as against the indirect obstacles dealt with in the other chapters of this report.

The abolition of formalities for EU citizens entering another Member State fosters among individuals a sense of belonging to a common area. Nevertheless, the right of entry has not brought about the abolition of identity checks on people crossing internal borders, the impetus of the 1992 deadline under the Single European Act notwithstanding. In this connection, although the entry into force of the Schengen agreements was a major landmark, the result was a fragmentation of the area of free movement between Schengen and non-Schengen countries. It is desirable, therefore, that the principle whereby people may move freely without being checked at internal borders should be extended to all EU Member States.

As recognized in the Treaty - by way of restrictions on the freedom of movement of persons - the abolition of controls cannot, of course, take place at the expense of security. Member States' actions in the context of the third pillar bear witness to a desire to reconcile, on the one hand, free movement and, on the other, effective protection against crime, drugs and illegal immigration. Member States must in this connection agree on detailed arrangements for transfering checks to the external frontiers of the Union.

Initially, the right of residence in any Member State of the Community, one of the basic principles of the EEC Treaty, was closely linked to the pursuit of an occupation. Since then, through the combined effect of secondary legislation and the case-law of the Court of Justice of the European Communities, the concept has been broadened and now tends to cover people generally. This step-by-step broadening has meant, however, that the right of residence tends to apply piecemeal, in a way which is no longer fully in keeping with the needs resulting from modern forms of mobility.

One of the merits of the Maastricht Treaty is that, by recognizing the right of Union citizens *inter alia* to move and reside freely in the territory of another Member State, it pointed to a new objective: to extend, without any discrimination, the right of entry and residence to all categories of nationals of Member States. The need emerged, therefore, to pinpoint the obstacles which, in the legislation and its implementation by the national authorities, still stand in the way of a freedom of movement to match that ambition. First of all, it is advisable however to recall the underlying legal principles of the right of entry and of residence.

I. CURRENT LEGAL SITUATION

Under the Treaty, every citizen has the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down therein and the measures adopted to give it effect (Article 8a of the Treaty, as amended by the Maastricht Treaty). Citizens are largely unaware, however, of conditions and detailed arrangements that govern the granting and exercise of that right.

1. Right of entry

EU citizens have the right to enter any Community Member State simply on presentation of a valid passport or identity card. No other document or formality - e.g. declaration, answers to questions or stamp - can be demanded (*Pieck* Case 157/79 and *Commission v Netherlands* Case 68/89). An entry visa or the like may be required in the case of family members who are not nationals of a Member State (see chapter VI on that point).

The widely held view is that right of entry means that people may move within the Community as they would in a Member State, i.e. without being subjected to border checks. The birth of the internal market on 1 January 1993 removed major obstacles to the freedom of movement of persons, but mainly as consumers. While the disappearance of customs checks and other border formalities has put an end to many of the difficulties faced by travellers, identity checks on people, a very visible aspect of the continued existence of frontiers, have been maintained.

The fundamental provisions should be recalled. The current wording of Article 7a of the EC Treaty simply repeats what was stated in Article 8a of the Single European Act. It is linked to (c) of Article 3 and, together with the latter, comes under the heading "Principles" of Part One of the Treaty, a fact which bears witness to its fundamental importance in the framework of the system. In view of the problems of interpretation raised by the Article, it is perhaps advisable to recall its actual wording:

> *"The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article and of Articles 7b, 7c, 28, 57(2), 59, 70(1), 84, 99, 100a and 100b and without prejudice to the other provisions of this Treaty.*
>
> *The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."*

A declaration accompanying the final Act reflects the "firm political will" of the Parties to take the decisions necessary to complete the internal market, but adds that "setting the date of 31 December 1992 does not create an automatic legal effect". When seen in its context, the declaration is a reminder of the complex conditions to which the application of the second paragraph of Article 8a was subject.

By introducing the concept of "citizenship of the Union", the Maastricht Treaty altered in several respects the situation resulting from the Single Act and its definition of "internal market"; put another way, the

present Article 7a must be read in conjunction with the provisions on European citizenship: compared with Article 7a, which is generic and focuses on the “internal market”, the provisions on European citizenship found in Article 8 *et seq.* are specific to the individual, and their effect is to supplement or develop the general rule governing the internal market. In this connection it should be noted that, according to the second subparagraph of the new Article 8(1), *"every person holding the nationality of a Member State shall be a citizen of the Union"*. Paragraph 2 of that Article adds that *"citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby"*. Article 8a(1) states that *"every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect"*. Paragraph 2 of the Article provides for a specific procedure with a view to *"facilitating the exercise of the rights referred to in paragraph 1"*. That provision thus recognizes that the rights concerned are in themselves operational.

It may be concluded, in the light of these provisions, firstly that the "free movement of persons" - which, judging from Article 7a, would appear to be an objective feature of the internal market - in this instance constitutes an "individual right"; secondly that the substance of that right is supplemented not only by the "movement" of persons referred to in Article 7a but also by a "right of residence"; thirdly that the right thus defined is granted indiscriminately to "every" citizen of the Union, i.e. to the nationals of any Member State, without restriction as to category, e.g. persons working in an employed or in a self-employed capacity, service providers, etc.; and fourthly that enjoyment of that right may be restricted only by requirements specifically provided for in the Treaty or by provisions adopted for its implementation, thus excluding the possibility that failure, on the part of the Community, to adopt the provisions applicable might, *per se* be regarded as an obstacle.

The provisions referred to thus entail a reversal of the burden of proof, in that free movement and the right to reside henceforth constitute a general principle; that it applies to all citizens of the Union; and that its wording, by virtue of Articles 8 and 8a, has swept aside the temporary reservation once set out in the Single Act, in so far as it is restrictions on freedom of movement and on the right of residence - and not that freedom or that right - that have to be shown to be compatible with Community law. Since several options are now available to the Community legislator in this area - in particular the second paragraph of Article 6 on the prohibition of discrimination on grounds of nationality and Article 8a(2) on facilitating the exercise of the right to move and reside - the absence of implementing measures will no longer constitute a valid ground for denying citizens of the Union full enjoyment of "rights" available to them under Article 8a.

In their proper context, those provisions clearly show how the process evolved. The “four basic freedoms” were originally but an extrapolation of certain EEC Treaty headings and of the substance of its provisions; it is thus that they have inspired legal practice and case-law for thirty years of the Community's existence.

The step forward represented by the Single Act consisted in expressly enshrining that constitutional doctrine in the Treaty or, to be more precise, in the former Article 8a. Already then, that provision was a basic directive whose purpose was to give effect to the Treaty. As shown above, the addition of the provisions on European citizenship lend credence to the claim that freedom of movement and the right of residence now feature among the basic rights of all Community citizens.

2. Right of residence

(a) Conditions under which the right of residence may be exercised. While exercising the right of entry calls for possession of a valid passport or identity card, the right of residence, as evidenced by the issuance of a residence card if the period of residence exceeds three months, is subject to certain requirements.

Under Article 48 of the Treaty, workers may stay in another Member State for the purpose of employment and may remain in that Member State after being employed there. The rules governing the freedom of movement of workers are laid down by Regulation (EEC) No 1612/68. While its stated objective is to help satisfy the requirements of the economies of the Member States, the Regulation treats workers not only as factor of production but also as citizens. It expressly includes workers within a broad definition that also covers those seeking employment, those who have lost their jobs and those who have become unfit for work in the host Member State. The unemployed have, by virtue of the case-law, the right to stay in a Member State other than the one in which they were last employed, but are not entitled to unemployment benefit in that Member State.

Although not mentioned in the Treaty, the worker's family is not forgotten: there is a right for migrant workers to be joined by their spouse, their descendants who are aged less than 21 or who are dependent, and their dependent relatives in the ascending line, irrespective of nationality. Member States are also required to facilitate the entry of other relatives who are dependent or live under the same roof (see Chapter III).

Generally speaking, the purpose of the Regulation is to take into account the economic and social needs of workers who, together with their family, move to another Member State. It is thus a cornerstone of the EU's legislation. Directive 68/360/EEC sets out the rules governing the issue of the residence card that is an expression of the right of residence under the Regulation. The system is supplemented by Regulation (EEC) No 1251/70, which gives the right, subject to certain conditions, to remain in the Member State in which the person concerned has ceased working.

The right of residence is available to self-employed workers - including suppliers of services - by virtue of the right of establishment enshrined in Articles 52 to 57 of the Treaty. Directives 73/148, 75/34 and 75/35 contain the same rules as for employed workers, except that there is no provision for granting the right to stay to self-employed persons who have ceased working (see below).

In the wake of the Single European Act, the Treaty was no longer seen in a purely economic context. The right of residence was, by virtue of Directives 90/364, 93/96 and 90/365, extended to retired persons, students and, generally speaking, all those who have sufficient resources and health insurance for themselves and for their dependants.

The rules on the issue of the residence card which are set out in Directive 68/360/EEC apply to these groups of people - persons who are not gainfully employed - but with one appreciable difference: the card, which is valid for five years at least (except in the case of students, the validity of whose card may be limited to one year and is renewable), may be subject to renewal after two years. In order to exercise the right of residence, the person concerned must provide proof that he has sufficient resources (a statement is sufficient in the case of a student) and health insurance for the entire family. Sufficient resources are defined as resources exceeding: (a) those below which the host Member state might grant social assistance to its nationals or (b) the minimum old age pension.

(b) Recognition of the right of residence. The arrangements for recognition of the right of residence by the host Member State are laid down in Directive 68/360/EEC and the other instruments that refer to it. A residence card for Community nationals is issued by the host Member State on presentation of a valid passport or identity card and documents showing that the requirements for entitlement to the right of residence are met. The card must be valid for at least five years from the date of issue and must be renewable automatically. If the person concerned plans to stay for less than one year then a temporary residence card is issued, the period of validity of which may match exactly the planned duration of the stay.

The Directive stipulates that "Member States shall take the necessary steps to simplify as much as possible the formalities and procedure for obtaining the card". It is further specified that they may not derogate from those provisions save on grounds of public policy, public security or public health. That being said, the European Court of Justice pointed out that the right of residence stems directly from the Treaty and from secondary legislation and that it does not, therefore, depend on the issue of a card: the latter is merely an expression of the existence of the right of residence. An expulsion order may not, therefore, be issued if the person concerned fulfils the requirements applicable, even if he does not have a valid residence card (see *Sagulo* 8/77 and *Pieck* 157/79).

The Court of Justice held that Member States could carry out border checks in respect not only of the identity card or passport but also of the residence document (*Commission v Belgium* 321/87). In this connection, however, the Court recognized, indirectly, that the residence card could not be treated as a valid identity document for the purposes of movement within the Community.

II. LASTING OBSTACLES

A distinction is made between, on the one hand, restrictions arising from Community legislation itself, which is allegedly not suited to free-movement requirements, and, on the other, obstacles resulting from incorrect transposal of that legislation.

1. Restrictions arising from Community legislation

A number of restrictions on the right of entry and residence in another Member State that arise from Community legislation have been identified and should be examined again in detail:

(a) Suitability of documents for identity-control purposes. Since the free movement of persons is based on nationality, possession of a passport or identity card is necessary. Nationals of Member States that do not issue identity cards are sometimes turned away because they do not have a passport, even though they may have a residence card issued to Community nationals residing in another Member State. Admittedly, the residence card contains particulars based on the identity card or passport, but even so, it is not recognized as having any value outside the Member State that issued it. In order to facilitate the movement of such persons, the Commission is invited to propose that the residence card be recognized provisionally as an official document - just like an identity card - so that people will not be turned away at an internal border of the Community, even if, later on, they are the subject of a check inside the country.

(b) Repeated issuance of temporary residence documents. In the present context of low job security, increased mobility among groups of people who do not plan to stay for a long time (students, voluntary workers, trainees, etc.) and flexibility of the labour market, it is advisable that periods of temporary residence be aggregated; the person concerned could thus, in the final outcome, obtain a permanent residence card. There is also the issue of people who habitually spend part of the year abroad, e.g. pensioners.

(c) The situation of persons who move to another Member State in order to reside there for an undetermined period the duration of which will probably be over 3 months, without being expected to exceed one year. The procedure for issuing a temporary residence document, originally conceived to solve clearer situations (for example that of secondment for purposes of work of 6 months' duration in another Member State), appears not to be adapted to the needs of this new category of persons : the temporary document is sometimes delivered after its beneficiary has left the territory or after he/she has become entitled to receive a permanent residence card. Many people, aware of this situation, put themselves into an illegal situation while neglecting to ask for the residence document. As this situation is not satisfactory either for Member States, or for citizens, it is necessary to find a remedy for it.

(d) Establishing the existence of sufficient resources. Member States do not wish to allow in people who will only be a burden on their social security system. Without losing sight of the major economic aspects of this issue, the requirement to provide proof of sufficient resources should be made more flexible. The system whereby the person concerned simply states that he/she has sufficient resources, as in the case of students, could be made more widespread.

(e) Jobseekers. The right to look for work is part of the free movement of workers (see the Antonissen judgment 292/89) and, even more, is a precondition to the exercise of that freedom. Therefore, administrative rules imposing a duty to obtain a temporary residence card should not amount to an obstacle to the exercise of that right.

(f) Restrictions on the right of residence of a worker who becomes unemployed. First, the case of self-employed people : even if they have worked in the host country for many years, the fact that they have ceased their professional activity and no longer have sufficient resources means that, as regards the right of residence, they are not protected against expulsion. Compared with those working in an employed capacity, who are entitled to stay in the country after becoming unemployed, this is clearly a lacuna within the legal system. It would be fairer to grant self-employed workers the same right, on condition that they have actually carried on those activities for a minimum number of years in the Member State concerned and intend to resume working (a time-limit could be imposed in this respect).

That being said, unemployed persons who, after receiving unemployment benefits for a certain time, receive social assistance in the host Member State, are not protected either. Close attention should be paid to their case also.

(g) The right to stay with members of the family. This matter is dealth with in chapters III and VI on the family status and the situation of third-country nationals.

2. Obstacles resulting from poor transposal of Community legislation

Attention was drawn in particular to practices that reveal either a reluctance on the part of the authorities of the Member States fully to apply Community rules or - a more likely possibility - a lack of information and awareness on the part of the authorities responsible for applying the rules in the host Member State. Infringements of the freedom of movement of persons are particularly frequent as regards entry and residence and essentially concern the following aspects:

(a) The procedure for issuing residence cards. In spite of well-established precedents, numerous problems still arise, in particular: excessive slowness, in some cases deliberate, in the issuance of a permanent card by insisting, without justification, on the repeated renewal of a temporary card, with all the costs that this entails; requiring documents not specified by Community rules; fees that are excessive in relation to those that nationals of the host Member State have to pay in order to renew their identity card. A particularly serious aspect of these infringements is that they concern persons awaiting the

renewal of a card, in other words, people who are in a situation that is, by definition, so uncertain as to make it diificult for them to seek effective redress.

(b) Occasional difficulties as regards providing proof of employment. Before agreeing to issue a certificate of employment or enter the applicant's name on a register, some chambers of commerce or institutions require a non-temporary residence card which the authorities will issue only if there is proof that the person concerned is already a member of the profession. Those seeking employment can find themselves in a similar vicious circle if their employment contract can be signed only if they possess a permanent residence card.

(c) Threats of expulsion. In spite of there being well-established precedents in this respect (*Sagulo* 8/77,14.7.1977, and *Pieck* 157/79, 3.7.1980), some Member States continue to overlook the fact that the issuance of the card is nothing more than an expression of the right of residence; it does not constitute that right. Contrary to what tends to be the case in the Member States concerned, non-possession of a valid card should never *per se* lead to a threat of expulsion. In any event, the question of expulsion of Member States' citizens should be examined in the light of the concept of European citizenship, especially in the case of migrants who have become culturally integrated in the host State, and in the light of Article 8 of the European Convention of Human Rights. These considerations seem particularly relevant for migrants' children born and educated in the host State.

(d) Link between residence card and access to social security benefits. Such a link is often established by the authorities of some Member States (registration with a social security institution is made conditional on possession of a valid residence card). Such practice may, however, constitute a vicious circle and undermine the very existence of the right of residence if the person's only financial resource is a pension payable by another Member State and cannot be received, in accordance with Regulation (EEC) No 1408/71, via the competent agency of the host Member State. The type of situation being brought into question is not the one in which the person concerned is in the wrong through having failed to apply for or renew a residence card; on the contrary, it tends to be the result of slowness on the part of the administration.

(e) The right to stay of a person who is unemployed through no fault of his own. Leaving aside Article 7 of Directive 68/360/EEC, Member States are reluctant to renew the residence card of persons working in an employed capacity who are made redundant through no fault of their own, even in cases where the period of validity of the card has not expired.

(f) Requiring proof of sufficient resources. Since it is included in the general Directive on the right of residence and in the directives dealing with persons who are not gainfully employed, the requirement of proof of sufficient resources does not concern workers. It is sometimes invoked against workers exercising their right of residence, thus overlooking the fact that, by virtue of the case-law, the activity need only be real and effective, even if the remuneration has to be supplemented by social benefits in the host Member State. Workers exercising the right of residence come up against the same problem, especially if they are unemployed. Some Member States regularly require students to prove that they have sufficient resources, whereas the Directive stipulates only that they make a statement to that effect.

(g) Language used for official documents. Although the legislation requires Member States to simplify as much as possible the formalities for issuing residence cards, there are still numerous difficulties, especially as regards the language in which the documents need to be submitted: certified authentic translations are demanded, resulting in additional delays and costs. Moreover, the sheer number of rules applicable, under civil law, as regards names and addresses for instance, sometimes leads to distortions which make life difficult for the migrants concerned.

(h) Link between the definitive residence card and access to various services and facilities. Difficulties arise in several Member States in connection with the administration's slowness in issuing a definitive residence card; without such a card, the person concerned may be denied access to certain services for a considerable time. In ***some member States, for instance***, this sort of problem arises as regards connecting the gas or electricity or subscribing to a mobile telephone service.

III. PROPOSALS

Some administrative simplification in the exercise of the right of residence seems necessary, in particular for persons staying probably more than three months, but less than a year, in another Member State. The Commission is therefore invited to consider the adoption of an uniform certificate which would be delivered by the home Member State, which will contain the same data as those inscribed on the identity card and would testify that its beneficiary is covered by a health insurance and has sufficient resources to cover his needs and those of his dependents, if any. The host Member State would be under an obligation to recognize this certificate for the persons concerned. The host Member State should not have more obligations towards the holder of this certificate than it does towards someone staying less than three months.The use of this system would be optional whereas the obtention of a temporary residence document will remain a right for those prefering to be registered as legally resident with the full legal effects this implies. Of course, in case of a stay exceeding one year or where the stay is expected to last more than one year, the existing regime would remain unchanged. Moreover, the procedure for issuing this certificate would have to be relatively simple and inexpensive.

If this proposal were welcomed by Member States, they would have to examine how to adapt the current provisions of Regulation 1408/71 so as to guarantee the holders of the new certificate that they will be able to benefit from their health insurance in the host Member State after three months. A possible solution is to extend the validity period of the E-111 form in order to make it coincide with the length of the stay. In fact, some social security institutions already deliver E-111 forms valid for up to one year.

CONCLUSION

The Member States and the institutions are invited to become fully aware of the implications of the changes Articles 8 and 8a on European citizenship have brought about as regards the scope of the right of free movement and residence. They should do this in particular by examining Article 7a and the other relevant provisions of the Treaty in the light of those new Articles.

As regards the right of entry, it has already been stressed that, for citizens of the European Union, the abolition of internal border controls is incomplete. The situation will remain unresolved until Member States have defined a common approach to external border controls. Obviously the Schengen agreement constitutes progress in terms of abolishing border controls between the Member States which apply it. It therefore ought to be extended as far as possible.

As regards the right of residence, it is necessary to adapt to the demographic and sociological changes that have taken place in Europe since the adoption of the first provisions of secondary legislation in that field. It is therefore recommended that a review or, at least, a consolidation of the provisions of secondary legislation take place with a view to ensuring compatibility with Treaty requirements in the wake of the process of clarification and amendment spanning from the Single European Act to the Maastricht Treaty. Following those changes, failure to act on the part of the institutions would no longer constitute valid grounds for maintaining restrictions that are incompatible with rights inherent in the possession of European citizenship. In addition, the necessary amendments should take place within a reasonable time and, if necessary, a timetable should be established for that purpose.

Finally, in the interest of the people moving within the Community as well as that of the Member States in seeking to control the legality of stays on their territory, the procedure for issuing the documents which accompany the exercise of the right to stay should be simplified. In particular, it is proposed to issue a certificate adapted to the situation of those people who go to another Member State for an undetermined period, probably longer than three months but shorter than a year, and prefer not to be registered as legal residents with all the rights and obligations this implies. In parallel, the Commission is invited to take systematic action against the manifestly unjustified obstacles that citizens still face when seeking to exercise their right of entry and residence, notwithstanding the possibility individuals have to take their case to national courts.

Chapter II : Access to employment

INTRODUCTION

Access to employment in another Member State is a fundamental aspect of the free movement of persons within the Union, since that freedom, as laid down in the Treaty, includes the right to go to another Member State to look for employment and work there, either as a self-employed person or as an employee. In addition, the right to take a job in another Member State is a means whereby workers and jobseekers can benefit from a larger labour market offering greater choice and opportunity.

However, free movement is not yet a daily reality for Europe's citizens. While much has been achieved in this field, there is still much to do in order to guarantee the effectiveness of the right to practice a profession in another Member State under the same conditions as nationals of that State.

In practice, as far as access to employment is concerned, there are most often two types of obstacle to the freedom of movement: indirect barriers of a social, sociological, cultural and linguistic nature, and barriers which restrict access to employment more directly and which result from legal and administrative obstacles or from a lack of information for jobseekers and potential employers alike.

Indirect barriers, which as such will be discussed in later chapters of this report (in particular Chapters III and V), include:
- a lack of security of employment for the spouse (most often the wife) of a mobile worker and a risk of having to leave the family in the home country;
- differences between national laws on labour and social protection and between national taxation systems, and a lack of information about such systems in the different Member States;
- an unfavourable economic climate, which has turned regions that traditionally welcomed migrant workers into depressed areas;
- inadequate knowledge of a foreign language on the part of most workers and employers (this is extremely important for jobs of a certain level which require relations with customers or responsibility for teams and involve a considerable amount of interaction).

Obstacles restricting access to employment more directly include:
- a lack of information on permanent jobs available abroad;
- gaps in the Directives on the regulated professions;
- difficulties regarding access to, and the exercise of, employment in the public sector;
- for the non-regulated professions, the lack in certain countries of a system of certification and the lack of a Community system of recognition of diplomas and qualifications.

These obstacles will be examined below from the following three angles: information on job offers (I), employment in the private sector (II) and employment in the public sector (III).

I. INFORMATION ON JOB OFFERS

For the citizen, the ability to gain rapid access to information on job offers in the various Member States is a considerable advantage which is likely to trigger, or at least facilitate, the effective exercise of his right to free movement.

In late 1994, the Commission set up the EURES (European Employment Services) network with a view to improving mobility conditions and contributing to the establishment of a European employment market. Today the network consists of 450 advisers (in the 15 Member States, Norway and Iceland), who use various information tools including in particular two databases, one containing information on job offers in the participating countries, the other information on living and working conditions. Special networks have been created in 13 border regions with the additional task of developing cooperation in the local employment market. Their special characteristic is the participation of the social partners, who thus contribute to the expansion of the network through social dialogue and concerted action with other partners in the field of employment. Apart from providing information on living and working conditions, trade-union Euro-advisers help to identify the problems arising in the fields of social security and tax. The Commission coordinates the updating of the databases, information exchanges, the training of EURES advisers and the management and promotion of the network.

EURES's strength lies in its human resources and in the network of contacts which it has created. The number of jobs offered in the database has recently increased substantially, as a result of the collaboration between Germany and Austria, but the other States must try to introduce more job offers into the system. In addition, EURES still has to receive political support (at all levels - local, national and European) if it is to optimize its role in the establishment of a European employment market.

The following improvements are suggested:

- Bring EURES closer to the persons most interested, mainly frontier workers, managers, skilled workers, unemployed persons and employers, by adapting information to their specific needs, and strengthen cooperation between EURES advisers and EURES trade-union advisers at cross-border level;
- Encourage Member States and employers to insert more offers in the database. Cooperation between firms and employers is essential in this respect;
- Improve the link between EURES, the trade-union Euro-advisers, the Advisory Committee on the Social Security of Migrant Workers and the Advisory Committee on the Free Movement of Migrant Workers;
- EURES must confirm its potential as an instrument for promoting employment policy not only at national but also at regional level, especially in border regions, and for encouraging social dialogue (territorial employment pacts);
- Strengthen the link between EURES and other Community programmes and initiatives.

II. EMPLOYMENT IN THE PRIVATE SECTOR

Considerable progress has been made on stimulating the effective exercise of free movement of persons in the private sector. The decisions of the Court and the Directives adopted on the recognition of qualifications in the case of the regulated professions (I) have greatly contributed to this. But the reality and size of the problem of the recognition of qualifications in the case of the non-regulated professions have been underestimated (II).

1. Recognition of qualifications and diplomas in the case of the regulated professions

Member States very often decide to reserve or restrict the taking-up or pursuit of certain activities on their territory to those in possession of certain professional qualifications. They do so for legitimate reasons, such as the protection of consumers, public health or the environment. In the absence of harmonization at Community level, the Member States are free to regulate or not to regulate a given activity. While in the case of some professions (doctors, vets, lawyers, teachers) all the Member States have opted for regulation, in the case of others (engineers, plumbers, psychologists, surveyors, etc.) the situation is very variable, some Member States having a stronger tradition of regulation than others. However, where Member States do regulate, each one does so by reference to the diplomas and other qualifications obtained in its national system of education and training. Consequently, it is impossible for a European citizen who holds a qualification acquired in his Member State of origin to meet the legal requirements laid down for the pursuit of the same activity in another Member State. The Community has addressed this problem in a number of different ways by adopting, in successive waves, various directives facilitating the recognition of professional qualifications.

Initially (from 1964 onwards) it adopted a series of directives known as the "**Transitional Measures Directives**", which dealt with activities in the craft and industrial sectors (plumbers, builders, travel agents, tour guides, wholesalers and retailers, hairdressers, etc.). Strictly speaking, these Directives do not provide for the recognition of diplomas; they introduce a system of recognition based on professional experience. They enable anyone who possesses a certain number of years of professional experience, acquired as a self-employed person, to pursue that activity in another Member State.

The major problem with these directives is that they offer no mechanism of recognition for recently qualified professional persons who do not have the required experience or for those who have only acquired experience as an employee. Like the Commission, it is considered that in these circumstances the host State is obliged under Article 52 of the Treaty, as interpreted by the Court of Justice in *Vlassopoulou*, to compare the qualifications obtained by the applicant and those which it requires under its own standards and to grant recognition where the applicant's qualifications attest that his knowledge and aptitude are equivalent to those required in that State. However, the absence of Community legislation formally establishing this interpretation leads to some uncertainty. More seriously, a few Member States refuse to take account of Article 52 and the case-law and follow the strict terms of the provisions in the existing Directives.

The Commission, in a recent proposal[1] designed to consolidate the Transitional Measures Directives, introduced a new provision implementing in legislative form the principles established by the Court in its decisions. It would be desirable that the Council and the Parliament would adopt the proposal rapidly, since this would make it possible to solve outstanding problems for young professional and employed persons more easily and would help to clarify the legal situation of all the parties concerned.

The second stage (from 1975) was the adoption by the Community of the **Sectoral Directives**, which introduced systems of recognition of diplomas for the following seven professions: doctor, nurse responsible for general care, veterinary surgeon, dentist, midwife, pharmacist and architect. These Directives lay down minimum criteria, common to all the Member States, for training (conditions of access, duration and content) and provide that diplomas sanctioning training which complies with these criteria must be automatically recognized in the Community and must give the holders the right to pursue the corresponding profession on the sole condition that they register with the competent authorities in the host Member State.

Overall, the systems of recognition introduced by these Directives work well. The hearings held by the Group for representatives of some of the sectors concerned showed that such professionals do not encounter many difficulties in pursuing their profession in another Member State.

With regard to these Directives (as distinct from the general system - see below - which establishes specific provisions in this connection), there is still the problem, however, of the non-recognition of diplomas acquired by Community citizens in third countries. In principle, recognition of such diplomas is a matter for the Member States. The fact that one Member State recognizes a third-country diploma does not oblige the other Member States to recognize it automatically. But European citizens who hold such diplomas should be able to exercise their right of free movement. In addition, the recognition of third-country diplomas by one Member State must not jeopardize mutual trust between the Member States and the legitimate confidence of citizens in the quality of professionals qualified in the Community (which confidence is based on the fact that Community diplomas sanction harmonized training). The Sectoral Directives could be amended in this respect by introducing, in the case of the seven professions, a provision based on the existing mechanism in the general system, which would oblige Member States to examine an application for recognition concerning a diploma acquired in a third country and to grant that application if the diploma in question has already been recognized in another Member State and if its holder has three years' professional experience certified by the Member State which recognized the diploma.

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[1] Proposal for a European Parliament and Council Directive establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the Directives on liberalization and transitional measures and supplementing the general systems for the recognition of qualifications, OJ No C 115 of 19 April 1996.

The third element in the existing corpus of legislation on the recognition of professional qualifications is the **general system** of recognition of diplomas governed by Directives 89/48/EEC and 92/51/EEC. All the regulated activities not covered by the previous Directives fall within the scope of the general system. Unlike the Sectoral Directives, the system is not based on harmonization: the Member States retain the right to regulate a particular activity or not and, if they do, to determine the level, structure and content of the training required. The general system is based on mutual trust: by adopting it, the Member States have accepted, as a general principle, that where a person is fully qualified to pursue a profession in his home Member State he should have the right to pursue the corresponding profession in another Member State. The accent is therefore on competence (the activities which a person has the right to pursue) rather than on the content of education and training. However, in the absence of harmonization, the general system enables the authority of the host State, where it can show that there are substantial differences between the education and training acquired and that required, to impose additional requirements on the applicant (e.g. that he should have professional experience, sit an aptitude test or complete a period of adaptation).

The general system has shown that it provides an appropriate means of enabling people to pursue a regulated profession in another Member State: during the first four years of the operation of Directive 89/48, about 12 000 European citizens obtained recognition of their rights, while the average rate of refusal or of the imposition of additional requirements was about 5%.

However, several remaining problems have been identified. First of all, not all the Member States have fully implemented the Directives. There have been delays in Belgium and Greece in particular. Tardy or incomplete implementation in the Member States sometimes leaves applicants confronted with a legal vacuum. In the Group's opinion, such delays are not to be tolerated. Even where in the Member States in question there are certain parallel mechanisms enabling interested parties to apply for recognition of their qualifications (e.g. the mechanisms applied in Belgium for the recognition of qualifications in the professions supplementary to medicine), such mechanisms are not easily readable and do not have the legal certainty which would result from proper implementation of the Directives. Above all, however, it is clearly the case that the behaviour of certain competent authorities shows a lack of willingness to apply the mutual trust on which the system is based. Perhaps, in response to national professional groupings, the presumption in favour of recognition has become secondary; the basic principle (the recognition as it is of the diploma) and the exception (the imposition of additional requirements) tend to become reversed. This tendency reveals itself in the attitude of the competent authorities, which engage in a detailed examination of the applicants' training. For instance, the authorities tend to compare, subject by subject, the course followed by the applicant with the course in the host State. There is also a marked reluctance on the part of the competent authorities to take account of the post-diploma professional experience acquired by the applicant and to admit that such experience can reduce or do away with the additional requirements contemplated. Lastly, a significant number of applicants complain of the difficulties they encounter in obtaining a decision from the competent authorities. The four-month time limit laid down in Directive 89/48/EEC is rarely respected (periods of up to a year without an official response are not uncommon). Applicants are often obliged to provide additional documents or supplementary information long after their initial application was submitted. The reasons given for final decisions are not always sufficient, if given at all. This is above all a problem of informing and training the authorities responsible for processing applications for recognition. Efforts should be stepped up in this field, especially at local level, and

the development of direct cooperation between the competent authorities in the different Member States should be encouraged.

Before concluding on this point, it is necessary to dwell on the special situation, from the standpoint of Community law, of **lawyers**. Since 1977, these professionals have been covered by a Directive enabling them to supply their services under their home professional title in all Member States. Pursuant to Directive 89/48/EEC they may also request recognition of their qualifications in another Member State with a view to pursuing their profession there under the professional title of that State. This proposal represents considerable progress in the field of the recognition of qualifications and, more widely, of the free movement of persons. It is a remarkable expression of the principle of mutual trust between Member States; it can offer the professional persons concerned the possibility of permanently pursuing their profession in another Member State under their original title; and, via the use of the home title, it reinforces information for, and the protection of, those citizens who wish to use the services of a lawyer specializing in the law of another Member State.

The following solutions are suggested:

- Improve the training of the competent authorities with a view in particular to increasing the mutual trust which the Member States ought to show (e.g. through exchanges of civil servants under the KAROLUS programme or through seminars for persons responsible in the Member States for processing applications for recognition). This should be combined with the proposals set out in Chapter VII of this report.

- Increase and improve information for potential applicants about their rights concerning recognition of professional qualifications and about the conditions in which those rights may be exercised. The Citizens First initiative has a role to play here but information possibilities (access to documents, explanatory brochures, advice, etc.) must also be developed within each Member State. Here too the reader is referred to the proposals in Chapter VII.

- Develop contacts with professional organizations and the social partners with a view to increasing mutual trust and transparency and reducing mistrust of non-national diplomas (through seminars, symposia, targeted information measures and meetings with the various actors in the recognition of qualifications, e.g. between the coordinators of the general system and the social partners).

- Expand the group of general-system coordinators to include the social partners.

- Develop direct contacts between authorities responsible for processing applications for recognition in the Member States.

- Oblige the Member States to take account of the professional experience acquired by the professional after completion of his training, both in the case of activities covered by the Transitional Directives and of those falling within the scope of the general system.

- Draw the attention of the Council and Parliament to the need rapidly to adopt the proposal for a Directive consolidating the transitional measures and the proposal for a Directive relating to the right of establishment for lawyers under their original professional title.

- Amend the Sectoral Directives so as to permit, while at the same time providing strict ground rules for, the recognition of diplomas acquired by citizens of the Union in a third country.

2. Recognition of qualifications and diplomas in the case of the non-regulated professions

If the profession which a European citizen seeks to pursue in another Member State is not regulated, the situation is governed by market forces. In such cases, non-nationals may in principle seek employment in another Member State in the same way as nationals of that State. Where qualified employment is involved, however, non-nationals may come up against the problem of the *de facto* recognition of their qualifications and diplomas.

The problem was identified in the Commission communication on recognition for academic and professional purposes (COM(94) 596 final): employers (or potential clients in the case of the self-employed) are unfamiliar with "foreign" qualifications and diplomas; consequently they find it difficult to assess the skills and knowledge of applicants, and the latter may feel that they are, wrongly, not considered for a post for which they are in fact qualified; in addition, applicants who, despite this, manage to find a job often feel they are paid less than colleagues with equivalent national qualifications. The importance of this problem was underlined by several trade unions and employers organizations.

Similarly, the European Social Partners (ETUC, UNICE, CEEP) in their Joint Opinion of 13 October 1992 on Vocational Qualifications and Certification stated that: *"... for employers and employees, transparency means that they understand the content and level of occupational qualifications. Individuals (employed or unemployed) want to know that the qualifications on offer are useful in the labour markets and will be recognized and valued by employers and society. This usually means that the qualifications involved and the way they are assessed and certified have national standing and are accepted by those concerned. This also applies at European level. Workers need to know what opportunities their qualifications may offer in other Member States and the ways in which these opportunities can be realised. Equally, employers need to understand the methods which facilitate this. This puts a premium on systems of vocational qualifications that are easily understood and are comprehensive and progressive in scope within national training arrangements and have a European dimension".*

The Union has tried in various ways to improve the comparability and transparency of professional qualifications. In 1985 CEDEFOP was asked to draw up the tables of correspondence for professional qualifications in various sectors. Between 1989 and 1993 nineteen tables were published. However, the limitations of this work were rapidly revealed. In its resolution of 3 December 1992 on transparency of qualifications, the Council concluded that there were doubts about whether the work on comparability provided the kind of clear information about qualifications necessary to promote free movement of labour and that this meant there was a need to consider new directions for work on transparency of qualifications. The work carried out by CEDEFOP made it possible to understand the systems of qualifications better and to take cognizance of the need to integrate the European dimension into those qualifications more fully. The work was hindered, however, by *inter alia* the rapidity of changes in the professions, the constant need to update qualifications and the fact that the system mostly took account of the basic qualifications subject to certification and ignored professional experience or in-service training. The 1992 resolution identified three key objectives:

- to enable individuals to present their occupational qualifications, education and work experience clearly and effectively to potential employers throughout the Community;

- to help employers to have easy access to clear descriptions of qualifications and professional experience, in order to establish the relevance of the skills of job applicants from other Member States to jobs on offer;

- to develop transparency and improve information about training systems, the content of training, certification and qualifications.

Following the resolution, a pilot project was launched to test the feasibility of a "portfolio" (individual statements of qualifications) as a means of increasing transparency. The portfolio was a kind of standardized curriculum vitae in which jobseekers themselves inserted information about their personal and technical aptitudes (training undergone, qualifications and professional experience acquired, linguistic ability). Evaluation of the pilot project showed that the portfolio was usable provided that (i) individuals received advice about how to fill it in (especially concerning translated information), (ii) use of the portfolio was promoted and developed so as to make it better known to employers and (iii) it was emphasized that the portfolio complemented other initiatives designed to promote mobility and other recruitment practices. However, the degree of satisfaction of portfolio users has been varied: the least skilled have had the greatest difficulty in using it and it was perceived as less useful by those who held the highest qualifications; a majority of employers was of the opinion that the portfolio alone would not provide them with all the information desired about qualifications. A follow-up to the pilot project is being implemented under the LEONARDO programme. It is also possible under that programme to obtain financial support for projects which promote the transparency and understanding of professional qualifications.

At the same time as its strategy of developing transparency, the Commission has also supported outstanding initiatives in the field of transnational cooperation which promotes the comparison, joint development and mutual recognition of qualifications for non-regulated professions. In all, 35 projects were chosen in 1994, covering a great variety of sectors and professions. While the approaches selected varied, the projects were generally aimed at identifying existing qualifications,

comparing their content and the methods by which they can be acquired and also the preparation of common reference systems for skills and the introduction of "European passports". A collection of pilot projects concerning the transparency and recognition of qualifications is being implemented under the LEONARDO programme, which itself attaches considerable priority to these problems. Under the programme, it is possible to obtain financial assistance for projects promoting transnational understanding and recognition of professional qualifications.

In the past, the Community legislator paid less attention to the recognition of qualifications and diplomas for non-regulated activities than for regulated activities. This may be explained by the fact that legal barriers to the taking-up or pursuit of a (regulated) profession constitute unavoidable obstacles which require legislation, while the difficulties facing jobseekers in the non-regulated sector have probably been underestimated. This is reflected in the fact that the Commission has not managed to allocate specific responsibility in this field. Thus, measures relating to the recognition of professional qualifications tend to be adopted in a specific, parsimonious manner, although they continue to be a recurring occupation of the Community institutions. The Council Decision of 6 May 1996 on setting up networks linking the universities and the world of work bears witness to this state of affairs, as does the resolution on the transparency of vocational training certificates adopted on 15 July 1996 by the Employment en Social Affairs Council.

The following suggestions are made:

- Increase and improve information for potential applicants about all questions concerning recognition of professional qualifications and, where appropriate, about the conditions in which their rights in this field can be exercised. The reader is referred in this respect to the proposals set out in Chapter VII;

- Develop contacts with professional organizations and the social partners with a view to increasing mutual trust and transparency and reducing mistrust of non-national diplomas (through seminars, symposia, targeted information measures and meetings with the various actors involved in the recognition of qualifications);

- Amend Article 49 of the Treaty to include a specific reference to the recognition of professional qualifications for employees, as is provided in Article 57 in the case of self-employed persons;

- Identify within the Commission clear responsibility for transparency and the mutual recognition of qualifications and diplomas for professional purposes;

- Develop a new approach to attacking the problems of the mutual recognition of qualifications and diplomas for professional purposes by setting up a forum (or observatory) to learn from national experience, with a view to monitoring changes in qualifications and diplomas, facilitating the dissemination of information and preparing standards promoting transparency and mutual recognition. The process should take account of the use, for professional purposes, of academic diplomas and qualifications acquired through professional training or experience. The forum should involve the social partners and other interested parties (universities, professional associations...).

- Establish a post of mediator for the recognition of qualifications, capable of intervening *inter alia* when an activity is not regulated or when the Specific Directives or the general system are not properly applied (the NARIC network could serve as a basis).

- Develop and improve linguistic training in schools and institutions (for this aspect, see also Chapter V of the report).

- Encourage the social partners (at European and national levels) to take decisive steps towards the recognition of professional qualifications.

III. EMPLOYMENT IN THE PUBLIC SECTOR

Progress on the free movement of persons, in particular as regards ensuring equal treatment and facilitating the recognition of diplomas and other qualifications for professional purposes, has not been achieved to the same extent or at the same rate in the public sector as in the private sector. Outstanding problems relating to employment in the public sector, and more particularly in the public service, are often similar to those which arose (and which are now partly resolved) in the private sector, as far as regulated activities are concerned. If such problems are more difficult to resolve in the public sector, it is largely on account of the latter's special characteristics and in particular of the traditions (reserving jobs for nationals) and idiosyncrasies of each national public service.

It must be remembered, however, that, seen in the context of Community law on the free movement of workers, there is no difference in national law between public and private employment. Article 48 (4) of the Treaty of Rome, however, offers Member States the possibility of excluding certain jobs from the principal of equal treatment. It should be noted that this is therefore a national choice and that nothing prevents the Member State from deciding that all jobs in the public sector are accessible to all Community nationals. If, on the other hand, a Member State decides to make use of the possibility afforded by Article 48 (4), the only jobs which may be reserved for national citizens are those which involve the exercise of government and the safeguarding of the general interests of the State or the local authorities. Thus, Member States may reserve jobs which involve the exercise of sovereignty for their own nationals, but for every other job in the public sector the rule of equal treatment will apply.

Nevertheless, certain genuinely complex and particularly sensitive problems persist concerning the implementation of equal treatment in the public sector, regardless of the exception provided by Article 48 (4). Other difficulties, which arise in particular at local authority level, often result from a lack of information, cooperation and goodwill and from the survival of anachronistic conceptions based on the presumption that only nationals can be loyal.

Such problems merit all the more attention since they were raised at the hearings which the Panel held, since the public sector employs about 22 million workers in the Union and since public sector workers (teachers and health professionals) are among the most mobile (public and private sectors taken together).

Even today, Community citizens suffer discrimination based directly on nationality as regards access to certain jobs in the public sector, even where the posts offered have no connection with the exercise of government. Apart from the problem of conditions of nationality, there are still, for nationals of a Member State who wish to work in another Member State's public sector, problems concerning the requirements imposed as regards both access to and practice of a public-sector job.

Access to public service and career development in the public service are often subject to strict rules which make the latter a closed system that is difficult to adapt to the personal and professional situation of people coming from another Member State. Thus, the fundamental questions raised by the implementation of the free movement of workers in the public sector are as follows:

(i) the elimination of all conditions of nationality for access to public employment, subject to the exception in Article 48 (4);

(ii) the application of the principle of mutual recognition in regard to various components (professional experience, seniority, diplomas, professional training or military service) which Community workers may have acquired in another Member State.

A further fundamental question is the coordination of the rules on social security for civil servants, in particular by extending to civil servants the system set out in Regulation (EEC) No 1408/71. The reader is referred in this connection to Chapter III of this report (Social and family status).

1. Elimination of nationality conditions for access to public employment

This requirement is at the very basis of opening up the public sector to all Community nationals. Considerable progress has been achieved in this field, in particular in the four priority sectors (identified below). In several Member States, however, there is still strong resistance to the idea of opening up the public sector in general.

Admittedly, Article 48 (4) of the Treaty provides *that "the provisions of this article shall not apply to employment in the public service"*. But it is well established case-law that this exception refers only to jobs which involve the exercise of powers outside the ordinary law and the safeguarding of the general interests of the State or local authorities. In addition, the Court always followed the "functional" interpretation of the exception of Article 48 (4) and rejected the "institutional"

interpretation defended by some Member States. According to the Court, the application of Article 48 (4) depends on the nature of the tasks and responsibilities covered by a post and not on the notion of public service as it exists in the national legislation of each Member State.

Prompted by the decisions of the Court, the Commission adopted on 18 March 1988 a Communication on its activity concerning the application of Article 48 (4). The Communication was primarily concerned with four priority sectors: organizations responsible for managing a commercial service, public health services, public education establishments and civil research.

In all four sectors, the Commission held that the activities carried out by the State were generally sufficiently removed from the exercise of public authority. Consequently, these sectors were to be accessible to all Community nationals in general, Article 48(4) being applied only in exceptional circumstances.

Following the Communication, and as a result of systematic action by the Commission vis-à-vis the Member States and of the Court's decisions, considerable progress has been made in opening up the public sector. But much remains to be done before all the nationality conditions not covered by the exception in Article 48(4) can be eliminated.

Apart from the priority sectors there is a whole series of activities where the State is confined to supplying a public service which cannot be defined as the exercise of public authority (e.g. firefighting). Moreover, within national civil services, many categories of job are equivalent to administrative, bureaucratic tasks of a technical or maintenance nature which also have nothing to do with the exercise of public authority. For example, one might mention the posts of administrative secretary in national or local government or posts of technical adviser to public bodies. For all these tasks, nationality is still often stipulated. In such cases, it is always up to the Commission to institute proceedings against the Member States concerned for failure to meet obligations.

But this case-by-case approach is inadequate, as was already the case with the priority sectors before the 1988 Communication. Proceedings for failure to fulfil obligations are long and do not by themselves resolve the cases of individuals who may have been unjustly rejected for years.

At the same time, the attention of the Member States and local authorities should be drawn to the blatant illegality of such clauses for posts of the type mentioned and the possibility which individuals who have been unjustly rejected in such cases have of later filing for damages before the courts should be emphasized.

It is also essential that, in future, the Commission should reinforce the sectoral approach initiated in its 1988 Communication. In this respect, recent judgements of the Court (of 2 July 1996) provide a solid basis for establishing a clearer and more accurate doctrine. To sum up, a distinction should be made between only two sectors as regards the application of Article 48 (4): activities typical of the State (in respect of which nationality may be required), and any other activity of the State (access to which should be subject to the principle of equal treatment).

On the basis of an action carried out in close cooperation with the Member States, the Commission should specify the criteria for determining whether a post belongs to activities typical of the State and moreover, should define more accurately those sectors which may still be reserved for nationals and, within those sectors, the levels of posts above which nationality may continue to be a condition of access. Even in those sectors which *a priori* fall within the activities typical of the State, there are administrative posts in respect of which there can be no justification for maintaining conditions of nationality.

It is important to emphasize that access by Community nationals to the public service of the Member States is not intended to encroach upon national competence in determining the operation and organization of public-sector employment. Member States retain full powers to organize the personnel employed by the State. The only requirement imposed on them is that they should accept into their public service all Community citizens without discrimination. This is the logical result of accepting the principle of free movement for workers within the European Union.

It will be noted lastly that the inclusion of Community citizens in the public services of the Member States should not be perceived as a form of disruption. On the contrary, in a European Union where collaboration between national governments is increasingly close, the presence of civil servants from different Member States within the public service of a particular State may add value and increase efficiency to a considerable extent.

2. Application of the principle of mutual recognition in the public sector

The taking-up and pursuit of a job in another Member State public sector are often frustated by difficulties relating in certain cases to the failure in the host state to take account of qualifications (diplomas, experience, seniority, etc.) acquired in the home state or to specific requirements (especially linguistic ones) which may result in the virtually systematic rejection of non-nationals.

Some Member States require candidates for a post in the public service to have a very sound knowledge of the language of the host country. While candidates should obviously know the language of the country, it is disproportionate to require, except perhaps for certain very specific posts, a virtually perfect knowledge of the language. Similarly, it is disproportionate to require systematically of a non-national candidate that he should provide a national certificate stating that he knows the language of the host country or that he should sit a language test. The host state should accept the certificates issued in another Member State (see *Groener*).

Linguistic requirements apart, in public services where access is subject to passing an examination, admission to that examination is sometime reserved for holders of a national diploma. Candidates

who hold a diploma acquired in another Member State are thus eliminated from the selection procedures. This problem is linked to the fact that certain Member States consider that the general system for the recognition of diplomas (Directives 89/48/EEC and 92/51/EEC) does not apply to activities carried out within the public sector.

Some Member States consider that the public service as such cannot be considered as a regulated profession. For these States, the diploma required does not sanction a particular type of training as in the private sector but a level of training (e.g. bac +3 or bac +4). By contrast, the Commission believes that Community workers already in possession of a diploma which allows them to pursue in their home state the profession which is the subject of the examination in question should have the right to rely on the corresponding mutual recognition directive.

Thus, a worker who is already employed as a teacher in Germany should have the right, according to the Commission, to professional recognition of his diplomas in France. The worker would, of course, have to sit the recruitment examination but, once he had passed, professional recognition of his diploma should mean that, with the exception of trial periods, any further training requirement (e.g. an adaptation period) could be waived. In the case in point, France, for instance, takes the view that the German teacher's diplomas merely give him the right to sit the examination; before he can work as a teacher in France, he will still have to undergo a training period as a new civil servant, despite the fact that he is already a teacher in his home Member State.

Even though this question is not fully resolved, given the great variety of jobs that exist in the public service, the relevance of these States' arguments may already be questioned. In all events, it is clear that the States concerned are at least obliged, on the basis of Article 48 and of the relevant case-law (in particular *Heylens*), to take diplomas acquired in another Member State into consideration.

It would be appropriate in this connection for the Commission to define more clearly its position on whether all activities carried out within the public sector constitute regulated professions within the meaning of the said Directives or whether only those activities are covered which have an equivalent in the private sector (i.e. which correspond to a given profession in the private sector, e.g. teacher, translator, interpreter, etc.).

Still on the subject of access to employment in the public sector, and more precisely to certain posts or certain categories of post in the public service, a requirement that is sometimes made is that the candidate should <u>have some professional experience</u>. In such cases, professional experience acquired in another Member State must be taken into account in the same way as experience acquired in the State concerned, without it being possible to discount that experience simply because it was acquired in another Member State (see *Scholz*). Similarly, if the national examination requires professional experience in a particular field or sector, the experience required should be compared with that acquired in another Member State.

Where a Member State grants certain dispensations to its nationals (civil servants or applicants for the public service) in order to enable them to complete their military service (deferment of the age limit for sitting an examination or taking account of the time spent on military service when calculating seniority), the same advantages must be granted to Community workers who have completed their military service in another Member State (see *Ugliola*).

Lastly, Community workers often encounter difficulties as a result of the non-recognition, in particular when determining the level at which they start their career (professional and salary classification), of factors acquired in their home Member State. The most serious problem is the failure to take account of experience acquired in another Member State. For instance, a doctor who has worked for 15 years in a public hospital in France and who, wishing to accompany his wife who has been transferred to Austria, finds a job in an Austrian public hospital will have to begin his professional career again from scratch in Austria. If he only stays there a few years and then settles in another Member State, he will once more have to start his career from the beginning.

The fact that a Community worker is obliged to begin his professional career again each time he crosses an internal border of the Union in order to enter the public sector of another Member State conflicts with the very principle of the creation of a European professional area. Thus, in the Group's opinion, the automatic refusal to take account of any experience acquired in another Member State is incompatible with the free movement of persons. For all that, account must also be taken of the risks which such consideration may contain for the structure, operation and financial coherence of the public service systems of certain Member States, in particular those which have a career public service.

Without going so far as to risk overturning national public service systems, all Member States should be invited not to refuse automatically to take account of experience acquired abroad. It should be possible to process applications for classification in the light of seniority acquired in another Member State on a case-by-case basis, subject to the necessary safeguards for certain overriding requirements. It is also desirable to improve the level of information between the public services of the Member States so as to enable national public services to know the structure, organization and distribution of tasks of the other public services in the Community. In this way, a comparison of professional experience acquired in various public services will be facilitated and such experience may more easily be optimized.

Considerable progress has been made on opening up the public service to all nationals of the Member States. Thus, in most Member States, employment in the priority sectors is fully accessible to Community citizens under equal conditions with nationals. These sectors include those where mobility is very great (education and health). However, mobility is restricted by several problems encountered by non-nationals (maintenance of nationality clauses; strict rules for the development of careers and professional life). Some of these problems will have to be tackled with new measures designed to facilitate free movement in the public sector. It should be possible to solve others, which have to do with reticence on the part of the administration, through better information and training within government, in particular at local authority level. Whatever the nature and purpose of the action contemplated, it will have to be prepared and carried out in close cooperation with the national authorities.

It is thus suggested to the Commission :

- to reinforce the sectoral approach initiated in its 1988 Communication, distinguishing two sectors only for the application of Article 48 (4): activities typical of the State (in respect of which nationality may be required), and any other activity of the State (access to which should be subject to the principle of equal treatment);

- to define in more details, and in close cooperation with the Member States, the criteria for determining whether a post falls within the scope of Article 48 (4), as well as those sectors which may still be reserved for nationals and, within those sectors, the levels of posts for which nationality may continue to be a condition of access;

- to ensure that the impact of the general principle of mutual recognition is felt within the public service; in particular :

- to ensure that Member States which impose a language requirement for access to posts in the public service, take into account the certificates of competence in the language of the host country, issued in another Member State;

- to ensure that Member States grant to Community workers who have completed their military service in another Member State, the same advantages as those granted to its own nationals;

- to ensure, when access to certain posts in the public service of a Member State requires the possession of professional experience, that the professional experience acquired in another Member State is taken into account in the same way as experience acquired in the State concerned;

- to ensure, when prior professional experience (seniority) determines the professional and salary classification of a worker occupying a public post, that Member States do not refuse automatically to take account of experience acquired abroad;

- to define more clearly its position on whether all activities carried out within the public sector constitute regulated professions within the meaning of the Directives 89/48/EEC and 92/51/EEC or whether only those activities are covered which have an equivalent in the private sector;

- to ensure, consequently, that all Member States apply the general system for the recognition of diplomas (Directives 89/48 and 92/51) to activities carried out within the public sector which constitute regulated professions within the meaning of these Directives.

CONCLUSION

1. Free movement is a right

European citizens have the right to seek employment in other Member States and to settle in a Member State to work there under equal conditions with nationals. To facilitate the effective exercise of this right, much has been done for the regulated professions in the private sector. But measures are still required, especially in the public sector and for the non-regulated professions. In addition, in all sectors, there is an enormous need for information and, in particular in the regulated sectors (both public and private), a need for training for the authorities responsible for recognizing diplomas and qualifications.

In all sectors, there is the failure to take account (regulated sector), or there are difficulties in taking account (non-regulated sector), of the professional experience acquired in the home State. In professional life at present, a diploma quickly loses its worth. Experience is becoming increasingly important, as is in-service training.

The question arises, therefore, whether it is not necessary to introduce a measure covering all sectors and addressed to the Member States (and through them to all actors in professional life), which would encourage the taking into account of experience acquired in another Member State. The participation of the social partners and effective cooperation between the Commission and national governments, and between national governments themselves, should be particularly encouraged in this respect.

2. Free movement is a means of establishing a European employment market

It is true that free movement is a means of creating a European mobility zone and of establishing a more flexible and more efficient labour market and that mobility of workers can help to offset the adverse effects of unemployment in Europe. But Europe continues to come up against a fundamental problem, namely that it has not so far been able to forecast the qualifications it needs.

Qualification requirements must be known in order to be able to manage the qualification–market and the European employment market. A flexible Community instrument is needed that will make it possible to monitor changes in the labour market and in qualifications, in connection with the Member States' education systems and professional training. This would help to reduce the problems of transparency, quality and mutual trust in systems. This provision should be made for participation of all actors (professional associations, trade unions, employers' associations, training professionals and local authorities).

Finally, the complexity of the distribution of tasks within the Commission with regard to questions of professional mobility, and the absence of clear responsibility for the non-regulated private sector, are very far from facilitating the establishment of a European employment market.

Chapter III : Social rights and family status

INTRODUCTION

The social rights and family status of persons moving from one country to another within the Union is a fundamental aspect of the free movement of persons. In practice, people moving or intending to move to another Member State in order to work, train or live there, are immediately faced with a number of often complex questions, concerning either the preservation, the acquisition or the exercise of social and family rights. Furthermore, those questions are often inseparable from subjects dealt with in other chapters of this report such as taxation and right of residence.

This chapter deals mainly with matters relating to the social protection of persons moving within the Union. Much has already been achieved and persons moving from one Member State to another benefit from a high level of social security protection. This is largely due to the good functioning of the coordination mechanism of national social security systems created at Community level in 1958 and developed on the basis of Regulation 1408/71 of 14 June 1971.

Nevertheless certain gaps in the existing Community rules have been identified, as well as the somewhat outdated state of these rules compared with the development of social security, which is no longer so sharply divided from social assistance and taxation. It should be recalled that Regulation 1408/71, which will be referred to frequently in the following paragraphs, was adopted at the beginning of the 1970s, at a time when the main type of social insurance scheme in the Member States was contributory. Subsequently, the tendency in all Member States has been to develop non-contributory systems financed not from contributions but by the public authorities. This has led to problems of delimitation of the competence of the Member States with regard to the collection of contributions.

Likewise certain difficulties linked to the ageing of Regulation 1408/71 should be emphasised, inasmuch as it has not been adequately adapted to take account of the introduction, in some Member States, of new forms of social security benefits which may not correspond to the traditional branches of social security provided for in the Regulation and to which, as a result, it sometimes proves difficult to apply the rules of this Regulation. Finally, there is also a risk, resulting from the different ways in which national social security systems are developing that eventually operation of Regulation 1408/71 will be jeopardized. In this respect, Member States should be therefore invited to consult and discuss reforms they plan to launch, in order to avoid differences between national social security systems becoming too large.

Apart from the question of social rights, questions relating to the family situation of persons exercising their freedom of movement are also dealt with in this chapter. These questions have been examined in the light of the existing Community rules, in particular the relevant provisions of Regulation 1612/68 of 15 October 1958 and the case-law of the Court. The main difficulties observed in this area concern family reunification and the application of the Community provisions governing access to social advantages. It would seem that these difficulties are incompatible with the twofold aim of preserving the family unit and integrating the family in the host country which is indissociable from the free of movement of persons.

It follows from the above that questions concerning social rights and family status of persons moving within the Union, are dealt with in the different ways at Community level, depending on whether they relate to social security, social assistance, family reunification or social advantages. And the remaining problems in that area cannot, owing to their sharply differing natures, be treated in the same way. For these reasons and for the sake of clarity, these different topics are divided into two separate categories: a first part dealing with social rights, mainly covers questions of social security and, to a lesser extent, social assistance, (I); in a second part concerning family status, questions relating to family reunification and social advantages are dealt with (II). However this chapter chiefly focuses on the social rights and family status of Union nationals. The situation, especially the social rights and family situation, of third country nationals legally residing in a Member State, is discussed in Chapter VI of this report.

I. SOCIAL RIGHTS

Under the heading of social rights, questions concerning social security (A) and, to a certain extend, social assistance (B) are examined below.

A. Social security

In general, national social security legislation does not make specific provision for persons having worked or resided in another Member State. Therefore, to ensure that persons exercising the right to free movement were not disadvantaged from the social security standpoint, the authors of the Treaty of Rome provided the Community with powers in this field, but only to the extent necessary to allow free movement. As a result, the Community provisions in this field have only a supplementary function. They do not affect the freedom of Member States to lay down their own social security rules.

Essentially, the Community rules on social security are based on Article 51 of the Treaty and on Regulations 1408/71 and 574/72[2]. The rules are based on four principles: settlement of conflicts of law (the law applicable is in principle that of the place of employment), equal treatment (all discrimination based on nationality is prohibited), aggregation of insurance periods (all periods taken into account by the various national laws are aggregated for the purposes of acquiring and retaining entitlement to benefits, and of calculating such benefits) and the payment of benefits to Community residents.

The purpose of these rules, and of Regulation 1408/71 in particular, is to establish machinery to coordinate Member States' of the European Union (at the time, the EEC) social security schemes in order to promote freedom of movement of workers. This objective has on the whole been achieved and the results of the machinery established by Regulation 1408/71 are positive: the mechanism works relatively well; it affords a high level of protection in the field of social security for persons moving from one Member State to another and it has the advantage, thanks to certain specific provisions, of covering a vast majority of the citizens of Europe[3].

There are still problems, however, some of which could be resolved within the framework of Regulation 1408/71, while others would require different solutions. It is worth noting here two types of difficulty which cannot be resolved in the context of the Regulation.

First, there are the problems caused by the differences between national legislation and, second, the problems caused by the total lack of coordination between national non-statutory supplementary social security schemes, especially pension schemes, as the latter are excluded from the coordination machinery applicable to statutory schemes. However, as this topic has already been discussed in a separate report by the Panel[4], it will not be examined in this chapter.

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2 Council Regulation (EEC) 1408/71 of 14 June 1971 on the application of social security schemes to employed and self-employed workers and their families moving within the Community and Council Regulation (EEC) 574/72 of 21 March 1972 fixing the procedure for implementing Regulation (EEC) 1408/71 on the application of social security schemes to employed and unemployed persons and their families moving within the Community. The two Regulations have been updated by the Council Regulation of 2 December 1996 (OJEC n° L28 of 30.01.1997).

3 The scope of some of the provisions of Regulation 1408/71 is huge : for instance, under Article 22(1)(a), all nationals of a given Member State, may, provided they are insured in accordance with the legislation of a Member Stae, use Form E 111, in particular for holidays abroad, in order to receive urgent medical treatment in another Member State as if they were insured in that State, the costs being borne by the competent State.

4 Report on supplementary pensions, adopted on 28 November 1996, by the Panel

As for the problems relating to the differences between national social security schemes, it should be pointed out that Regulation 1408/71 established a system which only coordinates (and does not harmonize) national social security schemes in the European Union. These systems continue to vary considerably from one Member State to another. Although a number of problems are caused by these differences, in particular the lack of a common definition of the conditions for the granting of benefits[5], they cannot be resolved satisfactorily by amending the Regulation, which is not aimed at harmonizing national social security schemes. Furthermore, and most importantly, it would not be possible or desirable to attempt to harmonize such schemes.

On the other hand, there is a need to strengthen the cooperation that already exists between the national administrations. Its development, both at Community and at national and indeed local levels, would doubtless help to mitigate certain problems resulting from the differences between laws and prevent the aggregation of advantages or disadvantages, in particular as regards frontier workers. Provision indeed exists in the Regulation for developing and strengthening such cooperation, in particular through the Administrative Commission on Social Security for Migrant Workers (Articles 80 to 84 of the Regulation).

In addition to the two types of difficulties referred to above, several problems have been identified concerning: the persons covered by the Regulation (1); gaps in the matters covered (2) and inadequate provision for certain benefits (3). It also pinpointed various problems caused by the procedure in force for legislating in the field of social security (4); a lack of transparency and of clarity of the machinery set up the Regulation (5) and the impact of the lack of coordination in taxation matters (6).

1. Gaps as regards the persons covered by Regulation 1408/71

One of the major achievements of Regulation 1408/71 is undoubtedly its vast scope. It applies to employed and non-employed persons, who are or have been covered by the laws of a Member State and are nationals of one of the Member States, as well as to members of their families and their survivors (Article 2(1)). The importance of this achievement, however, must be viewed in relation to the fact that a number of mobile persons are not yet covered by the Regulation which, apart from exceptions such as Article 22(1) does not apply to non-active Community nationals, or to members of their families. Nor does it apply to third country nationals who are legally established in a Member State (and are not members of the family of a worker who is a national of a Member State).

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[5] For example, as regards pensionable age : if a person has worked for 30 years in country A where the retirement age is 65, then another 5 years in country B where the limit is 60 : at age 60 he will retire in country B and receive a pro rata pension (very small) from that State, but will have to wait another 5 years before receiving a higher pension from country A. Another example concerning the concept of invalidity : a person who has been insured in three Member States and who becomes disabled may be regarded as 100 % disabled in one Member State, 55 % in another and not disabled in the third Member State.

(a) Non active persons

The current scope of the Regulation as regards the persons covered is inadequate in view of changes that have taken place since its adoption and, in particular, since the adoption of the three Directives on the right of residence of retired persons, students and other persons with sufficient resources and sickness/maternity insurance. In 1991, the Commission submitted a proposal[6] to the Council on extending the scope of Regulation 1408/71 to persons who do not already fall within it (students, non-active persons, etc. - the term of non-active is used to refer all persons, other than workers and students, who are insured in a Member State). The proposal, once adopted, should enable the beneficiaries of the three Directives to exercise their right to free movement within the limits provided for in the Directives. The proposal, however, is still before the Council. Problems remain, particularly as regards students insured under a special students scheme. At present, only students insured in a Member State as workers or members of the families of workers are covered by the Regulation. It is logical and essential to extend the scope of the Regulation to such persons, provided they are entitled to freedom of movement within the Union.

(b) Third country nationals

Even now, third country nationals legally established in a Member State of the Union are still excluded from the scope of Regulation 1408/71. Reference should be made in this connection to Chapter VI of this report which deals in greater detail with the situation of third country nationals in the Union.

2. Gaps in the matters covered by Regulation 1408/71

Two serious gaps in the matters covered have been identified. They concern the special schemes for civil servants (a) and pre-retirement schemes (b).

(a) Special scheme for civil servants

Pursuant to its Article 4(4), the Regulation does not apply to special schemes for civil servants or persons treated as such. Thus the persons covered by special schemes are not covered by the coordination measures provided for in the Regulation. The problems resulting from this exclusion started to develop when national civil services were opened up to nationals of other Member States, at least as regards employment not covered by Article 48(4) of the Treaty. In 1991 the Commission put forward a proposal to the Council[7] on extending the scope of the Regulation to cover special schemes for civil servants and persons treated as such. The proposal, which had remained pending before the Council, was again discussed following a judgement of 22 November 1995[8] in which the Court found that, in failing to adopt any coordination measures in the field in question, the Council had not fully satisfied its obligation under Article 51 of the Treaty. Accordingly it would be welcome if a decision be taken on this proposal in a near future.

(b) Pre-retirement schemes

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6 OJ No C 46, 20.2.1992, p. 1.
7 OJ No C 46, 20.2.1992.
8 *Vougioukas* Case 443/93 [1995] ECR I-4033.

Pre-retirement schemes are not covered by the Regulation. Although pre-retirement benefits are indeed social security benefits, they are not, according to the Court[9], covered by the Regulation as they are not unemployment benefits or old-age benefits within the meaning of Article 4(1) of the Regulation. Thus there are no Community provisions guaranteeing the exportability of such pensions. On two occasions, in 1980 and again in 1996, the Commission presented a proposal[10] aimed at settling this problem. However, the proposal is still before the Council. There is a major gap in Community legislation in this field. The gap, which particularly affects frontier workers (since in theory they live in a Member State other than the State awarding the pension), is prejudicial to all recipients of such pensions in a Member State who might wish to move to another Member State. As it is urgent to improve free movement in this field, the Commission's proposal should be supported. It would be suggested, however, that due consideration be given to the view of the European Trade Union Confederation that provision be made for cash benefits to supplement the remuneration of a worker in gradual retirement (person working half time or quarter time for a certain number of years prior to pensionable age).

3. Inadequate protection afforded by Community rules

(a) Sickness benefits - Cross-frontier health care

Article 22(1)(a) of Regulation 1408/71 guarantees nationals of a Member State insured under the laws of a Member State who are temporarily staying in another Member State the right to all **urgent medical treatment** necessitated by their state of health. Costs are borne by the competent State. Besides this**,** Article 22 (1)(c) of the Regulation enables nationals of a Member State who are insured under the laws of a Member State, as well as members of their families, to go to another Member State to receive **non-urgent medical treatment,** the costs being borne by the competent institution. They must, however, obtain an authorization from the competent institution, the purpose of which is to guarantee the financial balance of national social security schemes. Without challenging the prior authorization requirement, it would be desirable to increase the possibility of benefiting, at the expense of the competent institution, from cross-frontier health care, notably in order to gain access to treatment locally in frontier regions or in cases where treatment is sought in the country of origin.

With regard in particular to **everyday medical treatment in frontier regions**, it would be desirable to relax the conditions governing the availability of such treatment so that existing equipment can be used more intensively and efficiently whilst at the same time increasing the number of conventions between social security institutions in neighbouring countries on the reimbursement of cross-frontier medical treatment. More agreements of this type would help to reduce the difficulties currently encountered by former frontier workers and members of their family. Under the Regulation, frontier workers are entitled to health benefits in both Member States (State of employment and State of residence) whilst they are in employment, but this is not the case for former frontier workers (e.g. old age pensioners, entitled only to health care in the State of residence), or their families, unless there is an agreement between the States concerned or between the competent authorities of those States.

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9 *Valentini* Case 171/82 Judgment of 5 July 1983. *Otte* Case 25/95, Judgment of 11 July 1996.

10 Proposal for a Council Regulation of 10 January 1996 (OJ No C 62, 1.3.1996).

It is again necessary to emphasize the enormous need for information on the part of the competent institutions which issue the forms (E 111, E 104, etc.) and the equally important need to simplify those forms, which are complex and numerous. Whilst Form E 111 is generally familiar to competent authorities, the same is not true of all the other types of form which citizens may request the competent authority of their country of origin to provide for the competent authority of the host country. The competent services in the Member States are themselves frequently unable to inform a public confused by the variety of forms.

With regard to the development of the use of "smart" national social security cards, the Commission should examine the means to make the data contained in those cards readable in the other Member States, for purposes of applying Regulation 1408/71. In this respect, the value of the work already carried out by the Commission under the TESS programme (telematics in social security) should also be underlined.

(b) Unemployment benefits

Until now, Regulation 1408/71 has guaranteed unemployed persons seeking employment in another Member State unemployment benefits in the Member State of last employment for a maximum period of three months only. The Court recognized, in a 1991 judgement, that a six-month stay for Community nationals seeking employment in another Member State should, in principle, allow the persons concerned to obtain information in the host country concerning the vacancies corresponding to their qualifications.[11] The Commission adopted a proposal for a regulation[12] aimed at enabling unemployed persons seeking employment in another Member State to receive unemployment benefit beyond the three-month period, subject to certain conditions relating to amount and duration. It is however difficult to take a position on this proposal since there is insufficient evidence for an evaluation of its benefits and consequences. EURES might have a role to play in the gathering of this evidence.

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11 *Antonissen* Case C-292/89 [1991] ECR I-745.

12 Proposal for a Council Regulation amending, for the benefit of unemployed persons, Regulation (EEC) 1408/71 and Regulation (EEC) 574/72 (OJ No C 68, 6.3.1996).

4. The question of unanimity

Most of the problems described above should be settled by amending the Regulation. However, a major difficulty is posed by the fact that, by virtue of the legal basis of the Regulation, i.e. Articles 51 and 235 of the Treaty[13], the decision-making process in this field requires unanimity. Experience shows, however, that certain problems, which can no longer be allowed to continue, cannot be resolved if the unanimity rule is retained. It should also be remembered that Regulation 1408/71 is aimed at facilitating freedom of movement for persons, in the same way as other instruments aimed at the completion of the internal market, but which do not require unanimity. This is a problem that can be settled only at political level.

5. Lack of transparency and clarity

While it is true that, apart from the inadequacies described above, the machinery introduced by the Regulation functions relatively well and is an important Community instrument, it is a fact that the machinery cannot easily be understood by non-specialists and that the relevant rules sometimes lack clarity, from the standpoint of both the beneficiaries and the institutions responsible for applying the rules. The lack of transparency is largely due to the unavoidable complexity of the Regulation. The result is a constant need for information and explanations, which the Commission endeavours to satisfy by publishing brochures, guides and by holding or taking part in seminars, and an equally vast need for close cooperation between the different administrations concerned. The cooperation already exists at Community level, for all transnational problems (and not only problems relating to frontier areas), and at national or even local level, between national administrations. This cooperation should be considerably expanded.

6. Lack of coordination in taxation

Whereas provision is made for coordination in social security, the lack of coordination in tax matters may cause the persons exercising the right to free movement a number of serious and complex problems, ranging from the impact of the taxation system on the social security system to the impact of the social security system on the taxation system. A major problem is the "budgetization" of social security schemes, or the tendency towards mixed financing of social security (via social and tax contributions). For further details, see Chapter IV of this report.

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[13] Article 235 was added as a legal basis in 1981 to allow Regulation 1408/71 to be extended to self-employed persons.

B. Social assistance

Social assistance is above all a matter of social policy, this being an area falling exclusively within the competence of the national authorities, except where responsibility has been transferred to the Community. Article 51 of the Treaty and Regulation (EEC) 1408/71 apply only to social security legislation to the exclusion of social assistance. Thus, social assistance benefits cannot be exported. While the principle may be straightforward, difficulties arise from the fact that it is not always easy to make a clear distinction between social security and social assistance benefits (1). Without calling this principle into question, it is necessary to clarify the situation (2) and to raise the sensitive question of the non-exportable nature of some hybrid non-contributory benefits since 1992 (3).

1. Distinction between social security benefits and social assistance benefits

It is not always easy to make a clear distinction between social security benefits and social assistance benefits. Despite the importance of the distinction between social security and social assistance, no definition of those concepts exists. On the other hand, there are some publicly financed non-contributory benefits that must be regarded as intermediary benefits resulting from the gradual integration of social assistance in social security in the various national laws : hybrid non-contributory benefits (that have both social security and social assistance characteristics). In its case-law, the Court of Justice has given a broad interpretation of "social security". It has laid down a number of criteria, in particular that, in order to qualify as a social security benefit and, where applicable, be exportable (if it is linked to invalidity, old age or survivor's claims), the benefit should, disregarding any individual or discretionary assessment of the personal needs of the beneficiary, be granted on the basis of a legally defined situation and that it must be used to cover claims listed in Regulation (EEC) 1408/71. Accordingly, hybrid (partly social security and partly social assistance) non-contributory benefits that are nevertheless in keeping with those criteria would in principle be exportable.

2. Non-exportability of social assistance benefits

Social benefits that come under social assistance alone are totally excluded from the scope of Regulation (EEC) 1408/71 (Article 4(4)). They are not exportable. At best, Regulation EEC) 1612/68 guarantees equal treatment as regards qualifying for entitlement. Because the benefits are not exportable, persons receiving them in one Member State who wish to move to another Member State may be expelled from the territory of the latter (on the grounds that they do not have sufficient means) or may be unable to leave the territory of the former (if they wish to continue receiving the benefits). The fact that social assistance benefits are not exportable gives rise to criticism and is incomprehensive to the beneficiaries. However exportability cannot be supported for reasons which should perhaps be summarized at this stage. In addition to the fact that this is a matter which falls within the competence of the Member States and reflects national political choices, it would be advisable to underline the soundness of the principle that the cost of so-called non-contributory benefits should be borne by the country of residence (which means that they are not exportable), and that making the benefits exportable could be very expensive for certain Member States. Moreover, social assistance systems are so diverse that the benefits cannot be made exportable without a minimum of coordination between those systems and, the conceptual differences between systems are often so great as to be irreconcilable (e.g. social assistance targeted on the individual or on the family). The non-exportability of social assistance benefits does not, of course, apply to the

benefits cross-border workers receive by virtue of their activity in the country of employment, even if they do not reside there.

3. Non-exportability of certain hybrid non-contributory benefits

However, certain hybrid non-contributory benefits have been non-exportable since 1992. As from 1 June of that year, by virtue of Article 10a of Regulation (EEC) 1408/71, hybrid benefits listed in Annex IIa to the Regulation may no longer be exported.[14] The aggregation system and the principle of equality of treatment apply as regards qualifying for those benefits, but the benefits themselves are non-exportable if they are listed in Annex IIa to the Regulation. The validity of this non-exportability clause is being challenged in a case now before the Court of Justice [15].

II. FAMILY STATUS

Freedom of movement for persons is not complete if it does not carry with it, for citizens who settle in another Member State, the right to be joined by their family and favourable conditions under which the family may become integrated in the host country. The basic Community rules in this field are to be found, in the case of employed workers, in Regulation 1612/68 and Directive 68/360/EEC. These provisions served as a model for a range of directives which extend grosso modo the same regime to other categories of persons, i.e. : self-employed workers (Directive 73/148/EEC), pensioners (90/565/CEE), persons having sufficient resources and sickness/maternity insurance (90/564/CEE) and students (93/96). It may be therefore be concluded, from the point of view of family interests, that the objective of free movement has, thanks in part to the case-law of the Court of Justice, been attained. However, several problems remain concerning family reunification (A) and access to social advantages (B). The Panel has opted to deal with the question of social advantages in this section dealing with family status in so far as access to those advantages is a means of achieving the objective of the preservation of family unity and of fostering integration in the host country.

A. Right to settle with one's family

By virtue of Article 10(1) of Regulation (EEC) 1612/68, "the following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member state and who is employed in the territory of another Member State: (a) his spouse and their descendants who are under the age of 21; (b) dependent relatives in the ascending line of the worker and his spouse". This provision is also found, with a few slight changes, in the other directives referred to above. The examination of this question, the importance of which is evident, has nevertheless revealed problems concerning : the married couple's non-dependent descendants and relatives in the ascending line; the unmarried partner, **and** the place of residence of the family. These different situations are examined hereafter.

(1) The married couple's non-dependent descendants and relatives in the ascending line

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14 Provisions adopted by way of Regulation (EEC) 1247/92 of 30 April 1992, OJ No L 136, 19.5.1992, p. 1.

15 *Kelvin Snares* (Case 20/96, pending).

Under Article 10(1)(b) of Regulation (EEC) 1612/68 and the corresponding provisions of Directive 73/148/EEC (self-employed persons), Directive 90/364/EEC (right of residence generally) and Directive 90/365/EEC (right of residence of pensioners), there is no right to settle with one's family for relatives in the ascending line or descendants who are not dependants of the married couple, or for their children who are more than 21 years old and who are no longer their dependants. In order to reinforce family unity**,** there are no valid grounds for denying non-dependent children more than 21 years old or relatives in the ascending line who are not dependent on their children, the right to join their parents or children, as the case may be, in the Member State where the said parents/children are installed. Accordingly, this possible extension of the right to settle with one's family should be reexamined by the Council.

(2) Spouse and unmarried partner

"Spouse", as referred to in particular in Article 10(1) of Regulation (EEC) 1612/68, does not include an unmarried partner. If one of the partners (in an unmarried couple) finds employment in another Member State, then the other partner - a national of a Member State - must, if he or she does not work, prove that he or she has sufficient resources and social insurance in order to qualify for the right of residence in the second Member State. Following the Court of Justice in *Reed*, however, it must be reaffirmed that when, on the basis of the principle of equality of treatment **(**Article 7 of Regulation 1612/68**)**, a Member State grants certain rights to nationals *living as unmarried partners*, it must grant the same rights to *unmarried partners* living on its territory who are nationals of other Member States. The other partner must thus be allowed to reside in the second Member State if the latter allows its own nationals to bring into the country an unmarried partner who is not a national of that Member State.

Beyond this affirmation, attention is drawn to the fact that the "family group" is undergoing rapid change, and that growing numbers of people, often with children, form *de facto* couples. In view of the possible need to take account of these changes in Community legislation, it would be useful to carry out a study intended to identify the criteria which, in the Member States, provide for non-married couples to be treated in the same way as married couples, as well as the extent to which this assimilation applies.

(3) Place of residence of the family

Problems may arise from the fact that members of the family do not necessarily live under the same roof. One need only refer to the case-law of the Court of Justice on this point.[16] Genuine difficulties may arise, however, in particular for children who wish to reside in the same Member State as their parents but not under the same roof**.** Thus it should be explicitely recognized that children exercising their right to settle with their family, should not be obliged to live under the same roof as their parents.

B. A family's access to social and tax advantages

1. Clear provisions

Under Article 7(2) of Regulation (EEC) 1612/68 a worker who is a national of a Member State is to enjoy in the territory of the other Member States *"the same social and tax advantages as national*

16 *Diatta*, Case 267/83 of 16.02.1985,[1985] ECR 567.

workers". This is a specific application of the principle of equality of treatment, on which the Court of Justice has commented on numerous occasions. The following examples of social advantages can be mentioned :

- discount cards on transport prices delivered to large families by a national railway company;
- an allowance for handicapped adults granted by a Member State to its own nationals on the basis of a legislative provision;
- loans without interest granted by public law credit institutions to families with low incomes on the birth of a child, in line with directives and with the financial support of the State;
- a social benefit which guarantees, in a general way, a minimum means of existence;
- allowances for birth and maternity;
- access to leisure-time activities, such as - for instance - sailing.

The examples result from the case-law of the Court. By virtue of the principle of equality of treatment, these advantages cannot by refused to a worker or the members of his family on the grounds of their nationality. There are still, however, some difficulties as regards the application of this principle by Member States.

2. Difficulties as regards application

More often than not the problems result from incorrect application of Community law. In this connection, it may be pointed out that, *Cristini*[17] notwithstanding, recognition of membership of a large family is, in some Member States, still reserved for nationals. While a solution to these problems lies in action for failure to fulfil an obligation, greater efforts should be deployed with a view to informing, and increasing awareness among, the national authorities concerned. As already pointed out in Chapter I of this Report, special attention should be paid to the problem, given that several Member States make the granting of social benefits (including social security benefits) conditional on the possession of a valid residence card. Again it must be underlined that such problems may arise from a lack of information or awareness at the level of the national authorities concerned and efforts should be deployed to remedy that situation. Generally speaking, if local authorities fail to put into effect rights available under Community provisions, it is often because they are unaware of, or insufficiently familiar with, those provisions and, in some cases, because they are not especially keen to put them into effect. This comment does not, however, apply solely to questions relating to the legal and family status of citizens exercising their right of free movement. Reference is accordingly made, on this point, to Chapter VII of this Report.

CONCLUSION

In order that the social protection of persons exercising their right to free movement should contribute fully to ensuring effective exercise of that right, **the following Commission initiatives should be supported :**

- the extension of the personal scope of Regulation 1408/71 to students and other non active persons who are entitled to free movement, have sufficient means and are insured in a Member State;

- proposals to extend the practical scope of Regulation 1408/71 to special schemes for civil servants and persons having equivalent status, and pre-retirement schemes;

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17 Case No 32/75 [1975] ECR 1085.

Other recommendations :

- The conditions governing access to non-emergency cross-border medical care in certain specific cases where there can be no question of abuse of the rules should be relaxed and the development of conventions on the coverage of cross-border medical care by the social security institutions of neighbouring States should be encouraged;

- to examine the means to make magnetic national social security cards lisible in any Member States, for the application of regulation 1408/71;

- to realize a qualitative and quantitative evaluation of the potential benefits and consequences of an extension beyond 3 months, of the period of exportability of unemployment benefits;

- in the context of the IGC, a review of the unanimity needed to amend Regulation 1408/71.

- greater efforts to disseminate information on the system introduced by Regulation 1408/71 and greater cooperation between the administrations concerned;

Regarding the question of family status, it is recommended :

- to reexamine the proposal to extend the right to settle with one's family to children and relatives in the ascending line, who are not dependent of their parents/children;

- to carry out a study intended to identify the criteria which, in the Member States, provide for non-married couples to be treated in the same way as married couples, as well as the extent to which this assimilation applies.

- to deploy greater efforts at national level to provide information and increase awareness in front of the problems regarding the application of the principle of equality of treatment as regards social advantages.

Chapter IV: Tax and financial status

INTRODUCTION

As in the case of access to employment or social and family status, tax and financial status may involve indirect obstacles to the free movement of individuals. It is not enough to say that there is freedom to move, live and work in another Member State; for such freedom to be real, it must also be possible for it to be exercised under economic conditions which are not prejudicial.

The principle of equal treatment for citizens of the Union, irrespective of nationality, solves the bulk of problems: nationality will not in itself lead to different treatment. All the same, in the tax and financial sphere, people who move within the Community are more likely than others to encounter financial difficulties or disadvantages that will discourage them. Despite the progress made, the act of moving to another Member State to live or work there still entails disadvantages simply because of its cross-frontier dimension.

Foremost among the difficulties encountered are problems relating to direct taxation, a clearly sensitive field for Member States. In this context, the Member States have demonstrated their concern to eliminate cases of double taxation of income by concluding bilateral tax agreements. However, this approach has its limits since there are still situations, particularly in a cross-frontier context, where the equal treatment necessary for the internal market to operate smoothly is not guaranteed.

The problem of equal treatment also arises, albeit in a different manner than for income tax, in the case of the taxation of motor vehicles, particularly as regards registration tax. Although it is not, strictly speaking, a tax problem, this chapter also covers the difficulty sometimes encountered over the registration of a vehicle used at its owner's second home where that home is located in a Member State other than that in which the owner is legally resident.

The free movement of capital has removed the bulk of the obstacles which could affect people exercising their right to freedom of movement by penalizing them financially. At the very most, difficulties have been identified arising from the option available to Member States under Community law to require declarations to be made regarding the importation or exportation of capital.

I. DIRECT TAXATION

1. Problems encountered by individuals regarded as being resident for tax purposes

(a) Identification of residence for tax purposes

An individual who transfers his place of residence to another Member State will be anxious to ascertain his tax status as a result of that change. Being defined by the tax legislation of each Member State, his "residence for tax purposes" will not necessarily coincide with his civil domicile. It is important to establish a person's residence for tax purposes since it indicates the country in which all of his income (world income) must be declared.

The problem stems directly from the different definitions of "residence for tax purposes" in the Member States. The different criteria used include a stay exceeding six months, the place of principal residence, the centre of economic interest or even the same criteria that are used under civil law to determine an individual's place of residence. It is therefore easy to imagine the difficulty that may be encountered by a highly mobile individual, particularly if he has a number of residences within the Community, in determining his residence for tax purposes. It is then necessary to have recourse to the advice of tax experts or even to administrative procedures to clarify the individual's situation.

This prompts to emphasize the need for a common definition of "residence for tax purposes". While this affects the very heart of Member States' tax systems, it would seem inevitable if the problems caused by conflicts between tax laws (the minimum that can be expected from an internal market) are to be solved.

(b) Gaps in the network of bilateral agreements

Member States' tax sovereignty enables them to define their right to tax the various forms of income as they wish, thereby creating marginal but nevertheless real possibilities of double taxation. This is a major obstacle to the exercise of freedom of movement. Among all the possible bilateral agreements between Member States, there are some that have still to be concluded (seven out of 210 bilateral relationships are currently not covered).

These gaps in the network of agreements are regrettable. The Commission should encourage the Member States in question to take rapid steps to remedy the situation.

All the same, bilateral agreements are not always the ideal solution. These agreements, drawn up on the basis of the OECD Model Convention, do not always lead to the harmonious application of tax rules in the internal market context. It would be more in keeping with the principle of the internal market, for example, for the criterion of residence to be used instead of that of nationality, which is employed in some provisions of these agreements.

Overall, the Commission should draw the Member States' attention to the inconsistencies which result from the lack of coordination of the policies pursued regarding intra-Community bilateral agreements.

(c) The interaction between tax and social security systems

In most Member States, the social security system is partly funded through taxes, with the result that sometimes such taxes clearly have a mixed character, stemming both from social solidarity and from taxation. This does not directly affect the situation of individuals paying social security contributions and income tax in the same country; however, it may have quite perverse consequences for those making the two payments in two different countries owing to the lack of compatibility between the rules governing conflicts between laws in the tax sphere and in the social security field.

This problem is aggravated for frontier workers by the discrepancy between the definition of "frontier worker" in the bilateral tax agreement applicable and that in Regulation (EEC) No 1408/71 on social security schemes (a broader definition). While one frontier worker may contribute twice to his social security cover (e.g. a Danish resident working in Germany), another may contribute almost nothing) (e.g. a German resident working in Denmark).

This problem, which involves matters for which Member States are primarily responsible, is complex. It is necessary**,** however, to reduce the incompatibility between the rules governing conflicts between laws in these two frequently overlapping fields of taxation and social security. The Commission is therefore called upon to examine this problem with a view to finding a fair solution for the individuals concerned.

2. Problems encountered by individuals regarded as being non-resident for tax purposes

Individuals who are non-resident for tax purposes are normally taxed in the country in which they work. In this case, most Member States apply to such individuals tax arrangements which differ from those applied to residents, that is to say non-resident tax arrangements. These arrangements generally provide for just the income derived from the country of employment or activity to be taxed and frequently rule out the tax concessions granted to residents owing to their family situation and the various deductions permitted residents, the argument being that such benefits should be granted by the country of residence. Individuals who are non-resident for tax purposes are also frequently unable to benefit from the respective concessions in their country of residence owing to the absence or insufficiency of taxable income in that country.

One exception to this rule is the tax treatment of frontier workers' income where the two Member States in question have agreed bilaterally (as is frequently the case) that such income should be taxed in the country of residence. In this case, if frontier workers are taxed purely in their country of residence, they receive non-discriminatory treatment because they are then taxed in the same way as other residents. By contrast, individuals who carry out an activity in a Member State other than that of their residence and are taxed in the latter country are frequently subject to a higher level of taxation than individuals engaged in the same activities in their country of residence. Different tax treatment is therefore applied to them which is likely to impede their freedom of movement.

The Commission is invited to propose binding Community legislation designed to guarantee non-discriminatory taxation of non-residents.

3. Indirect discrimination in other cross-frontier situations

In some cross-frontier situations, national tax legislation leads, albeit indirectly, to discrimination that is incompatible with the free movement of persons. The following problems have been identified:

(a) Exemption for some forms of income and tax deductions or concessions: each Member State grants tax exemptions for particular forms of income (e.g. study grants) but on condition that such income is granted on the basis of the legislation of the Member State in question; tax deductions or concessions are also frequently subject to territorial restrictions. The same kind of distinction should be made here as was made in Chapter III between social security benefits and social assistance benefits: the exportability of tax concessions is no more desirable than in the latter case where they are based on a physical connection to the territory of a Member State (e.g. tax concessions for the purchase of housing located on national territory). By contrast, it would not seem to be consistent with the spirit of the internal market for a deduction in respect of an insurance premium to be applied only if the policyholder is established in the territory or for a child's school attendance to be taken into account only if it takes place in an educational establishment located on the national territory.

These problems can be solved by applying the principle of mutual recognition in all cases where the same thinking underlies the exemption, deduction or concession rules in the various Member States. The host Member State would thus be required to apply the same treatment to income derived from other Member States as is applied to comparable national income.

(b) Maintenance payments: where the payer and recipient of maintenance are divorced or separated and live in two different Member States, the existence of differing tax rules in the two Member States may lead to a situation either of non-deductibility in the country in which the payer lives and taxation in the country in which the recipient lives (economic double taxation) or of double exemption (in the opposite case). Community legislative action should be considered as a means of solving these problems.

(c) Estates and successions: the 1983 OECD Model Convention in this field is used only to a very limited extent by the Member States, which leaves scope for possible double taxation. The Commission should invite the Member States to conclude the necessary conventions.

4. Implementation methods

Aware that discussions are taking place on a possible new approach to the barriers still resulting from a lack of fiscal harmonisation, the Panel was unable to take a position on this matter which, in fact, is far beyond its mandate. It is therefore with that reserve that it submits the following reflexion.

Implementation of the above suggestions raises a special problem owing to the fact that only Article 99 of the EC Treaty affects Member States' taxation - in the area of indirect taxes. This is because taxes of this type, like customs duties, play a part in the formation of the price of goods and services and therefore in competition in the common market. It was therefore considered for a long time that the provisions of the Treaty were unrelated to direct taxation. However, the decisions of the Court of Justice then demonstrated that taxes of this type can also have an appreciable impact on the application of the Treaty and therefore give rise to disputes, particularly in connection with the free movement of persons, freedom to provide services and freedom of establishment.

In spite of the lack of specific provisions in the Treaty, case-law has been established in this area based on the principle of equal treatment. This case-law developed firstly in response to complaints from firms based on the requirement of competitive equality, but subsequently extended to the tax status of natural persons in connection with the application of tax allowances in cases where residence for tax purposes did not coincide with the source of the main income of taxpayers. The vacillations in this case-law show the Court's concern to establish a reasonable balance between the general interest of the tax authorities and the requirements of individual equity (see, on the one hand, the Bachmann and Werner judgments of 28 January 1992 and 26 January 1993 respectively and, on the other, the Schumacker and Wielocks judgments of 14 February 1995 and 11 August 1995 respectively). However, the fact remains that, in the absence of solutions based on legislation or agreement, disputes will inevitably arise at judicial level, at least in extreme cases. The question is therefore whether the Community institutions and the Member States should not seek ways of resolving the problems posed through common action rather than leave it to the Court to decide. Two methods would appear to offer practicable solutions.

Firstly, there is nothing to prevent recourse to the approximation of legislation provisions of Article 100, which are relevant once it has been established that legislative disparities are directly affecting the establishment or functioning of the common market. While this procedure is little used in the tax sphere, it is not without precedent. That legal basis has already been used for two directives concerning company taxation (Directives 94/434 and 94/435). There is no doubt that direct taxation arrangements can appreciably affect the movement and establishment of individuals, freedoms which are an integral part of the common market, as is stressed by the second paragraph of Article 7a of the EC Treaty, which was incorporated into the Treaty by the Single European Act.

Secondly, Article 220 of the EC Treaty specifically provides for the negotiation of agreements between Member States covering, among other things, "the abolition of double taxation within the Community". It is a remarkable fact that, after 40 years of experience, the Member States have not yet thought of using this method, which, in other fields, and particularly in connection with jurisdiction and enforcement of judgments, has proved to be a very effective instrument. Two practical comments must be added concerning the use of this provision. Firstly, Article 220 makes it possible for problems that have arisen in this connection to be solved not only within a multilateral framework; it can also lead to the conclusion of bilateral agreements designed to solve more limited problems - such as arise in the context of the movements of frontier workers - that are closely linked to neighbour relations. Secondly, recourse to Article 220 should be envisaged within a Community framework, so that the Commission is in no way excluded from this process. It should be pointed out that Article 155 of the Treaty gives the Commission a wide power of initiative as regards the very aims of the Treaty, which would enable it, in the light of the above, to present to the Member States a draft multilateral agreement and standard bilateral agreements at the same time.

II. REGISTRATION OF A CAR

The car is closely linked to the exercise of personal mobility. This personal asset is the subject of a number of practical difficulties which have been included in this section as they arise in tax or financial terms.

Registration tax: this tax, which exists in all the Member States except for Germany, Luxembourg and the United Kingdom, poses two types of problem: first, a lack of coordination between tax systems; second, a difference in the tax burden.

(a) The taxable event for the tax is the vehicle's initial registration in the country in question, and any exemptions are strictly a matter for the Member States, there being no coordination of tax systems. An individual moving with a vehicle within the Community can therefore be subject to two or more successive registration taxes. As the amount of this tax is not negligible, it disadvantages an individual moving across frontiers by comparison with someone who remains in the same country. The rule of non-discrimination in tax matters cannot alone solve this problem of economic double taxation.

In order to overcome this problem, there should be a system of coordination of tax systems. It is suggested that arrangements be made for part of the tax paid to be refunded on the transfer of the registration tax to another Member State on the basis of the average lifetime of vehicles. On departure from a country, the tax authorities would reimburse the difference between the tax paid in that country and the remaining lifetime of the vehicle.

(b) The place of registration of a vehicle is that of the "normal residence" of its user, as defined in Directives 83/182/EEC and 83/183/EEC of 28 March 1983. This concept of "normal residence" does not always coincide with that of "residence for tax purposes" used in the direct tax field. This difference creates difficulties in the relatively common case of an employee who uses a company car provided by an employer established in one Member State and who regularly returns to another Member State where he lives. Under such circumstances, registration of the vehicle, and therefore payment of the tax, can be claimed both by the Member State in which the company is established and by that in which the employee using the vehicle is normally resident.

Without intending to call into question Member States' tax autonomy, it appears that there is no solution to this long-standing problem. It is therefore suggested that the Commission examine the means at its disposal for correcting the unequal treatment which results from it. One proposal that it should consider would be to establish a system of shared taxation under which limited use of the vehicle would be permitted in the Member State in which it was not registered.

In the context of problems linked to vehicle registration, the difficulty has arisen in at least one country owing to the impossibility for an individual who has his legal residence (within the meaning of the two above-mentioned Directives) in one Member State and a second home in another Member State to register a vehicle in the country of secondary residence, even though that vehicle would be used only in that country. This in practice creates a situation in which registration is refused in the country of secondary residence. Although this is not, strictly speaking, a tax problem, the Commission should study means of ensuring that it is always possible to register a vehicle, for example by providing for the authorities in the country of secondary residence to accept the registration of the vehicle at the address of that place of residence on the understanding that all taxes relating to the vehicle in question are paid in that same country.

III. FINANCIAL MOVEMENTS

Article 73b of the Treaty provides for the free movement of capital. This covers the physical importation and/or exportation of money or financial instruments of any kind, which European citizens should be able to take with them when they move to another Member State. However, Article 73d authorizes Member States to introduce procedures for the declaration of all capital movements, of whatever amount, for purposes of administrative or statistical information. And in fact, even though physical movements of capital are still free, a number of Member States - Spain, France, Greece, Italy and Portugal - impose a declaration requirement beyond a given amount. There is no reason to contest this practice since the Court of Justice has confirmed its legitimacy in its Sanz de Lera judgment (joined cases 163/94, 165/94 and 250/94).

All the same, there is a problem of lack of information regarding the declaration procedures. In practice, individuals are unaware of the existence of the declaration obligation, particularly in the case of exports of financial instruments to another Member State which provides for such declarations; or else they are aware of this procedure (particularly in the case of the importation of financial instruments into their country) but choose to disregard it because they wrongly associate it with possible taxes or even sanctions. Failure to make the necessary declaration gives rise to a fine that varies in amount.

The option given Member States by Article 73d will not disappear with monetary union and the introduction of the euro. It is therefore necessary that the declaration obligation, where it exists, should be accompanied by adequate information stressing the very simple nature of the procedure and its perfect compatibility with the Treaty, which authorizes neither taxes nor sanctions of any kind. The Commission should also propose that the Council adopt a uniform procedure for those Member States which consider it necessary to retain declaration arrangements. In order to separate the crossing of an internal Community frontier from any kind of control, it is suggested, for example, that the procedure be based on that employed by Spain, which permits declarations to be made to a bank or to the central bank.

CONCLUSION

The Commission should examine, in a manner that is consistent with Member States' tax autonomy, the following suggestions designed to ensure that such autonomy does not penalize individuals exercising their freedom of movement:

- to adopt a common definition of residence for tax purposes;

- to draw up binding Community legislation governing the taxation of frontier workers and other persons who are non-resident for tax purposes with a view to ensuring non-discriminatory taxation for such individuals;

- to encourage Member States to fill the gaps in bilateral agreements relating to income tax and inheritance and gift taxes;

- to promote improved coordination of the tax policies pursued by Member States regarding bilateral and intra-Community tax agreements in the interests of the internal market;

- to reduce the inconsistency between the rules governing the conflict of laws as regards taxation, on the one hand, and as regards social security on the other hand, given that the two increasingly overlap;

- to preserve the principle of equality of tax treatment in cross-frontier situations, particularly as regards the taxation of cross-frontier pensions and the taking account of circumstances leading to tax deductions or concessions. In this context, emphasis is put on the need to provide an appropriate legislative framework for associations in order to ensure that donations benefit from the single market.

With regard to vehicle registration, the Commission should consider a system for coordinating national registration tax systems in order to avoid penalising those who move with their car to other Member States with comparison to those who remain in the same country**,** and to urge Member States to conclude the necessary agreements to eliminate cases of double imposition on the vehicle.

Finally, the Commission is invited to propose a simplification of the procedure for declaring financial movements in the Member States which consider it useful to maintain such a requirement.

Chapter V: Cultural rights

INTRODUCTION

Cultural diversity, in the same way as democracy and the European social model, represents for the Union and its Member States a richness which must be preserved. Cultural issues are moreover more closely linked to the present Community system than the unification project, which was initially concerned above all with the creation of a common market, had perhaps suggested. Inexorably, those issues have come to the fore, first in the field of the free movement of goods, then in that of services and, consequently, in that of commercial policy. This was plain to see in the final phase of the talks that led to the signing of the Marrakech agreements. Meanwhile, on an even bigger scale, other cross-cultural aspects surfaced in the very field that is the subject of this report: the free movement of persons.

In this field, problems raising directly to matters in which the Community's competence remained uncertain for a long time (education and culture) or too limited (professional training and research), appeared very soon. Quite often implicit in the EC Treaty of 1957, the Community's competence in these matters became explicit in the Maastricht treaty, in Articles 126 (education), 127 (professional training), 128 (culture) and 130 F to P (research). In the light of these new provisions and according to the objective pursued in this report, this chapter deals with problems of a cultural nature, which concern in particular the use of languages (I), the Community's actions undertaken in the field of culture, in so far as they have a link with the free movement of persons (II) and the concrete problems encountered by persons wishing to undertake education or training, general or professional, in another Member State (III).

I. THE USE OF LANGUAGES

Europe has to a large extent retained the diversity of its original languages (derived in part from Latin and Ancient Greek), this diversity being the outcome of a process of cultural development that began in the distant past. The multiplicity of European languages is of course a treasure to be safeguarded. It is essentially a question of creating in the Union a general atmosphere of mutual respect in a context of diversity, i.e. of fostering better understanding of the innumerable linguistic and cultural nuances that are specific to Europe, and thus attempt to produce a spirit of positive tolerance based on recognition and solidarity. It is in this spirit that some practical suggestions are put forward on how to promote a spirit of linguistic comprehension and tolerance, and encourage language teaching in the Community. Rather than delve into possible solutions to technical problems, it would be advisable to adopt a number of political measures aimed at settling linguistic problems within the EU geographical area in a spirit of freedom and mutual respect.

In this spirit, bilingualism and multilingualism, while very much a feature in Europe, are largely ignored and should be given recognition wherever they occur, be it in regions, groups of people, or individuals. This new approach would also make a major contribution to easing tension between language groups. Furthermore, administrative practice should take cross-border linguistic patterns into account and, when training programmes are drawn up, leave a suitable amount of room for languages that are geographically close to each other.

For individuals who settle in another Member State, their language of origin should be protected, within both the educational system and the administration, to prevent those migrants from being pushed into a cultural vacuum created by the loss of their cultural ties and the time needed to adapt to their new environment. This objective is already pursued, for children of migrant workers, by Article 3 of the Directive 77/486/EEC which states that *"Member States shall take, in conformity with their national situations and their legal interests, and in cooperation with the home Member States, appropriate measures in order to promote, in coordination with normal education, a teaching of the mother language and of the culture of the country of origin..."*. However, the application of this provision by the Member States remains unequal.

Of course, it would also be necessary to foster language training and the use of languages in the Community. The objective here would be to encourage by various means - school curricula in the Member States, exchanges of teachers and students, general direction of the Community's policy on grant-aid - a greater willingness to study and use the languages that form part of Europe's heritage. Consideration could accordingly be given to the following :

(a) the issue that must be addressed first is a fundamental one, namely to determine optimum objectives and learning levels for "foreign" languages: introduction of a second language early on, at primary school, in accordance with the priorities of each Member State; wider choice in secondary education; more detailed study at university level;

(b) fostering exchanges of teachers in secondary and further education; opening to a larger public the LINGUA programme and reinforcing the language component of all the other Community programmes (referred to in point III), the objective of which is to stimulate the mobility of persons (students, employed and unemployed workers, researchers...) who wish to perform a training period in another Member State.

(c) encouraging, within the framework of cultural actions (point II), the translation of the classics, i.e. the works that have helped to shape Europe's various national cultures. Particular attention should be paid to works written in languages that are less widespread and seldom translated;

(d) giving backing to radio and television programmes that focus on language and ensuring that, at every level, whether basic or advanced, they constitute a permanent feature of programme scheduling. In the same vein, encouragement should be given to the development of electronic means of basic and advanced language learning that are accessible to all.

II. COMMUNITY ACTION IN THE CULTURAL FIELD

Notwithstanding the undeniable impact of cultural issues in the Community system, the responsibilities of the European Community in this field were, for a long time, not fully clear. The Treaty on European Union finally dispelled those doubts by including under Title IX "*Culture*" a completely new Article 128 the underlying principle of which is that: "*the Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the cultural heritage to the fore*". The Article also underlines the link between, on the one hand, those new responsibilities and, on the other, duties assigned in other contexts: "*the Community shall take cultural aspects into account in its action under other provisions of this Treaty*". It may legitimately be claimed, therefore, that the EC Treaty now includes a complete and structured concept of the duties taken on by the Community in the cultural field.

After exploring this area of action, it appeared that resolving the cultural problems raised by intra-Community migration meant not so much introducing binding measures as exercising the power of political initiative of the institutions, drawing up concrete programmes and using the financial instruments available. This is indeed the approach the Commission has followed over the years with the numerous programmes it has launched under invariably evocative but sometimes also cryptic titles. One may mention for example, , the programme KALEIDOSCOPE (programme to support artistic and cultural activities having a European dimension), the programme ARIANE (a preparatory action programme in the field of books and learning), the programme RAPHAEL (a preparatory action programme focusing on the cultural heritage), work on drawing up future programmes on citizens' access to culture, and draft sectoral actions in the fields of music and the plastic arts, insofar as they refer to the free movement of persons.

These actions have the merit *inter alia* of facilitating the discovery of new cultural realities, of developing greater awareness of others and, by the same token, a European conscience, and thus of contributing to the actual implementation of a European area of mobility and well-being. However, the public is still largely unaware of the Community's programmes in the cultural field. The Commission should encourage Member States to step up their information effort in this field, especially at local level, since there is a striking imbalance in the level of information as between EU regions. There is also a need for closer coordination between the programmes and above all, between the Commission services concerned. In this connection, it would be desirable to produce a guidebook describing every culture-related Community programme and all existing programmes in the field of education, training and research (point III) that, directly or otherwise, relate to the free movement of persons.

***The special situation of artists and others active in the field of culture* :** these professionals are in a paradoxical situation since, on the one hand, they would normally be expected to be among the most mobile members of the population and, on the other, they often face insurmountable problems, in particular because they tend to stay in countries for short periods and because the procedures applicable to them are slow. Facilitating the transnational mobility of artists takes on added importance, given that free movement is a general objective of the Treaty, that their activities consist of performances at a number of locations, and that transnational performances add to artistic creativity and are an essential component of the flowering of the cultures of the Member States while remaining respectful of national and regional diversity, a flowering to which the Community must contribute. The Commission must keep up its attempts specifically to foster the mobility of artists and help their work reach a wider public, firstly by encouraging sectoral studies aimed at increased awareness and understanding of the problems that are specific to the various fields of artistic activity and promoting the dissemination of the data gathered in the process. Secondly, since most often, artists and other cultural operators belong to professions that are neither regulated nor highly organized, they should be encouraged to create European platforms or forums that would be in a position better to promote their activities, defend their interests both at national level and as regards the transnational mobility problems they face, support artistic creation and contribute to the flowering of the cultures of the Member States.

III. MOBILITY IN EDUCATION, TRAINING AND RESEARCH

Under the provisions of the Treaty (Article 126, Article 127 and (d) of Article 130 G), Community action is to encourage mobility in the field of education, training and research. Several Community programmes have accordingly been adopted which are aimed in particular at encouraging exchanges and the transnational movement of students, teachers, researchers, trainees (whether employed or unemployed) and trainers. The programmes are very successful and are making a major contribution to an increase in mobility in the Union, but a number of problems restrict their implementation on a larger scale and their effectiveness. In this respect it is sufficient to underline the cumbersome and non-transparent procedure for adopting programmes, the complexity of the project selection procedures and the constant need for information, not only on the Community programmes themselves, but also and above all on the conditions under which the right of free movement may be exercised. Moreover, in addition to the problems still faced by those whose mobility is covered by those programmes, far more severe problems often await those who migrate spontaneously (i.e. not under a programme). Most of these problems were identified in the Green Paper on transnational mobility which the Commission adopted on 2 October 1996 in the context of its duties under the above-mentioned Articles of the Treaty. In the course of the Panel's work several problems have been identified - both specific and general - that affect persons (students, researchers, workers, jobseekers, trainees and voluntary workers) who wish to train, complete a period of training or perform voluntary work in another Member State. Those problems have been examined in relation to the following themes: mobility in education (A), mobility in vocational training (B), mobility among trainees and voluntary workers (C) and mobility of researchers (D).

A. Mobility in Education

Article 126 (1) of the Treaty states that *"the Community shall contribute to the development of quality education"*, paragraph 2 adding that *"Community action shall be aimed at encouraging mobility of students and teachers, inter alia by encouraging the academic recognition of diplomas and periods of study"*. Those objectives are currently being pursued by several subprogrammes (ERASMUS, COMENIUS and LINGUA) in the context of the SOCRATES programme : ERASMUS/SOCRATES for students in further education, COMENIUS/SOCRATES for pupils in secondary education and LINGUA/SOCRATES for students and pupils aged 14 to 25 - have been set up to add to the European dimension of education. Under the ERASMUS and LINGUA programmes, pupils and students may take part in exchanges and, thereby, study in another Member State. The programmes are very successful, judging from the uninterrupted increase in the number of applications and opportunities for exchange. Moreover, the advantage of mobility in this context is that, in principle, it resolves the question of academic recognition of periods of study abroad (whereas this is still a crucial problem as far as student mobility outside the programmes is concerned). However, a number of difficulties remain not only for those whose mobility takes place within the framework of those programmes, but also for students who make their own arrangements for proceeding with their studies in another Member State.

(a) Social protection for students **:** As pointed out in Chapter III of this report, students are not actually covered by the system of protection available under Regulation (EEC) No 1408/71. They receive that protection only if they are workers - and are, therefore, insured in a Member State - or members of a worker's family. This problem would be solved by the adoption of the Commission proposal of 13 December 1991 that students in particular should be included among the persons covered by Regulation (EEC) No 1408/71.

(b) Possibility of double taxation of student grants **:** By virtue of Article 20 of the OECD Double taxation Convention model, students are in principle exempt from income tax on payments received from abroad which are intended to cover the cost of their food and lodging and studies or training. There is still, however, a risk of double taxation in so far as the existing network of bilateral tax conventions does not yet cover every possible link between the fifteen Member States (see Chapter IV). In this respect, (as already stated in Chapter IV) the network of tax agreements between Member States should be completed.

(c) Academic recognition of diplomas and periods of study**:** This is a crucial issue in the case of student migration outside Community programmes and migrants' children who return to their home Member State in order to continue their studies. There is, at Community level, no system of academic recognition (for students seeking to continue their studies in another Member State) of qualifications awarded or study periods spent in a Member State. While the ECTS (European Course Credit Transfer System) for awarding and transferring course units facilitates, in the context of the Socrates programme, the academic recognition of study periods spent in another Member State, such recognition is, in the case of qualifications and study periods not covered by that programme, left entirely to the Member States. Problems of academic recognition arise above all in the case where a student completes a cycle of studies in one Member State and, when transferring to another Member State in order to continue his studies, changes over from secondary to further education, or from graduate to postgraduate studies. The Commission has always held that it does not have the necessary legal basis for the adoption of any legislative measures in this respect. On the other hand, it has set up the Network of National Academic

Recognition Information Centres (NARIC), which acts jointly with the networks of the Council of Europe and with UNESCO (European region). There is, however, no Community measure specifying that an academic qualification is automatically to be regarded as corresponding to another. It all depends in principle on the university and educational establishments concerned.

The information drive set in motion by NARIC is an initial response to a crucial problem of information in this field. This action must accordingly continue and be stepped up. Moreover, the Commission should take its inspiration from the work carried out in this field by the Council of Europe and UNESCO (European region), in connection with which a draft Convention (to be signed in April 1997) provides for the introduction of an "annex to the diploma", its purpose being to describe in detail the course followed by the holder, and thus facilitate academic or professional recognition (especially in the case of non-regulated professions) of the qualification(s) obtained. In this connection, in its conclusions of May 1996 on synergies between academic and professional recognition of qualifications in the Community, the Council invited the Commission to look specifically into the possibility of introducing a European "administrative annex" to diplomas.

That being said, there remains a major problem as regards the absence of binding Community rules on the academic recognition of qualifications. While Article 126 provides that Community action is to aim in particular at encouraging the academic recognition of diplomas and periods of study, it also limits such action to support measures. To take a step forward and recognize the Community's real potential for action in this field, in the context of the IGC, backing should be given to a proposal to include in the Treaty the legal basis that will enable the EU to introduce a Community system for facilitating the academic recognition of diplomas and periods of study.

(d) ***Use, for professional purposes, of an academic title obtained in another Member State*****:** Strictly speaking, it is a question not of academic recognition of a qualification, but of recognition of the right to use an academic title. This was the central issue in *Kraus* (Case C 19/92). In that judgement, the Court held that Member States could, subject to certain requirements, make the right to use a foreign academic title subject to an authorization procedure. The Judgement adds, however, that Articles 49 and 57 of the Treaty could well provide the legal basis for adopting legislative measures as regards *de facto* professional recognition. Consideration should, in this field, be given to Community legislative action based on Articles 49[18] and 57 of the Treaty and aimed at encouraging the development of concerted action by academic authorities and professional bodies. This action could also include the particular problem of recognition of doctorates.

[18] Without préjudice to a possible modification of Article 49 of the Treaty (see chapter II).

B. Mobility in vocational training

Article 127 of the Treaty stipulates that *"the Community shall implement a vocational training policy ..."*, adding that *"Community action shall aim to facilitate access to vocational training and encourage mobility of instructors and trainees and particularly young people"*. In this connection, the Community introduced, some years ago, the LEONARDO DA VINCI programme for vocational training (initial, continuing or life long). Support may, under that programme, be given to pilot projects and placement and exchange schemes put forward, in the context of partnerships between training agencies, universities or enterprises, by three or more Member States. In particular, the pilot projects enable young people undergoing initial vocational training, young workers (including unemployed young people), students and newly qualified young people to undergo - subject to certain conditions - a period of training in industry in another Member State. Although it has met with a great deal of success, the programme faces several difficulties among which must be pinpointed the problem of transnational training of jobseekers and that of the recognition of training certificates acquired in another Member State.

***(a) Transnational training of jobseekers*:** Much as with the issue, dealt with in Chapter III, of the three-month limit on the exportability of unemployment benefits, there is an additional problem here, in that unemployed persons undergoing training in another Member State are not regarded as jobseekers in that Member State and do not, therefore, fulfil the requirement of being registered as unemployed persons. Accordingly they may not, for a three-month period, export their unemployment benefits to the Member State where they are undergoing training and may lose their status as unemployed persons in the home Member State. In this respect it would be desirable, when under the legislation of the Member State concerned, people without work are allowed to retain their status as unemployed persons when taking part in a training scheme in that Member State, to allow them, when undergoing training in another Member State, to retain their status as unemployed persons, their benefits, the social protection, and the right to register as jobseekers in that Member State.

***(b) Recognition of training certificates obtained in another Member State*:** Among the major problems is the fact that, without a Community system for the recognition or validation of periods of vocational training spent in another Member State, the impact of measures to promote training mobility will fall below expectations. As pointed out in Chapter II on access to employment in the non-regulated sector, the Commission has launched a series of initiatives aimed at increasing transparency and facilitating the recognition of vocational training qualifications obtained in another Member State. These are also the objectives of the LEONARDO DA VINCI programme, but lack of transparency as regards qualifications obtained abroad and the absence of a system of certification in several Member States continue to restrict the mobility of those who seek to receive vocational training - supplementary or otherwise - in another Member State. A possible solution would, as suggested by the Commission in its Green Paper, be to extend to the field of vocational training the ECTS scheme to higher education.

C. Mobility of researchers

According to (d) of Article 130 G, "*... the Community shall carry out the following activities, complementing the activities carried out in the Member States: ... stimulation of the training and mobility of researchers in the Community*". On 15 December 1994 the Council accordingly adopted a programme in the field of training and mobility for researchers. Although the programme has already met with a good deal of success, a number of problems have come to light in the course of its implementation**.** However, the problem of social protection for researchers must be highlighted. Researchers who belong to a special scheme for civil servants in their home Member State but who have never belonged to a general social security scheme in that country cannot qualify under the arrangements for the coordination of social security schemes provided for in Regulation (EEC) No 1408/71, since the latter does not apply to special schemes for civil servants and the like. On this point, and given the importance of the mobility of researchers, the Panel wishes to confirm its support (as expressed in Chapter III) for the Commission's 1995 proposal to include special schemes for civil servants and the like in the scope of Regulation (EEC) No 1408/71.

D. Mobility of trainees and voluntary workers

Persons undergoing training or performing voluntary work in another Member State who are not recognized as students, workers or unemployed persons find it difficult or even impossible to complete their traineeship or period of voluntary work abroad.

***(a) Right of residence of trainees and voluntary workers*:** A major problem faced by these people is that, if the period of training or voluntary work exceeds three months, they must obtain a residence permit, the issuance of which is, by virtue of Directive 90/364/EEC on the right of residence, subject to their meeting two separate requirements: they must be covered by sickness insurance and they must have sufficient resources. Since voluntary work and, in many cases, training are, as a rule, not remunerated it is very difficult if not impossible to obtain such a permit. It would be desirable to promote an action whereby trainees and voluntary workers undergoing a period of training, or performing voluntary work, in another Member State would be recognized as having a right of residence for an equivalent period.

***(b) Social protection of trainees and voluntary workers*:** Trainees and voluntary workers do not qualify for protection under Regulation (EEC) No 1408/71. They are afforded that protection only if they are workers - and are accordingly insured as workers in a Member State - or are members of a worker's family. Consideration should be given to including them among the persons covered by Regulation (EEC) No 1408/71. There remains a major problem, however, in that trainees and voluntary workers may in some cases not be covered by a Member State's social security scheme. Accordingly, it would be desirable to incite the Member States concerned to recognize a social status to those persons.

***(c) Recognition of periods of training in other Member States*:** Even in the context of the YOUTH FOR EUROPE programme that supplements the SOCRATES and LEONARDO programmes - in particular by enabling young people aged fifteen to twenty-five to take part in exchange activities and by making provision for periods of voluntary service - trainees and voluntary workers face, in terms of mobility, the general problem of validation and recognition of periods of training or voluntary work spent in another Member State. Here, as in the case of the academic recognition of diplomas and periods of study or of

recognition of vocational training abroad, a system should be introduced with a view to facilitating the mutual recognition of traineeships and periods of voluntary work.

Before closing this chapter, it is important to point out that a partial solution to some of the problems mentioned above could be found, as suggested in the first chapter of this report, in a certificate which would be specific to stays whose duration is between three months and one year.

CONCLUSION

Linguistic diversity in Europe is a richness which must be preserved and reconciled with the objective of free movement of persons by fostering by various means (school curricula in the Member States, exchanges of teachers and students, general direction of the Community's subvention policy) a greater willingness to study and use the languages that form part of Europe's heritage.

Community actions undertaken in the cultural field, in particular those which contain a mobility aspect, have also an obvious interest from the point of view of the free movement of persons. However, the success of these actions calls for additional efforts on the one hand, in the field of information, above all at local level, and on the other hand, in the development of a better coordination between the various culture-related Community programmes and a closer cooperation between the various Commission services concerned. In addition, these actions could be usefully supplemented with the development of a specific action in order to better take into account the particular situation of artists and others active in the cultural field.

The Community should continue to encourage mobility in education, training and research as a very important objective by seeking, where necessary, the adoption at the appropriate level (Community, national or even local as the case may be) of measures or actions aimed at tackling the outstanding obstacles in this field, whether these obstacles are specific (for example the problem of academic recognition of diplomas) or more general, such as the right of residence, social protection or the information of the persons undertaking a training in another Member State.

Chapter VI. The special situation of third-country nationals

INTRODUCTION

The situation of third-country nationals within the Union is special compared with that of Union citizens in that, since they are not nationals of a Member State, they do not enjoy, except in part in certain specific situations (e.g. if they are members of the family of a national of a Member State established in another Member State), the rights created by the principle of free movement of persons in the Union.

The purpose of this chapter, therefore, is to examine, within the limits of the remit assigned by the Commission, the current situation of such persons in the light of the principle of free movement and how some of the problems they encounter and which, indirectly, affect the freedom of movement enjoyed by citizens of the Union can be mitigated or resolved.

It should be stated very clearly at the outset that the following developments relate only to third-country nationals lawfully residing in a Member State. There is no question of this report touching upon issues of immigration policy or on matters concerning the determination of nationality.

Generally speaking, once legally admitted into one Member State, third-country nationals have no rights at Union level when they move to other Member States. However, some third-country nationals lawfully residing in a Member State have, at present, a link with Community law and therefore enjoy certain rights or facilities as regards movement within the Union. It has therefore been thought necessary to distinguish between, on the one hand, these special categories (I) and, on the other, the general situation of third-country nationals legally established in a Member State of the Union (II).

I. Special situations of certain third-country nationals in the Union

Basically, three types of situation are discussed here: that of family members (A), that of workers seconded in connection with a supply of services (B) and that of refugees and stateless persons (C). Reference is also made, but in more general terms, to the special situation of nationals from third countries associated with the Community through an external agreement (D).

A. Third-country nationals who are members of the family of a Union citizen

The status of family members of a Union citizen (who has exercised his right of free movement) is the same regardless of whether those family members are citizens from Member states or from third countries. The latter generally encounter the same problems as family members who are nationals of a Member State (see Chapter III). However, they are subject, because of their nationality, to additional difficulties. In this respect, several problems have been identified concerning the right of a family to live together (1), entry into the territory of a Member State (2), the situation of the divorced spouse (3) and the right to take up a professional activity as a self-employed person in the host Member State (4). It should be emphasized that

the problems encountered by such persons directly affect the Community members of their family and the exercise by the latter of the rights conferred on them by the Treaty.

1. Right to settle with one's family

With reference to the corresponding development in Chapter III, the extension there proposed, of the right to settle with one's family, to descendants over 21 who are no longer dependent on their parents, and to relatives in the ascending line who are not dependent on their children, should benefit, not only Union citizens, but also citizens from third countries. However, for the latter, it is suggested adding the condition that the family group be already formed in the home Member State, in order for them to be entitled to join their parents or children in another Member State. In other words, a third country citizen, child or relative in the ascending line who is not dependent on his parents or child and who wishes to move directly from a third country to be with his/her child or parents in the host Member State, will be subject solely to the national rules applicable.

2. Right of entry into a Member State of the Union

Although lawfully residing in a Member State, on entering the territory of that State or of another Member State, family members who do not have the nationality of a Member State may be required to have a visa. Admittedly, under Directive 68/360/EEC, *"Member States shall accord to such persons every facility for obtaining any necessary visas"*. In practice, however, this process is very often a source of difficulties : it may take several weeks to obtain a visa, thus preventing travel which has not been planned well in advance; sometimes even, family reunification is thwarted by a simple refusal to issue the visa requested. These difficulties affect not only family members who are third-country nationals - the main persons concerned - but also, and to the same extent, the Union citizen (child, spouse or parent) whom they wish to join or who is accompanying them. The freedom of movement of a Union citizen can thus be seriously impeded compared with that of another such citizen whose family members all have the nationality of a Member State. It is thus desirable that visa requirements, at least for family members, be abolished.

3. Non-existence of the right of residence in the host Member State for the divorced spouse

The right of residence in the host Member State enjoyed by a third-country national who is the spouse of a Union citizen is subject to the durability of that person's marriage. In the event of divorce, the interested party may find him or herself, from one day to the next, deprived of the right to stay in the Member State where he/she was hitherto resident. The precariousness of this situation is hard to accept, in particular as it may be used to the disadvantage of such persons. It is not rare for them (most often women) to be subjected during marriage to the threat of divorce. Even in the event of the marriage being dissolved, Community law should continue to offer some legal protection to the spouse who is a third-country national, in particular with regard to his/her right of residence. The fact that the third-country national may have exercised certain rights in the Community during his/her marriage creates objective ties whose effects exceed the duration of the marriage. Such is the case in particular where there are common children or where the spouse has exercised his/her right to pursue a profession. Accordingly is suggested not only that national authorities be invited to take into account this situation but also that the various Community

provisions applicable to the right to remain, should be amended so as to recognize a right of residence for the divorced spouse who is a third-country national.

4. Right to pursue a professional activity in the host Member State

Under secondary Community law, the third-country national who is the spouse of a Union citizen has the right to take up a professional activity in the Member State where he/she resides with his/her spouse. However, where the Union citizen pursues a professional activity in the host State (as an employed or self-employed person), his/her third-country-national spouse has the right under existing provisions to pursue a professional activity only as an employed and not as a self-employed person. This legal gap is particularly surprising since the right to pursue a self-employed activity was recognized, in the 1990 and 1993 Directives on the right of residence, for the spouse of a Union citizen who is studying, has retired or is lawfully residing in another Member State. The same problem arises with the third-country-national children of a Union citizen working in another Member State. Like the spouse, such children have been granted the right to pursue an activity as an employed but not as a self-employed person. Accordingly it is recommended the necessary initiatives in this matter be taken.

B. Workers for a Community firm supplying services

Very often, Community firms exercising their right to supply services in another Member State (Article 59(1) of the Treaty) temporarily send members of their staff to the State where the supply is to be carried out. This phenomenon was recently the subject of an important Community legislation : the Directive on the secondment of workers, which concerns the field of labour law and applies to workers whether they are Community or third country nationals[19].

Where firms include third-country nationals among their staff, they encounter specific difficulties to the extent that they are often obliged either to forgo the proposed supply or to circumvent, in order to keep their contract, the formalities and procedures imposed on them. It should be explained that the reference here is 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 a supply of services by their employer. As the Court held in *Vander Elst*,[20] workers employed by an undertaking established in one Member State and sent temporarily to another to supply services do not in any way seek access to the labour market in that State, if they return to their country of residence after completion of their work.

The difficulties encountered by such firms are due to the burdensome (e.g. the requirement that a worker should be employed for at least one or two years by the same undertaking before he is seconded), slow and extensive formalities imposed on them when they want to second temporarily to another Member State one or more workers who are members of their staff and are third-country nationals. This type of procedure - very cumbersome and very long - creates a *de facto* obstacle which undertakings may find difficult to overcome.

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19 Directive 96/71/EC of 16.12.1996 of the European Parliament and the Council relating to the secondment of workers within the framework of provision of services (OJ L 18, 21.1.1997, p.1).

20 Case 43/93, Vander Elst, Judgment of 9.08.1994, [1994] ECR I-3803.

Evidently, employers in one Member State cannot be prevented from supplying services in another because they employ third-country nationals, and no condition should prevent a worker from a third country from following his company when it provides a service in another Member State, since the worker is an integral part of the regular labour force in the Member State where the undertaking is established.

While there is no question here of creating new rights for third-country nationals as such, the Panel considers, in the light of Article 59 of the EC Treaty and of the case-law of the Court of Justice, in particular *Vander Elst*, that Community action should be undertaken to clarify the situation concerning the temporary presence of these workers in the Member State where the services are supplied and to try and reduce the obstacles facing their employers. The purpose of such a measure should be to strengthen the rights which Community employers derive from Community law on the freedom to supply services, with particular reference to the handling of visa, residence and work-permit problems.

C. Refugees and stateless persons

In 1964 the representatives of the Governments of the Member States adopted Declaration 64/305 whereby " *the admission into their territory, in order to pursue an activity as an employed person, of refugees recognized as such within the meaning of the Convention of 1951 and established on the territory of another Member State must be given especially favourable consideration, in particular in order to accord such refugees the most favourable treatment possible in their territories* ".

In addition, as regards social security, the assimilation of refugees and stateless persons was acknowledged by Regulation (EEC) No 1408/71, Article 2(1) of which provides that *"this Regulation shall apply to workers who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as also to the members of their families and their survivors"*.

Lastly, in 1985, when Directive 85/384/EEC on the recognition of diplomas in the field of architecture was adopted, the representatives of the Governments of the Member States adopted a statement (85/C210/02) whereby, anxious to take account of the special situation of refugees and to grant to those pursuing an activity on a self-employed basis in a Member State the same treatment as that granted to those pursuing this activity as employed persons, *"the taking up and pursuit in their territories of an activity as a self-employed person covered by Directive 85/384/EEC, in respect of establishment or the provision of services, by refugees recognized as such within the meaning of the Convention of 1951 and established within the territory of another Member State, must be given especially favourable consideration, in particular in order to accord such refugees the most favourable treatment possible in their territories"*. A similar statement appears in the minutes of the meetings at which the other Sectoral Directives on the recognition of diplomas were adopted.

However, in the Panel's view, the current situation of refugees and stateless persons recognized as such within the meaning of the Convention of 1951 and living in the territory of a Member State is still precarious from the Community viewpoint. It is thus suggested that such persons be assimilated, for the purposes of applying the Treaty, to the nationals of the Member State in which they live.

D. Nationals of third countries associated with the Community through an external agreement

The situation which results from the many association and cooperation agreements concluded by the Community is extremely complex. Today, there are agreements with more than 90 countries (ACP, Maghreb, Turkey, the countries of Central and Eastern Europe, the Baltic countries and the countries of the former Soviet Union). All these agreements are very different. As far as the mobility of persons is concerned, they may contain provisions relating, in varying degrees, to employed persons, social security, the right of establishment and the supply of services. The diversity of these agreements and the rights they confer to individuals means that they cannot be viewed as a "model" for the future.

II. General situation of third-country nationals lawfully residing in a Member State

Apart from the particular situations mentioned above, questions relating to "migration policy" fall in principle, and, save exceptions, within the competence of the Member States, but are among to the "questions of common interest" defined in title VI of the EU treaty.

Within this framework, work is currently underway within the Community Institutions with regard to a common approach concerning rules relating to conditions of entry, movement and residence of third country citizens. From this viewpoint, priority should be given to resolving the various questions concerning the simple right to travel for third country nationals lawfully established on the territory of the Member States of the Union, as is already the case between certain signatories States of the Schengen Convention.

Finally, attention must be drawn to the fact that there are also difficulties, in the field of "social protection", deriving from the fact that Regulation 1408/71 (examined in detail in Chapter III) does not apply to third-country nationals lawfully established in a Member State, except when they are members of the family of a Community worker or when they have the status of refugee or stateless person.

This exclusion produces a number of problems, not only for the individuals themselves but also as regards the management of social security schemes, inasmuch as the competent institutions daily encounter a variety of difficulties in applying and coordinating, in respect of persons insured in one Member State, whole sets of completely different rules : those contained in Regulation 1408/71 in the case of Union nationals, and those resulting from widely diverging bilateral agreements in the case of third country nationals. The question then arises whether all or certain provisions of Regulation 1408/71 should not be extended to third-country nationals who are lawfully resident and are insured in a Member State.

CONCLUSION

It is recommended :

- to consider an extension of the right to settle with one's family in another Member State, to descendants over 21 and to relatives in the ascending line who are third-country nationals and not dependent on the spouses, subject to the condition that the family group was already formed in the home Member State;

- that visa requirements for family members be abolished;

- that a right of residence be recognized for a divorced spouse who is a third-country national;

- to recognize explicitly the right of the spouse and children of a Union citizen working in another Member State, who are third-country nationals, to take up, in that State, an activity as a self-employed person;

- to take action at community level to clarify the situation concerning the temporary presence of workers seconded to another Member State as part of a supply of services by their employer and to reduce the obstacles their employers come up against by seeking, in particular, to resolve the visa, residence and work-permit problems;

- for the purposes of applying the Treaty, refugees and stateless persons recognized as such within the meaning of the Convention of 1951 and living on the territory of a Member State should be assimilated to nationals of the Member State in which they live;

- to envisage a partial or complete extension of Regulation No 1408/71 to third-country nationals who are lawfully resident and are insured in a Member State.

Chapter VII: Protection of the rights of individuals

INTRODUCTION

The lifting of most of the barriers to the free movement of persons has involved a considerable legislative drafting effort in order to frame the common rules necessary for giving practical effect to that freedom. The legislative effort must now be followed up, in the field of the free movement of persons as in that of the free movement of goods, services and capital, with a new drive to ensure that the rules are applied effectively.

Back in October 1992 the Sutherland report ("The internal market after 1992: Meeting the challenge"), which was drawn up at the Commission's request, warned that the proper functioning of the single market would largely depend on the extent to which the rules underpinning it, in particular those relating to the free movement of persons, were known, understood and applied in the same way as the rules of national law. Citizens must be able to rely on Community law being applied uniformly and to enjoy the rights and guarantees it affords in all Member States. Legal certainty and, more generally, confidence in the entire European integration process depends on this.

The Treaty on European Union has made the Community institutions more accessible to individuals for the purposes of protecting their rights. It has officialized the right to petition the European Parliament and created the office of European Ombudsman. The drafters of the Treaty thereby clearly signalled their intention to convince an often sceptical public that citizenship of the Union brings with it not only rights, but also machinery to protect those rights. A better balance nevertheless remains to be struck between rights that have been created and their effective protection.

The protection of rights obviously means that they must be able to be effectively pursued before the competent judicial authorities; the issues involved are discussed in this Chapter since the specificity of Community law calls for some analysis. It was decided to look first into two questions that cannot be dissociated from any guarantee for the exercise of individuals' rights: the means employed for informing citizens of their rights, and the need to raise the awareness of the professionals and authorities involved in the application of Community law.

The whole difficulty of protecting the rights of individuals in the European Community, in the field of the free movement of persons in particular, resides in the fact that the protection afforded, in terms of the provision of legal information, effective application of the rules or access to legal remedies, largely depends on action by the Member States. Such protection therefore hinges on the political willingness of the Member States and, more generally, the extent to which all the parties involved at national level are aware of the principles of Community law. This is the main theme developed in this Chapter.

I. PROVISION OF LEGAL INFORMATION

1. Need to improve the provision of information

(a) Importance of the availability of information and its content

All those who have to deal with requests for information or complaints are aware of the fact that the expectations of members of the public go beyond the actual extent of their rights. This largely stems from a basic misunderstanding: the creation of a single market and, all the more so, a Union involving citizenship is seen, mistakenly, as conferring more extensive freedom of movement than is the case at present.

The information available to individuals tends to stress the general principles of their right to move freely, but often fails to enumerate the restrictions on that right or the difficulties it raises. Only when citizens try to exercise their rights (at least as they imagine them) do they become aware of the gap between theory and reality. Two examples serve to illustrate this:

- the widespread unawareness of the obligation to apply for a residence permit can have serious consequences in many other areas than that of exercise of the right of residence (see Chapter I);

- many citizens unnecessarily expose themselves to large financial risks either through ignorance of the value of "E" forms, which entitle the holder to receive national social security benefits when travelling in another Member State, or through confusion between the many different types of "E" form available (see Chapter III).

It usually proves time-consuming and costly to settle problems after the event, particularly when dealing with administrations. It is therefore essential that members of the public should be better informed about the practical arrangements for exercising their right to free movement, the difficulties they can encounter and the ways and means of overcoming those difficulties.

But lack of information can even make it pointless having a right, as people will obviously not seek to exercise a right that they are not aware of having. Mention can be made here, by way of example, of the right to vote and to stand as a candidate in elections to the European Parliament for citizens of the Union residing in another Member State: the rules having entered into force only shortly before the most recent elections, the option of voting or standing as a candidate in the host country was not properly publicized in most Member States, with the result that many of those eligible did not take up the option. This was all the more regrettable in the case in point as the right to take part in those elections had great symbolic value for a citizens' Europe.

Finally, the problem of information sometimes arises in terms of access to justice. Indeed, in the often precarious situations which characterize moving to another Member State, access to justice would remain a hypothetical right for individuals if they could not benefit from legal aid. However the possibility of access to legal aid in a Member State other that one’s own in order to defend there one’s rights as a European citizen remains largely unknown. The same is true of the rule resulting from the Francovitch judgement according to which an individual may, where he cannot benefit from a Community directive because it has not been implemented in national law within the time limit laid

down and where consequently he suffers loss, nevertheless obtain compensation for this breach. Here also information has a role to play.

(b) Current difficulties in obtaining information

The following problems have been noted:

- there are a large number of bodies and networks providing information on Community affairs, but these cater more for the practical needs of businesses (take, for example, the highly developed network of Euro-Info-Centres for SMEs which is responsible for informing, assisting and advising SMEs) than for the need of individuals to ascertain their rights;

- national authorities are not, or are not seen as, active enough in distributing information (see the discussion of this point in section II.3). This makes it difficult for individuals to find information sources in their immediate surroundings;

- when services catering for the needs of individuals are set up, either at Community level (e.g. the INFO-92 database which focused on the objectives of the internal market and on its social dimension, and which offers a real guide both for a wider public and for the professional; or the "Euro-Jus" network of legal advisers placed at the public's disposal at the offices of the Commission in the Member States and gives free information and advice on the effects of Community law) or nationally, the public is rarely informed of their existence, let alone of what they offer;

- the information effort is not properly coordinated within the Community institutions. General responsibility for the rights of individuals is scattered between several Commission Directorates-General, which gives the impression that there is no overall, consistent approach to the information needs of citizens.

The Commission is invited to follow the example of the European Parliament and certain Member States and recommend that a right of access to information be written into the Treaty.

2. Citizens First initiative

The Citizens First initiative, which started in November 1996 and by which citizens are invited to ask for brochures on Community law and, where necessary, to ask for personalised legal information, must be applauded. This joint Commission/European Parliament project, which forms part of their information programme for the European citizen, starts precisely from the realization that most European citizens are ill-informed about their rights and opportunities at Community level (a recent survey found that 80% of the persons interviewed felt this to be the case). The aim of Citizens First is to encourage European citizens to exercise the rights conferred on them by Community law, through their right to be informed and to be heard.

Citizens First has been put in place by the Commission in close cooperation with the Member States and non-governmental organizations. The result is a new style of presentation by the Community institutions

which emphasizes practical information rather than general principles and points up any specific features of the national rules transposing Community law. Furthermore, the services that have been set up are not confined to providing information and documentation, but also signpost the appropriate official departments to contact in the different Member States.

Citizens First is as an adequate response to the problems outlined above. The initial results of the initiative are significant: the Citizens First freephone line received some 450,000 calls in the space of three months, thereby demonstrating the keen interest generated among the general public but also the fairly widespread lack of knowledge of the topics covered. The Commission is therefore encouraged to place the initiative on a permanent footing.

II. RAISING AWARENESS OF COMMUNITY LAW

1. Raising awareness among lawyers and the legal professions

Legal professionals play a key role in the effective application of Community law. Community rules including those relating to the free movement of persons, must be relied upon by individuals before the national courts. But if individuals are to be able to ensure that their rights are upheld, the judiciary in question, responsible for applying Community law as a matter of course, must be sufficiently trained and informed in order to discharge this duty properly. The same applies to lawyers and, more generally, to all legal professionals, who are responsible for advising and defending the interests of their clients. There are undoubtedly good specialists in Community law in the Union, but practitioners as a whole have unfortunately not yet developed a systematic "Community reflex", i.e. a natural tendency to look for the implications of Community law in the cases they have to deal with.

A number of initiatives offer a response to the need to stimulate a European legal consciousness among legal practitioners - a need stressed by the European Parliament's Committee on Legal Affairs and Citizens' Rights - and deserve to receive more support and encouragement from the Member States or be mirrored at national level. It is a question of the following initiatives :

– the proposal presented by the Commission on 19 November 1996, to establish an action programme (Robert Schuman Project) and aiming to provide temporary financial support to institutions (courts, bar associations and similar professional bodies, universities or professional schools, for example) responsible in the Member States for providing information and training for the legal professions in order to raise their awareness of Community law;

– the Jean Monnet action, which concerns in particular the training of university trainers;

– the Community common action of 28 October 1996, "Grotius", establishing a programme of incentives and exchanges to encourage legal practitioners to become more familiar with the judiciary and legal systems of the other Member States;

– the systematic and important information that the European Court of Justice provides to the legal and judicial worlds, for example through the organization of training visits for national judges devoted principally to the operation of preliminary rulings under Article 177.

2. Raising the awareness of national officials

The problems encountered in the application of Community law concern individuals in their relations not only with the legal professions, but also with administrations. It is above all in their dealings with national officials involved in the application or enforcement of Community law in the Member States, particularly as it relates to the free movement of persons, that members of the public can run into difficulties.

Individuals tend to look to the European institutions for help in enforcing the rights conferred on them by Community law. It would be simplistic to put this down to ignorance of the basic principle that Community law must be applied as an integral part of national law: immediate recourse to the Community institutions can often be explained by the lack of communication or cooperation between national authorities. A host of practical problems could be settled swiftly if national administrations were in the habit of corresponding with each other and exchanging information on the cases they have to deal with. As things stand, however, alleged infringements reported by individuals are in fact mostly difficulties stemming from the lack of administrative flexibility towards the special situation of migrants.

There are chiefly two types of problem:

- the officials concerned are unaware of the Community dimension of their duties and apply the rules over-enthusiastically (especially the restrictions on the free movement of persons, which protect the interests of their own Member State), sometimes to the extent of distorting the Community rules they are supposed to be applying;

- or the same officials, by failing to cooperate with their opposite numbers in other Member States, often through lack of mutual trust, unnecessarily complicate matters for individuals who, in their movements, fall within the jurisdiction of two or more Member States.

The Citizens First initiative, by involving the relevant national authorities in the preparation and dissemination of information on Community law as it relates to individuals, should help to bring about a change of attitude, at least as regards the first type of problem described above. The Karolus programme targets the second type of problem, in particular by organizing exchanges between Member State administrations of national officials involved in applying that legislation. The Community hopes in this way to stimulate the necessary level of European awareness and foster the spirit of cooperation that should prevail among the national authorities of different Member States so that the situation of persons moving within the Community is more fully taken into account.

The Commission must assign more ambitious objectives to the Karolus programme. Namely, it is recommended, (as did the report by the Sutherland group in 1992 on the functioning of the single market), that Member States should be encouraged to organize cross-border exchanges between their authorities in the interests of citizens moving within the Community, through direct communication channels. Without wishing to overlook the major practical difficulties involved (language problems in particular), such efforts cannot be spared if Community law and, more generally, the Community spirit is to become part of the way people think.

3. Raising awareness among other professions

It is also important to raise the awareness, among the other professions who provide advice to the public such as for example accountants and tax consultants, on the consequences of Community law and in particular, the free movement of persons. In addition to possible co-financing by the Commission of continuing education courses for these professions on these subjects, an initiative similar to the Jean Monnet action, for the training of university teachers, could be useful in developing the awareness of all the professional advisers who are involved in the dealing with questions linked to Community law to a greater or lesser extent.

III. THE LAW AND PROTECTION OF INDIVIDUALS' RIGHTS

The problem of the dearth of remedies available to individuals for enforcing the rights conferred on them by European Community law is particularly acute in the sphere of the free movement of persons, an area where Member States are putting up a great deal of resistance.

1. Judicial remedies

As regards individual rights, European citizens ought to be reminded that, where their rights are infringed, they can always take their case to the national courts in the country of their residence - usually administrative or labour courts - which, in turn, have the opportunity to submit prejudicial questions to the European Court of Justice according to Article 177 of the EC Treaty. In fact, it is from this procedure that most of the case law which has defined the status and the rights of migrants has been developed.

2. Services providing legal advice or legal assistance

People increasingly need advice, not just information. But bodies offering legal advice in the field of the free movement of persons are fairly few and far between in comparison with other areas of Community law. This can be explained by the fact that, in the study of Community law and in information on career opportunities in the field, greater emphasis is placed on the competition rules, intellectual property questions and, generally, the rules and regulations affecting business activity. Community law on the free movement of persons thus cuts across several disciplines, and few experts are capable of covering subjects as varied as the right of residence, social security and taxation, for example.

In this regard also, the Commission is encouraged to urge Member States to develop the teaching of Community law, which should be a fundamental part of obligatory training for all lawyers.

Among the services available, the usefulness of the Euro-Jus Network should be underlined. This network of local legal advisers who work at the Commission's offices in the Member States, provides members of the public with impartial and informal information about their rights under European Community law and how to enforce them. Members of the Euro-Jus network provide an extremely useful service because they are conversant with Community law and at the same time familiar with the legislation and administrative set-up of the Member State concerned. The network is still only embryonic, however, the experts are, as a rule, available for only half a day per week. This may explain why the public is not more aware of its existence. This network, which has already provided services more than proportional to the limited means currently at its disposal, deserves to be consolidated and reinforced.

2. The role of professional organizations and associations

A number of professional organizations and citizens' associations set up to defend the interests of European citizens, or of certain categories of citizens have a role to play in the field of the free movement of persons :

- they may give to individuals and their families who live in another Member State, often isolated and in a precarious position, a joint voice in their contacts with the authorities, and would possibly support them if they bring legal proceedings;

- moreover, they would arguably be in a position to offer more effective assistance in acting as an interface between individuals and the authorities if they pooled their experience and their efforts more extensively, for example by grouping the complaints addressed to them in order to alert the competent authorities. But for this, interest groups with a Community profile would need to be better spread across the Community;

- apart from these functions of representing interests, associations have also a role of advice to play in the field of the free movement of persons, for example in order to facilitate the integration of migrant workers and their families in the host State or to offer financial support to individuals having difficulties abroad.

The Commission is invited to maintain its efforts to encourage associations to develop informal and independent advisory activities specializing in Community law, *inter alia* by promoting exchanges and cooperation between existing services. The aim should be to prompt members of the public to get into the habit of relying on Community law, just as they rely on civil or administrative law under their domestic legal systems.

Furthermore, the Commission is invited to consult, wherever appropriate, these interest groups in the field of the free movement of persons, considering that regular contacts with professional associations in the field of recognition of professional qualifications constitutes an exception in this context. Of course, there are difficulties stemming from the fact that the free movement of persons is subject to scattered competence within the Commission, as is mentioned in section III below. Finally, in a spirit of recognition on the role of associations for the effective achievement of a Europe for citizens, the Commission is invited to remedy to the absence of an adequate legal and economic framework for the exercise of associative activities on the internal market scale.

3. Remedies not involving the courts

a) At Community level

Individuals who consider that their rights under EC law have been flouted avoid taking action through the courts, which may prove long and costly, and prefer to rely on less formal remedies. In doing so, they tend to take their case almost immediately to the Community institutions. Admittedly, members of the public are rarely aware of the fact that the national courts are responsible for applying Community law as a matter of course; they are perhaps also afraid that the national authority to which a question to do with Community law has been referred will not be sufficiently sensitive to the Community dimension (see section II.1 above). But the fact remains that the Commission receives a large number of individual complaints concerning the free movement of persons, in parallel with petitions addressed to the European Parliament.

The Commission is presented as “the guardian of the Treaty”; under Article 169, it may refer cases where Member States fail to fulfil their obligations under the treaty to the European Court of Justice. But it is not obliged to pursue each and every infringement of Community law in individual cases; Article 169 leaves it indeed considerable leeway when it comes to deciding whether or not to take up a particular matter with a Member State. In practical terms, the Commission will take action only where, among other things, the infringement reveals a regular administrative practice on the part of the Member State concerned. In line with the case-law of the European Court of Justice concerning the application of Community law, the Commission rightly advocates a decentralized approach and supports efforts to make national courts more aware of their responsibilities (see the discussion of this point in section II.1).

It is up to European citizens to take their complaints to the European Commission where they feel they are suffering an infringement of their rights and prerogatives under EC law. Experience shows that these complaints constitute an important source of information for the Commission on the realities faced by citizens. It is well known that these complaints are carefully analysed and registered by the Commission and that they serve as a basis for assembling files which may lead to infringement procedures against a Member State on the basis of Article 169 of the Treaty.

However the Commission is not equipped to face a great number of individual complaints in the field of free movement of persons. In addition, the competent officials in this field are scattered between different services within the Commission. A global and coherent vision, of the legal and practical problems encountered by citizens in the exercise of the free movement, is lacking. Accordingly it is sometimes difficult for the Commission to determine which, amongst either using Article 169 proceedings, an informal approach to the Member States concerned, or legislative proposals, is the appropriate solution.

In order to remedy this situation, the Commission should bring together under the responsibility of a single Commissioner all the services dealing directly with free movement of people, including the treatment of complaints brought by individuals, offering to both the outside world and inside the Commission, a central point which is at present lacking. The service thus created would be backed up by local branches in the Member States, based for example at the Commission's offices. In any event, the Commission should show itself to be more attentive to the concerns of citizens in dealing with their complaints. Without questioning the margin of discretion granted by Article 169, the Commission should keep complainants correctly informed of the follow-up to their complaint. The European Ombudsman should be congratulated on raising this same problem. Though recognizing the limited mandate of the latter, it is possible that he or she will also have a role in this respect.

Mention should be made of the important role played by the European Parliament's Committee on Petitions, which brings useful pressure to bear on the Commission and thus ensures that certain complaints receive the attention they deserve. Members of the European Parliament have also a responsibility in their individual capacity on behalf of their constituents, for example through the instrument of parliamentary questions addressed to the Commission or the Council and, through this intermediary, to governments of the Member States. This aspect of MEPs' work deserves greater recognition and encouragement so that European citizens may be more inclined to address themselves to them.

b) At national level

European citizens residing on the territory of a Member State other than their own forget that they can benefit from an official protection through the diplomatic or consular representations of their home country in case of administrative difficulties or infringements of rights guaranteed under Community law. For their part, diplomatic and consular missions should have or be aware of the duty to ensure the respect, by the national authorities to which they are accredited, of the rights conferred on their nationals in their capacity of Union citizens.

Finally, on a strictly internal level**,** each Member State has its own arrangements for settling disputes between its citizens and its administration. Here, too, action is needed to raise awareness of Community law: existing ombudsmen and conciliation services in the Member States do not appear to be particularly aware of the Community dimension of their work, unless it is that individuals themselves do not think of this means of ensuring that the administration upholds their rights in the field of the free movement of persons.

The reader is referred here to the points made earlier about the provision of information on Community law.

CONCLUSION

The Commission is invited to follow the example of the European Parliament and certain Member States by recommending the inclusion of a right to access to information in the Treaty. It is also recommended to give a permanent status to the Citizens First initiative.

The efforts deployed at Community level to raise awareness of lawyers and legal professions on Community law is impressive. It is desirable though to extend the effort to other professions, i.e. non-legal professions, which involve the exercise of an advisory activity linked to the free movement of persons. Nor should the teaching of law be neglected and should contain an obligatory basic training in Community law.

With regard to the awareness of national officials, which is crucial, the accent should be put, within the framework of the Karolus programme, on direct administrative co-operation across the internal frontiers of the Union.

An efficient legal defence of individuals rights conferred by Community law pre-supposes the reinforcement of existing advisory and legal assistance services in this field. In particular, attention is drawn to the under-exploitation of the possibilities offered by the Euro-Jus network.

The Commission is invited to pursue its efforts to stimulate, among non-governmental organizations, the development of activities of informal and independent advice on Community law, in particular by encouraging exchanges and collaboration between existing services. Incidentally, the Commission must be aware of the difficulties resulting from the absence of a European statute available to associations with a European profile.

In order to remedy the division of responsibilities in the area of free movement of persons within the Commission, it is suggested bringing together under a single commissioner responsible for questions of free movement of persons, all the services directly dealing with those questions, including the treatment of complaints brought by individuals, giving both outside and inside the Commission a central point which is currently lacking.

Finally, in order to guarantee by all available means the effective application of Community law, the Commission is encouraged to raise awareness among individuals on the possibilities of non-judicial remedies that they have at Community and national levels in order to defend their rights resulting from Community law.

CONCLUSION

At the conclusion of the task entrusted to it by the Commission, the Panel would first and foremost wish to emphasise, that over the last few decades, free movement of persons has largely become a reality.

Certainly, it is not as complete as the other fundamental freedoms enshrined in the Treaty, but with regard both to the necessary legislation and its application in practice, much has been achieved.

For different reasons, however, this reality is, in part, obscured. First, because in matters which have such an immediate impact on the life of the people concerned, red tape or insufficient information may result in some of those people coming up against insurmountable obstacles, which fosters a feeling that Europe is failing them.

The second reason is that in the minds of European citizens, free movement conjures up an idea which goes well beyond the rights actually conferred by the Treaty. For many people, it suggests a right to move to and live in the countries of the Union without having to comply with any particular formalities, which is not in fact the case.

Finally, there is a belief in some quarters that free movement should enable all Union nationals to enjoy the same rights and entitlements in each and every country of the Union. There is thus a confusion between free movement and harmonisation, assuming that the latter would amount to an aggregation of the rights accorded by each of the Member States.

Nevertheless, problems of substance continue to impede free movement. They are few in number but in general of great significance to those directly concerned. In order to resolve them, it is to be hoped that the Community will seize the initiative and agree a solution. Frequently, proposals for directives or regulations exist, but cannot be adopted in the absence of agreement within the Council.

Most of these proposals should be adopted as soon as possible.

In a certain number of cases however, better co-operation between the Member States would suffice to resolve the difficulties identified, particularly in relation to frontier regions, information of the public, training for the competent authorities in the Member States and an improvement in the protection of individual rights.

Furthermore, the effective rules must be applied effectively, not only to the letter but also in the spirit with which they were intended.

Satisfactory application of the right of free movement requires the involvement of all those concerned and in particular national, regional and local authorities, professional bodies and those responsible for social security.

In addition, and this is one of the most important points, European citizens should themselves be well-informed about their rights. Considerable efforts have already been made by the Commission in terms of transparency and information - both collectively and at an individual level -. Not only the credibility of the Union but its future development as a democratic body is at stake here.

Finally, on certain points, it has not been possible to come to an informed conclusion because the evidence available was insufficient.

In this context, it is both surprising and regrettable that population movements within the European Union are not the subject of more extensive study, whether quantitative or qualitative. Before reaching a decision on the desirability or the scope of a measure concerning the free movement of persons, it is not unimportant to know roughly the number or people affected by the proposal or what the consequences would be.

Confronted by economic and social difficulties much greater than in the past, Europe's citizens are anxious about their future. Accordingly, they will not accept further steps in the construction of Europe or its enlargement unless they feel that their own concerns are being taken into account in a practical way.

Much is expected of the right to move freely, not only from those who wish to work or train in another country but also from those who simply wish to visit or settle elsewhere. Those expectations should be fulfilled.

Annex I

Mandate of the Panel

(Taken from the Communication setting up the Panel)

The role of the panel will be to identify the existing and potential obstacles which confront European citizens seeking to exercise their rights to move freely and to work within the Union. Accordingly, the Panel will be responsible for assessing and reviewing all aspects of the operation of the single market with regard to the free movement of people. Its report will cover all the problems which are directly or indirectly linked to the creation of an internal labour market and which continue to prevent or impede the exercise of the right of free movement. Its report will also propose possible solutions to those problems.

To this end, the panel will examine

a) the manner in which existing measures are applied in practice and the ways in which they might be improved or made to function more effectively ;

b) new measures which could complete the current body of legislation by removing existing obstacles or providing solutions to issues not so far addressed by the Community.

and make recommendations accordingly.

The panel will need to examine all of the administrative and practical difficulties with which a citizen of the Union must contend when he or she decides to move to another Member State to seek, or to take up employment or when moving between Member States on business. For this reason the panel will need to address itself not only to workers and the self employed but to members of their families, to those who have yet to enter the labour market, to those whose working life has ended and to other non working persons.

Finally, the study should not confine itself to problems which a citizen encounters qua workers or self-employed person but also include the practical problems which are encountered by him or his family as consumers (e.g. transfer of funds, importation of personal belongings and motor vehicles, recognition of driving licences, taxes on the registration of motor vehicles).

The panel should be encouraged to take a wide-ranging approach; however, since the reason for establishing the panel is to assist the Commission in bringing forward a coherent series of proposals on mobility issues in the context of an internal labour market

- *the remit of the panel should concentrate mainly on studying the problems of those moving to another Member State in order to live and/or work there, including cross border workers;*

- *the panel will focus on the problems encountered by Community nationals. In certain cases, the problems of third country nationals legally resident in the Community (e.g. family members of a Community national) will have to be taken into consideration, since many of the known difficulties (for example, discrimination on the grounds of national origin) cut across this legal distinction;*

- *the panel should concern itself only with problems linked directly or indirectly to free movement : it should not address the differences in working conditions, (for example health and safety at work, social protection) or living standards, except insofar as they represent an obstacle to free movement;*

- *the panel should seek the views not only of individuals who choose to exercise their right of free movement to seek employment in another Member State but also those of both sides of industry on the difficulties encountered by companies in implementing a personnel policy on a European scale.*

Annex II

List of the members of the High Level Panel on the free movement of persons

Name	Function
Mrs Simone VEIL	Chairperson of the Panel Former Minister of State (France) Former Minister of Social Affairs Former President of the European Parliament Former Member of the European Parliament
Mrs Maria Helena ANDRE	Confederal Secretary of the European Trade Union Confederation (ETUC)
Mr. Guido BOLAFFI	Director General of the Ministry of Social Affairs, Family and Social Solidarity (Italy) Expert on immigration problems Editorialist of the “La Repubblica" Former trade-unionist
Prof. Dr. Kay HAILBRONNER	Chair of Public Law, Public International Law and European Law at the University of Constance (Germany)
Mrs Anna HEDBORG	Director General of the National Council for Social Security (Sweden) Former Minister of Social Affairs
Prof. David O'KEEFFE	Chair of European Law, University College, London
Mr. Pierre PESCATORE	Former diplomat (Luxemburg) Former judge at the Court of Justice Professor of European Community Law Member of the Permanent Court of Arbitration, The Hague
Mr. Tony VENABLES	Director of the Euro Citizens Action Service (ECAS)

Annex III

Setting up the Panel and working methods

I. SETTING UP THE PANEL

On 24 January 1996 the Commission adopted, on the initiative of Mr Flynn, Mrs Gradin and Mr Monti and in agreement with President Santer, a communication setting up a High-level Panel on the Free Movement of Persons.

The idea originated in the White Paper on social policy, which the Commission adopted in late 1994 and which emphasized that the Union must move towards the creation of a European mobility area in which freedom of movement in all fields is a daily reality for people across Europe. Since, of the four fundamental freedoms underlying the single market, least progress seemed to have been made on the free movement of persons, the Commission decided to give priority to a study of the problems arising in this field for all the categories concerned. Freedom of movement is a right, but it is not yet a daily fact for the people of Europe. The effectiveness of the right to move freely would contribute not only to attaining the objectives of the single market but also bringing the Community closer to the goal of an "ever closer union among the peoples of Europe" envisaged in the original treaties, which gave form to the Communities and, subsequently, to the European Union. European citizens of all categories should feel free to move within the Union and to benefit from the human and material resources of European society as a whole without being constantly confronted by administrative or practical difficulties.

It was with this in mind that the Commission decided to invite a Panel of independent experts (the list of whom is attached in Annex 2) to explore the question, with the purpose of identifying at their level the problems which arise, evaluating them and proposing solutions. The Panel's report is intended to help the Commission in the preparation in due course of an integrated strategy for the free movement of persons, including specific proposals designed to get to grips with outstanding problems.

II. WORKING METHODS

1. Launching of the inquiry by the Commission

At the Panel's first meeting, in April 1996, a preparatory file was presented to the members by the Commission. The file contained sixty or so factsheets drawn up by various Commission departments concerning the problems of the free movement of persons which they handle in their daily work. These working papers, prepared by DGs II, V, VI, VII, XII, XV, XXIII and XIV and with the help of the EUROJUS network, coordinated by DG X, constituted a prodigious source of information and made it possible from the beginning to organize the Panel's work appropriately.

In addition, at this initial exploratory meeting, the Commissioners and Directors-General responsible for setting up the Panel provided it, in their introductory remarks, with more general information on the current state of affairs, on the various initiatives taken recently or contemplated by the Commission and on the expectations which the Commission had of the Panel as regards better protection of individuals' rights, bringing the Union closer to its citizens and, at national level, awareness of the deep affinities between all Europeans despite their political and cultural differences.

2. Meetings and operating methods

Following the initial meeting, the Panel concentrated on organizing its deliberations, which meant, after a preliminary overall analysis, arranging its discussions in accordance with an intensive schedule so as to produce a sufficiently complete report within one year. Its first concern was to supplement its information by drawing on various sources close to the problems in reality: the services of the Commission itself, Parliament's Committee on Petitions, professional associations and organizations active in the field. In addition, as a result of the publicity given to setting up the Panel, several communications were received from associations representing various interests and from individuals with their own problems of this kind. All this information was carefully registered and perused by the Panel.

(a) An initial source of information was provided by the Commission's departments, not only those which had already contributed to the preparatory file but also DG XXII, the Legal Service and the Secretariat-General. The Panel received the heads of the different departments in accordance with its agenda in order to hear their explanations and hold an in-depth dialogue with them. The evidence they provided highlighted the main lines of the policy followed by the Commission, the legislative and legal facts and the reality of the problems encountered. It provided a keen illustration of the problems arising and, with the mass of complaints concerning certain points, an indicator of the disorders affecting the Community system.

(b) The Panel also received information from Parliament's Committee on Petitions, which, either directly or through the intermediary of the Commission, threw valuable light on the problems involved.

(c) Another source of information was provided by the hearings, accompanying the successive meetings, at which a number of professional organizations and other representative associations active in the European sphere gave evidence. The hearings proved particularly fruitful, since, in addition to the information provided, the meetings showed that the associations and federations are doing particularly useful work relaying information emanating from the Community and performing invaluable work at grass-roots level in defence of the European citizen's rights.

(d) The Panel was also assisted in its work, with the results of the analysis made by a consultant, of the responses to a questionnaire prepared by the Commission services and sent through the Union (and the EEA), to various addressees (professional organisations, trade-unions, associations and Consulates) dealing with questions relating to the free movement of persons. From the analysis of the 258 responses received, it resulted that the most frequent problems encountered by persons wishing to settle in another Member State, arise first, about access to employment in the public service of another Member State. Next come problems in securing the recognition of professional qualifications, both in the regulated and non regulated sectors. There are also frequent problems arising, for example, when applying for a residence permit (in providing the documents required by the competent authority to satisfy the conditions imposed and to obtain a five-years residence card), when applying for the academic recognition of diplomas or when importing a vehicle into the host Member State.

3. Specific report on supplementary pensions

In accordance with the specific mandate conferred on the Panel by the Commission on 7 February 1996, the Panel produced a separate report on the question of supplementary pensions which was submitted to the Commission on 28 November 1996.

Annex IV

Chronological list of the principle secondary legislation mentioned in the Panel report

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 of 04.04.1964, p 850).

Council Regulation (EEC) 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ L 257, 19.10.1968, p. 2).

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, 19.10.1968, p. 13).

Regulation (EEC) 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 of 30.06.1970, p 24).

Regulation (EEC) 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community; as amended by Regulation (EC) 118/97 of the Council of 2.12.1996 (OJ L 28 of 30.01.1997).

Regulation (EEC) 574/72 of the Council of 21 March 1972 laying down the procedure for implementing Regulation (EEC) N° 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community; as amended by Regulation (EC) 118/97 of the Council of 2.12.1996 (OJ L 28 of 30.01.1997).

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, 28.6.1973, p. 14).

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 of 20.01.1975, p.10).

Council Directive 75/35/EEC of 17 December 1974 extending the scope of Directive 64/221/EEC on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health to include nationals of a Member State who exercise the right to remain in the territoy of another Member State after having pursued therein an activity in a self-employed capacity (OJ L 14, 20.01.1975, p. 14).

Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ L 78, 26.03.1977, p. 17).

Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ L 19, 24.01.1989, p. 16).

Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ L 180, 13.7.1990, p. 26).

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 No L 180, 13.7.1990, p. 28)

Council Regulation (EEC) N° 1247/92 of 30 April 1992 amending Regulation (EEC) N° 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving withing the Community (OJ L 136, 19.05.1992, p. 1).

Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC (OJ L 209, 24.07.1992, p. 25).

Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students (OJ L 317, of 18.12.1993, p. 59).

Proposals

Proposal of 13 December 1991 for a Council Regulation (EEC) amending Regulation (EEC) 1408/71 of the Council of 14.06.1971 and Regulation (EEC) 574/72 of the Council of 21.03.1972, laying down the procedure for implementing Regulation (EEC) 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ C 46 of 20.02.1992, p. 1)

Proposal of 21 December 1994 for a European Parliament and Council Directive 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 C 128 of 24.05.1995, p. 6).

Proposal of 10 January 1996 for a Council Regulation amending, for the benefit of beneficiaries of pre-retirement benefits, Regulation (EEC) 1408/71 on the application of social security schemes to

employed persons, to self-employed persons and to members of their families moving within the Community (OJ C 62 of 01.03.1996, p. 14).

Proposal for a Council Regulation amending, for the benefit of unemployed persons, Regulation (EEC) 1408/71 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 (EEC) 574/72 laying down the procedure for implementing Regulation (EEC) 1408/71 (OJ C 68 of.06.03.1996 p 11).

Proposal of 8.02.1996 for a European Parliament and Council Directive establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the directives on liberalization and transitional measures and supplementing the general systems for the recognition of qualifications (OJ C 115, 19.04.1996, p 16).

Annex V

Chronological list of the sentences of the European Court of Justice mentioned in the Panel report

Case 15/69,	"Ugliola",	Judgment of 15.10.1969,	[1969] ECR p 363.
Case 32/75,	"Cristini",	Judgment of 30.09.1975,	[1975] ECR p. 1085.
Case 8/77,	"Sagulo",	Judgment of 14.7.1977,	[1977] ECR p 1495.
Case 157/79,	"Pieck",	Judgment of 3.7.1980,	[1980] ECR p 2171.
Case 171/82,	"Valentini",	Judgment of 5.07.1983,	[1983] ECR p 2157.
Case 267 / 83,	"Diatta",	Judgment of 16.02.1985,	[1985] ECR p 567.
Case 131/85,	"Gül",	Judgment of 7.05.1986,	[1986] ECR, p 1583.
Case 222/86,	"Heylens",	Judgment of 15.10.1987,	[1987] ECR, p 4097.
Case 321/87,	"Commission v. Belgium",	Judgment of 27.04.1989	[1989] ECR, p 997.
Case 379/87,	"Groener",	Judgment of 28.11.1989,	[1989] ECR, p 3967.
Case 292 / 89,	"Antonissen",	Judgment of 26.01.1991,	[1991] ECR I, p 745.
Case 340/89,	"Vlassopoulou",	Judgment of 7.05.1991,	[1991] ECR I, p 2357.
Case 68/89,	Commission v. Netherlands	Judgment of 30.05.1991,	[1991] ECR I, p2637.
Case 6 et 9/90,	"Francovitch",	Judgment of 19.11.1991,	[1991] ECR I, p 5357
Case 204/90,	"Bachmann",	Judgment of 28.01.1992,	[1992] ECR I, p 249.
Case 112/91,	"Werner",	Judgment of 26.01.1993,	[1993] ECR I, p 429.
Case 19/92,	"Kraus",	Judgment of 31.03.1993,	[1993] ECR I, p 1663.
Case 419/92,	"Scholz",	Judgment of 23.02.1994,	[1994] ECR I, 505.

Case 279/93,	“Schumacker”,	Judgment of 14.02.1995, [1995] ECR I, p 225.
Case 43/93,	“Vander Elst”,	Judgment of 9.08.1994, [1994] ECR I, p 102.
Case 80/94,	“Wielocks”,	Judgment of 11.08.1995, [1995] ECR I, p 2508.
Case 443/93,	"Vougioukas",	Judgment of 22.11.1995, [1995] ECR I, p 4033.
Case 25/95,	"Otte",	Judgment of 11.07.1996, [1996] ECR I, p 3745
Case 163-165-250/94	“de Lera”,	Judgment of 14.12.1995, [1995] ECR I, p 4821.
Case 20/96,	"Kelvin Snares",	*pending*

Annex VI

Acronyms

ARIANE : Preparatory action programme to support activities in the field of books and reading, including translation - Ariane 1997.

CEDEFOP : European centre for the development of vocational training.

ECTS : (*European Credit Transfer System*) : System of awarding and transferring course units.

EURES : (*European Employment Services*) network of 450 advisers (in the 15 Member States, Norway and Iceland), who provide information on job offers in the participating countries and on living and working conditions.

EUROJUS : Network of legal advisers placed at the public's disposal at the Commission's offices in the Member States.

EURO-INFO-CENTRES : network of services established in the Member States which are responsible for informing, assisting and advising small and medium enterprises.

GROTIUS : Programme of incentives and exchanges for legal practionners established by the joint action adopted by the Council on 28 October 1996, on the basis of Article K.3 of the Treaty on European Union.

JEAN MONNET : Community action concerning the training of university teachers.

JEUNESSE POUR L'EUROPE : Community action programme intended to contribute to young people's development by promoting exchanges and complementary activities outside formal education and vocational training structures, adopted on 16 June 1988.

KALEIDOSCOPE : Programme to support artistic and cultural activities having a European dimension, adopted on 29 March 1996.

KAROLUS : Programme of training and exchanges between Member States administrations of national officials who are engaged in the implementation of Community legislation required to acheive the internal market, adopted on 22 September 1992.

LEONARDO DA VINCI : Community action programme for the implementation of a Community vocational training policy adopted by the Council on 29 December 1994.

NARIC : Network of National Academic Recognition Information Centres

RAPHAËL : Preparatory action programme in the field of cultural heritage.

ROBERT SCHUMAN : proposal for a action programme aiming to provide temporary financial support to institutions responsible in the Member States for providing information and training for the legal professions in order to raise their awareness of Community law.

SOCRATES : Community action programme encouraging cooperation between the Member States in school education (Comenius), higher education (Erasmus), the promotion of language skills (Lingua) and upgrading of teaching skills, adopted on 14 March 1995.

TESS : Telematic for social security

TMR : Community action programme “Training and Mobility for Researchers”.

Report of the High Level Group on Free Movement of Persons on supplementary pensions

The High Level Group on the Free Movement of Persons , composed of Mrs. Simone Veil (Chairman), Mrs. Anna Hedborg (Rapporteur), Mrs. Maria Helena André, Mr. Guido Bolaffi, Prof. Kay Hailbronner, Prof. David O'Keeffe, Mr. Pierre Pescatore and Mr. Tony Venables unanimously adopted the following report at its meeting of 28 and 29 November 1996.

The problems encountered in the area of supplementary pensions by workers moving from one Member State to another have been the subject of discussions within the Commission and of consultation with the social partners, the pensions industry and experts within the Member States for some time. At its meeting of 7 February 1996, the Commission decided, after a review of the current situation, that the matter should be referred for an opinion to the high level panel on free movement of persons and that the panel should be asked to present separate recommendations concerning the best way to deal with the obstacles to free movement in this area.

The panel's consideration of Community action in the field of supplementary pensions was predicated on two initial findings.

First, the present situation in the Member States is characterised by a large degree of diversity, in relation to the extent of coverage of supplementary schemes, the legal rules which govern them (e.g. whether of an obligatory or purely voluntary nature) and the structure and funding of the schemes themselves. This diversity contrasts with the far greater degree of homogeneity in statutory pension provision which exists in the Union and which provided the legal context for Community legislation (Regulation 1408/71). There, for example, the obstacle to free movement created by the existence of vesting periods (minimum qualifying periods for acquiring rights) was overcome by the co-ordination of national statutory pension schemes, which requires national authorities to assimilate periods served abroad to periods served in the domestic economy. Because of their multiplicity and diversity, it is difficult to conceive how a similar rule of aggregation of periods of insurance or service could be imposed as a general rule on supplementary pension schemes.

In addition, supplementary pension provision is an area of continuing and rapid change. Demographic changes are likely to place increasing emphasis on supplementary pensions, leading to an extension of their coverage.

The panel would stress that inappropriate legislation at Community level might adversely affect the development of supplementary pension schemes in those Member States where they are not yet widespread or might result in the stagnation or reduction in supplementary pension provision in others.

The second, and perhaps more important, consideration is the contractual nature of supplementary pension provision. Even in those Member States which place upon employers a legal duty to establish supplementary pension schemes, the terms and conditions of membership are determined by agreement between the social partners, whether it be at the level of the undertaking, the industry or nationally. National governments having generally refrained from laying down statutory rules regarding minimum or maximum vesting periods, methods of financing, level of benefit, indexing rules, and transferability the Commission should not, in the Panel's view propose an entirely different approach at Community level or intervene in this process of dialogue between the social partners.

The forgoing conclusions do not detract from the fact that the prospect of a loss of supplementary pension rights is a clear disincentive to mobility, and represents a serious obstacle to the exercise of the rights of free movement, as granted by the Treaty establishing the European Community. In the panel's view, Community initiatives in this area should offer practical solutions, which have a good chance of success and which, by respecting existing national policy choices, the specific character of private law agreements and by allowing scope for future changes, are consonant with the principle of subsidiarity.

In arriving at its recommendations, the panel was guided by a basic principle of Community law, that of "equal treatment" : a European citizen who chooses to work for employers in more than one Member State should not, as a result, incur a loss of supplementary pension rights which s/he would not have had to suffer had both the old and new employer been established in the same Member State. The panel also takes the view that, although in Community law nothing prevents a worker who moves between two Member States being treated more favourably than one whose mobility is confined within national borders (so-called "reverse discrimination"), Community initiatives should, so far as possible, not place the citizen exercising rights of free movement in a privileged position. Such an approach would put Member States under pressure to secure similar guarantees by statutory intervention in the national arena which would conflict with the voluntary, contractual nature of existing schemes and might lead to the undesirable result of a reduction in coverage and rights for employees.

In the panel's view, an approach based on equal treatment places the emphasis on the preservation of rights of individuals (as opposed to transferability of rights from one scheme to another, which would imply the creation of special rights for the mobile worker).

The panel further considers that, given the predominance of contractual rights and the role of the social partners in this field, legislative intervention by the Community should be the minimum necessary to secure the preservation of rights; further initiatives should however be taken to encourage the voluntary extension of rights.

The panel would therefore suggest that the Commission should, at least initially, confine any proposal for a directive to a three-pronged approach, encompassing the following elements:

a) preservation of acquired rights
b) cross border payments
c) short-term employment in another Member State.

In addition the panel proposes the creation of a European Pensions Forum, to act as a focus for discussion between interested parties and the offer of technical assistance to those concerned with resolving the problems raised in connection with supplementary pension rights by cross-border migration.

I Preservation of acquired rights

A worker who leaves a pension scheme in order to work for a new employer in another Member State should not be deprived of any rights s/he has already build up in that scheme and that s/he would have remained entitled to had s/he moved to another employer within the home state. The rights acquired by the worker at the time where s/he decides to move to another Member State is, in the panel's view, to be determined according to the terms of the supplementary pension scheme in question. If at that point the worker has failed to complete the minimum qualifying period (or in other words, his/her right to a pension has yet to vest), there will be no acquired right which can be preserved. But in this respect, the worker's situation is no different from that of a colleague contemplating employment with another firm within the same Member State.

Where a worker has acquired rights, they should be preserved on an equitable basis. Where the rights of former active members of the scheme in the home country are periodically adjusted (indexation, bonuses, etc.), analogous adjustments should be made to the acquired rights of the former employee who moved to another country.

A Commission proposal might set in place standardised minimum conditions for preserving acquired rights which might be developed (for example by way of codes of practice) by the social partners, brought together in the body outlined below.

II Cross border payments

Supplementary pensions acquired in one Member State should be receivable in any other Member State, in accordance with the Treaty provisions on free movement of capital. Such a provision would be of interest not only to those who have worked for employers in different Member States but also to Community citizens who, having spent their entire working lives in one Member State, choose to retire to another. Member States should therefore be required to eliminate any residual obstacles to the cross-border payment of supplementary pensions.

III Short-term employment in another Member State

The Panel considers that further measures should also be taken in favour of those who move abroad temporarily. A first step might be limited to those who remain in the employment of the same

employer or group ("seconded employees") and it could be extended -- at a later stage -- to other short-term migrant employees intending at some point to return to their home Member State.

Companies increasingly operate on a Community wide scale and it is estimated that there are currently over 150.000 employees who are seconded to other Member States to assist with the setting up or running of branches or subsidiaries. Seconded employees expect to return to their home state and their original employer without a break in their employment. Consequently, they and their employers prefer that they remain in their home state scheme during their secondment. However, present regulatory and taxation barriers frustrate this, leading to additional costs for employers and inconvenience for employees. The Panel believes that a Commission's initiative should be taken to remove them in an approach based on mutual recognition of supplementary schemes.

The elements of such a proposal might be

- avoiding a requirement for scheme members to stop contributions to an authorised home state scheme when seconded temporarily abroad;
- avoiding a requirement for employees seconded to the host state to join a scheme in the host state;
- enabling schemes authorised in one state to be recognised in another;
- ensuring that contributions to an approved home state scheme receive tax privileges in the host state on the same basis as contributions to an approved scheme in that state;
- establishing rules, for example as to the maximum length of secondment that could benefit from this treatment (at least five years)**,** or as to eligibility of individuals to benefit from this treatment.

This approach reflects the Panel's belief that emphasis should be on the preservation of rights and equal treatment rather than transferability. The employee's pension fund remains in the home state and s/he continues to acquire pension rights in accordance with the terms and conditions of that scheme and within the regulatory framework created by the home state for such schemes. An employee seconded to another Member State should be placed, so far as possible, in the same position as an employee seconded to a different branch of the same employer within the home state. Some measure of control would of course be required in a system of mutual recognition. Certain conditions would have to be defined, for example to prevent tax evasion or exploitation of remaining differences in tax treatment between Member States. Other restrictions may be required, in order to limit the benefit of favourable treatment to genuine cases; this may entail a requirement to membership of the scheme prior to the secondment, or a limitation on the length of the secondment.

Tax relief on a host state basis would be in keeping with the tax status of the seconded employee, who will be taxed on his/her employment income in the host state and will generally also be resident there for tax purposes; this approach will also protect against fiscal abuse, as the benefit to the individual or company will be no greater than that accorded in respect of membership of a local fund.

This approach is already applied in some bilateral tax treaties between Member States (for example in Article 25 § 8 of the double taxation treaty between France and the United Kingdom). It might be extended, as a second step and perhaps after a review of its application to seconded employees, to workers who in exercising their rights of free movement, also change employer. In such circumstances, the Panel considers that the key element would be the agreement of the employee, the old and the new employers that the employee should remain in the old scheme. Here again it would probably be necessary, in order to gain the agreement of national governments, to limit the length of time during which the employee could remain in the home scheme. Such a proposal would be of immediate benefit to "short-term" migrants (for example, partners accompanying a seconded employee). By stimulating contacts between pension schemes and national tax authorities, it would enhance familiarity with and understanding of non-national schemes, and might, in the longer term, bring about a climate in which voluntary agreements on transferability could be reached.

Community Pensions Forum

The Panel is of the opinion that further progress in the removal of obstacles to mobility created by supplementary pensions is dependent upon the involvement of those most directly concerned : the social partners, pension fund administrators and the national regulatory authorities. It would therefore propose the creation of an ad hoc forum which would act as a focus for debate and research into new initiatives. Such a forum could, for example, offer an independent assessment of the operation and impact of legislative measures adopted by the Community, such as those outlined above, and make suggestions for further measures. It could facilitate the negotiation of agreements between schemes on transferability and offer to the social partners a framework for the exchange of information and expertise in this area. Such a forum could be established immediately and in advance of the adoption of proposals for the aforementioned legislative measures.

In addition to providing a secretariat to the Forum, the Commission should also create a service offering direct technical assistance to European citizens and to pension schemes confronted with problems in the field arising from the exercise of the rights of the free movement. By so doing, it could assist with the application of community rules and facilitate voluntary arrangements going beyond those rules.