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What Does Free Movement Mean in Theory and Practice in an Enlarged EU?

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Abstract

The purpose of this report is to assess the main challenges to the principle of free movement of persons in theory and practice in an enlarged European Union. The right to move freely represents one of the fundamental freedoms of the internal market as well as an essential political element of the package of rights linked to the very status of EU citizenship.

The scope *ratione personae* and the current state of the principle of free movement of persons is assessed by looking at the most recent case law of the European Court of Justice and the recently adopted Directive on the rights of citizens of the Union and their family members to move and reside freely within the territory of the member states. But what are the hidden and visible obstacles to free movement of persons in Europe? How can these barriers be overcome to make free movement and residence rights more inclusive? This working document addresses these questions along with:

1. Who are the beneficiaries of the free movement of persons in an enlarged Europe?
2. What is the impact of the recent legal developments in the freedom of movement dimension, such as the European Court of Justice case law and the new Directive?
3. To what extent are pro-security policies such as the Schengen Information System II and an enhanced interoperability between European databases fully compatible with the freedom of movement paradigm?

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1. General overview of the free movement of persons in an enlarged EU: Who are the beneficiaries?

The abolition of border controls on persons while crossing the internal frontiers in the European Union (EU) constitutes a key ingredient of the freedom rationale in the EU area of freedom, security and justice.[1] The freedom to move and reside in the Union has become one of its essential political symbols and a milestone of the internal market. In this section, a general overview of the free movement of persons is provided along with a specific look at the personal scope of this freedom.

For the establishment of a common market, the abolition of any obstacles on the mobility of people was deemed to be a necessary pre-condition. Hence the traditional internal border checks of those not holding the nationality of the sovereign state concerned needed to be abolished.[2] The Single European Act (SEA) called for the achievement of an internal market[3] comprising a space without internal frontiers, in which the free movement of persons, goods, services and capital needed to be guaranteed.[4]

The Schengen agreement aimed at establishing the principle of free movement of persons in the European Community.[5] The degree of insecurity that shifting the old border controls was expected to involve at the national level justified the difficulties of reaching an agreement on the 'freedom to move'. The dismantling of the border checks as well as the increased permeability of frontiers also led to many fears at the national level of the potential increase of massive irregular immigration and transnational organised crime (Anderson, 2004). It was felt that the right to move and reside freely within the Union (openness) needed to be accompanied by a security framework (control). The Schengen agreement was thus supplemented by the Schengen Implementing Agreement of 1990, which brought into the EU common borders various measures meant to compensate the apparent security deficit resulting from the abolition of internal border controls. One of these key security tools foreseen by the

[1] See the Tampere European Council Presidency Conclusions (European Council, 1999); see also J. Apap and S. Carrera (2003a).

[2] See Commission of the European Communities (1985).

[3] The first concept used by the original treaty was the one of the common market; see Art. 3 of the EC Treaty, which provides that "For the purposes set out in Art. 2, the activities of the Community shall include…(c) an internal market characterized by the abolition, as between member states, of obstacles to the free movement of goods, persons, services and capital"; see also P. Graig and G. de Búrca (1998).

[4] Art. 14.2 of the EC Treaties provides that "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".

[5] The original Schengen Agreement was signed on 14 June 1985 by Germany, France and the Benelux countries.

Convention was the establishment of the Schengen Information System (SIS).[6] As we see later in section 3.1, the compatibility between the second generation of the SIS with the freedom of movement paradigm remains an issue very much open to discussion.

The Maastricht Treaty (Treaty on European Union or TEU) in 1993 brought a rethink about the economic nature previously attributed by the SEA to the principle of free movement through the creation of the concept of EU citizenship. The TEU attempted to convert 'common-market citizenship' (i.e. whereby the individual is a holder of economic freedoms) into a broader idea of 'Union citizenship'. If free movement was first conceived as a purely economic phenomenon, the TEU provided a brand new political and social meaning to the whole debate.[7] It also extended in Art. 12 the rights of exit, entry and residence to all nationals of the member states without any discrimination on grounds of nationality.[8]

A significant part of the Schengen regime was transferred by the Amsterdam Treaty into the European Union framework on 1 May 1999. The Protocol attached to the Amsterdam Treaty integrating the Schengen *acquis* into the EU incorporated the section dealing with the Schengen border *acquis* into Title IV of the EC Treaty's structure and thus into the 'community method'.

As the European Council stressed at its meeting on the 15–16 October 1999 in Tampere,

> The European Union has already put in place for its citizens the major ingredients of a shared area of prosperity and peace: a single market, economic and monetary union, and the capacity to take on global political and economic challenges. The challenge of the Amsterdam Treaty is now to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all.[9]

Yet, five years after Tampere this continues to be an unmet goal.

The right to move and reside freely throughout the territory of the Union is a pre-condition for the exercise of most of the other basic rights conferred by European Community (EC) law. The exercise of this set of EU rights becomes a reality only when the person involved moves across borders. The personal scope of this freedom needs to be examined in terms of who may be included or excluded from that precious privilege. The traditional link between the nationals and the territory of a state was substantially altered with the entry into force of the TEU. The creation of a transnational EU citizenship, along with the set of rights and responsibilities that it involves, has played a fundamental role in that change. An EU citizen is a person holding the nationality of a member state. Not every EU citizen, however, has full and free access to the list of fundamental rights attached to this symbolic status, particularly to the right of free movement. Under the current EU legal framework, we may distinguish between those Union citizens who fully or partially hold the set of fundamental EU freedoms

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[6] The SIS was developed to enable the authorities designated by each member state to have access by an automated search procedure to alerts on persons and property for the purpose of border checks and other police and customs checks.

[7] In addition to the right to move and reside freely within the territories of the member states, the Consolidated Version of the EC Treaty also incorporates the right to vote and to stand as a candidate (Art. 19), the right to protection abroad by diplomatic and consular authorities (Art. 20), freedom of information rights in relation to Union institutions and the right of petition (Art. 21).

[8] Art. 12 of the EC Treaty provides that "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited".

[9] See para. 2 of the Tampere Presidency Conclusions, European Council (1999).

granted by the EC Treaties,[10] secondary legislation, European Court of Justice (ECJ) case law as well as the European Charter of Fundamental Rights of the Union.[11]

Moreover, the principle of free movement is still dependent on a degree of financial self-sufficiency of the person moving. Residence rights will not be granted to those EU citizens who lack sufficient resources to cover themselves in the hosting state (i.e. the requirement to provide proof of adequate means of subsistence and health insurance). Access to residence and the employment market, the social system and the educational system continues to be subject to excessive economic conditions and practical obstacles. Those economically inactive persons such as students, retired persons and those dependent on social allowances[12] as well as those in atypical employment situations (such as part-time workers, temporary workers, seasonal workers, etc.) at present face numerous difficulties while trying to produce evidence of adequate means of subsistence for exercising their free movement rights.

What is the *ratione personae* scope of the freedom to move? We may distinguish three main categories of persons to whom the freedom of movement across the current member-state borders may apply under distinct circumstances and conditions:

1. EU citizens from the 'old' 15 member states (EU-15) and their family members (the so-called 'the privileged group') who, if they can prove sufficient financial means of subsistence, may fully enjoy the benefits of living and moving freely in an area of freedom, security and justice;
2. nationals from the new member states or Central and Eastern European countries (CEECs), to whom a set of transitional arrangements limiting the free movement of workers has applied since 1 May 2004; and
3. those not holding the nationality of any member state (i.e. third-country nationals) – in some very specific cases the right of free movement has been also extended by EC law to non-EU citizens. The analysis here will not focus on this last broad category of persons.[13]

1.1 EU citizens from the EU-15 and their family members – The privileged group

The principle of free movement for the nationals of the EU-15 includes the right to enter, move and reside in the EU without any discrimination on grounds of nationality. As

[10] See among others, Art. 12 as well as Arts. 17-22 of the EC Treaties.

[11] See the Charter of Fundamental Rights of the Union as introduced in the Provisional consolidated version of the draft Treaty Establishing a Constitution for Europe, Title V, on citizens' rights, Arts. II-39 to II-46, Brussels, 25 June 2004, CIG 86/04. Art. II-45 stipulates that "1. Every citizen of the Union has the right to move and reside freely within the territory of the member states. 2. Freedom of movement and residence may be granted to nationals of third countries legally resident in the territory of a member state."

[12] On social policy see Art. 137 of the EC Treaty.

[13] Within this third category we could include for instance those third-country nationals qualifying for the EC status of long-term resident, which may allow non-EU nationals who have resided for a period of at least five years in one member state to move to another member state with a number of limitations and under a set of rather restrictive conditions. See Council Directive 2003/109/EC, of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L16/44, 23 January 2004; see also J. Apap and S. Carrera (2003b). We may also include in this group those Turkish citizens to whom the 1963 Association Agreement as well as the 1970 Additional Protocol signed between Turkey and the European Community may apply; in this regard, see the Joined Cases C-317/01 and C-369/01, *Eran Abatay and Others* (C-317/01) and *Nadi Şahin.*

previously mentioned, the introduction by the TEU of the principle of EU citizenship represented a key moment in the history of the political integration in the Union. This Treaty closely attached to the very essence of the new EU status the right to migrate (to move and reside freely) to other member states and, while doing so, not to suffer unequal treatment or discrimination. Art. 17.1 of the EC Treaties confers the title of citizen of the Union on every person holding the nationality of a member state. This provision states that "Citizenship of the Union is hereby established. Every person holding the nationality of a member state shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship."[14]

EU citizenship was hence destined to be the fundamental status of nationals of the member states.[15] The group of political, economic, social and judicial rights as well as duties linked to it can be mainly found between Arts. 18 and 21 of the EC Treaties. Art. 18 is the legal provision dealing specifically with the right to move and reside freely. It expressly states in para. 1 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." Further, EU citizenship is not limited to these fundamental rights. The second para. of Art. 17 of the EC Treaty additionally extends to all these persons "the rights conferred by this Treaty". Therefore, it also includes the rights present within the still not legally binding Charter of Fundamental Rights as well as the rights resulting from the common constitutional traditions of the member states.[16]

As the European Commission highlighted in its Communication on the follow-up to the recommendations of the High-level Panel on the free movement of persons,[17] bringing citizenship of the Union into the EU picture made the rights to enter, reside and remain in the territory of another member state an integral part of the legal heritage of every EU citizen. The holding of this new citizenship should constitute for every EU national a guarantee of belonging to a political community under the rule of law.[18] It should also contribute to raising citizens' expectations as to the set of rights and benefits that they expect to see conferred and protected.

Thus EU citizenship brought about a new concept of citizenship – no longer based exclusively on a feeling of belonging to a national community, but includes belonging to a larger community of liberal democracies based on a common set of values. As Guild (2004) points out, this European status is first acquired at the national level, because of the link with the state of nationality; however, the group of fundamental rights conferred by it can only be

[14] See also the new wording provided by the Art. I-8 of the provisional consolidated version of the draft Treaty Establishing a Constitution for Europe, Brussels, 25 June 2004, CIG 86/04, which states "1. Every national of a member state shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship; it shall not replace it. 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Constitution. They shall have: (a) the right to move and reside freely within the territory of the member states."

[15] See Case 413/99, *Baumbast and R. v. Secretary of State for the Home Department* of 17 September 2002; see also case 184/99 *Grzelczyk* [2001] ECR I-6193, p. 31.

[16] Art. 6 of the TEU stipulates that "1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the member states".

[17] See the Communication from the Commission to the European Parliament and to the Council (European Commission, 1998).

[18] See the Resolution on the second report from the Commission on citizenship of the Union, COM(97) 230 C4-0291/97, OJ C 226, 20 July 1998.

exercised outside the traditional state. The exercise of these rights becomes a reality by moving across the traditional borders and hence migrating.[19] It is also while making use of these rights that the protection against discrimination on grounds of nationality (the right to equality) provided by EC law comes into play. As the ECJ held in the *Uecker* case,[20] the fundamental freedoms and guarantees given by the EU legislation as regards freedom of movement for workers cannot be applied to the situation of persons who have never exercised the right to freedom of movement within the Community (what has been called a wholly 'internal situation').[21]

The holding of the nationality of a member state is the *condition sine qua non* for acquiring citizenship of the Union, and therefore having the right to claim the exercise of the rights linked to it (De Groot, 1998). Nationality and EU citizenship are inseparable and superimposed. Matters of nationality, however, remain within the exclusive competence of the member states.[22] The Treaty of Amsterdam added to Art. 17 that "citizenship of the Union shall complement and not replace national citizenship". Member states have so far jealously guarded their national competence concerning legislation on the acquisition, loss and proof of nationality as an essential part of their national sovereignty. They have consequently kept the discretion to decide who can or cannot be an EU citizen. The ECJ interpreted the exclusive competence over nationality matters by the member states in the *Micheletti* case.[23] An individual with dual Argentinean and Italian nationality arrived in Spain with a view to profit from his right to freedom of establishment as an orthodontist. The Spanish authorities refused to grant him a residence permit as in such instances Spanish legislation refers to the last or effective residence, which in this case was Argentina. While confirming the right for a member state to determine its own nationality rules, the ECJ held that nationality of one of the EU member states was sufficient and that a citizen does not have to choose between the two nationalities. Indeed, this judgment has dramatically influenced nationality law at the EU and national levels. The ruling put into question the total exclusivity member states have had over nationality and their discretion to exclude some categories of persons. The ECJ emphasised that this competence must be exercised in compliance with EC law.[24] It equally remarked that the effects of nationality being attributed by one member state may not be restricted by

[19] See Case 175/78, *R. v. Saunders* [1979] ECR 1129; see also Case 298/84, *Pavlo Ioirio v. Azienda Autonomo delle Ferrovie dello Stato* [1986] ECR 247 and Case C-299/95, *Kremzow v. Austria* [1997] ECR I-02629.

[20] See Joined cases C-64/96 and C-65/96, *Land Nordrhein-Westfalen v. Kari Uecker and Vera Jacquet v. Land Nordrhein-Westfalen* [1997] ECR I-03171.

[21] See also Case 175/78, *R. v. Saunders* [1979] ECR 1129, Case 298/84, *Pavlo Iorio v. Aziendad Autonomo delle Ferrovie dello Stato* [1986] ECR 247 and Case C-415/93, *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman, Royal club liégeois SA v. Jean-Marc Bosman and others and Union des associations Européennes de football (UEFA) v. Jean-Marc Bosman* [1995] ECR I-04921.

[22] See the Declaration on nationality of a member state attached to the final Act of the Treaty on European Union, OJ C 191, 29 July 1992, which states, "The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the member states, the question whether an individual possesses the nationality of a member state shall be settled solely by reference to the national law of the member state concerned. Member states may declare, for information, who are to be considered their nationals for Community purposes by way of a declaration lodged with the Presidency and may amend any such declaration when necessary." See also the Conclusions of the European Council in Edinburgh, Bull. EC 12/92.

[23] See Case C-369/90, *M.V. Micheletti and others v. Delegacion del Gobierno en Cantabria* [1992] ECR I-4239.

[24] See para. 10 of the judgment in which the ECJ ruled that "under international law, it is for each member state, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality".

another member of the Union that imposes additional conditions on the recognition of such a nationality for the purposes of exercising the fundamental rights provided by the EC Treaty.[25]

Moreover, as De Groot (2004) rightly highlights, not all the nationals of a member state are effectively EU citizens. There are indeed a number of interesting borderline cases with regard to EU citizenship.[26] Also, although on a first reading it would appear that a right of free movement is provided to all nationals of a member state, after having demonstrated the nationality of one of the members of the Union, the EU-15 citizen involved must additionally prove that he or she belongs to one of the groups of people who can benefit from such a compendium of fundamental rights. These different categories were artificially encapsulated into a set of secondary legislation that advocated a narrow, sector-by-sector or piecemeal approach to the application of fundamental rights, differentiating among workers,[27] self-employed persons seeking establishment, service providers and receivers,[28] students,[29] retired persons[30] and a residual category of those capable of financially supporting themselves (persons of independent means).[31] All those who fit into these categories can, to varying degrees, be joined by certain members of their families. Yet, as later discussed, this sectoral approach to free movement rights has been positively amended with the adoption of a new Directive integrating and substituting all these legal fragments.

EU citizenship does not give rise to unrestricted rights. Although the right to move and reside has ceased to be exclusively reliant on the status of the worker, it is still very much dependent on the enjoyment of a degree of financial self-sufficiency, i.e. carrying out an economic activity or being in possession of sufficient resources (or both) and proper health cover. As a result, residence rights will not be granted to those EU-15 citizens who lack sufficient financial resources to cover themselves at least partially. Therefore one may argue that the poor are indirectly denied the exercise of their free movement rights and excluded from the privileges granted by the EU status. Although after the entry into force of the TEU the bulk of rights and obligations conferred to all EU citizens confirmed a reduced focus on the economic considerations intertwined with free movement, the current legislation still requires economic criteria to be fulfilled for one to have access to these freedoms.

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[25] This has been recently reconfirmed by the ECJ in the Case C-148/02, *Carlos Garcia Avello v. Belgian State*.

[26] Such cases include those persons who are citizens of British overseas territories, the Danish inhabitants of the Faroe Islands, those among the Netherlands' Antillian and Aruban populations, the inhabitants of the French overseas territories and those nationals of Latin America who may fall within the personal scope of a dual-nationality treaty with Spain, etc.

[27] See the Council Directive on the abolition of restrictions on movement and residence within the Community for workers of member states and their families, 68/360/EEC of 15 October 1968; see also the Council Regulation on freedom of movement for workers within the Community, 1612/68/EEC of 15 October 1968; and the Commission Regulation on the right of workers to remain in the territory of a member state after having been employed in that state, 1251/70/EEC, of 27 June 1970.

[28] See the Council Directive 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, 73/148/EEC, of 21 May 1973; see also the Council Directive 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, 75/34/EEC, of 17 December 1974.

[29] See the Council Directive on the right of residence for students, 93/96/EEC of 29 October 1993.

[30] See the Council Directive on the right of residence for employees and self-employed persons who have ceased their occupation activity, 90/365/EEC of 28 June 1990.

[31] See the Council Directive on the right of residence, 90/364/EEC, of 28 June 1990.

For the purposes of free movement in the EU it still makes a big difference whether a person is or is not a worker as interpreted and defined by the European Court of Justice.[32]

1.2 Nationals from the new EU member states

The Treaty of Accession signed on 16 April 2003 (Act of Accession, Part IV: Temporary Provisions) allows the EU-15 member states to introduce 'transitional arrangements' for nationals migrating from the ten new member states,[33] except for the particular cases of those from Cyprus and Malta.[34] Since the date of accession (1 May 2004), these arrangements have substantially limited the rights of workers and service providers from the CEECs to move and reside in EU-15 countries.

The majority of the EU-15 member states are using these transitional periods to continue to apply their ordinary, national migration legislation to workers coming from these eight countries.[35] Ireland, the UK and Sweden[36] have been the only three EU members that have not closed the doors to their labour markets through transitional measures.

The transitional periods are divided into three different stages:[37] first, between 2004 and 2006 the free movement of workers will be left exclusively in the hands of the EU-15 member states.[38] Also, the previously concluded bilateral agreements on the free movement of workers between these acceding states and the EU-15 member states, which foresaw quotas for specific labour-market sectors, may be fully applicable during this time. In any case these measures may not be more stringent than those that were in force on the day the Accession Treaty was signed. Additionally, workers from these countries who were legally working in any of the EU-15 member states on the date of accession and who were admitted to the labour

[32] For a definition of a worker under EC law, see among others the following ECJ rulings: Case 75/63, *Mrs M.K.H. Hoekstra (née Unger) v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (Administration of the Industrial Board for Retail Trades and Businesses)* [1964] ECR 177; Case 53/81, *D.M. Levin v. Staatssecretaris van Justitie* [1982] ECR 1035; Case 66/85, *Deborah Lawrie-Blum v. Land Baden-Württemberg* [1986] ECR 02121; Case 139/85 *R.H. Kempf v. Staatssecretaris van Justitie* [1986] ECR 1741; Case 292/89 *The Queen v. Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] ECR I-745, etc.; see also J. Apap (2002), pp. 19-30.

[33] See the Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, Act of Accession, Part Four: Temporary Provisions, Title 1: Transitional Measures, signed in Athens on 16 April 2003.

[34] In the particular case of Malta, according to a safeguard clause included in its Accession Treaty, this country may restrict the access to its labour market at any time during a period of seven years after the date of accession.

[35] For example, Spain will continue to apply the Migration Law (14/2003) on the rights and freedoms of migrants in Spain and their social integration of 20 November 2003 (*Ley Orgánica sobre derechos y libertades de los extranjeros en España y su integración social*) and hence the requirement to be in possession of a working visa (*visado de trabajo*) and identity card for migrants (*tarjeta de identidad de extranjero*). For a description of the different national measures applied by the rest of EU-15 member states see M. Byrska (2004), p. 12.

[36] On 28 April 2004, the Swedish parliament rejected government (the Social Democratic Party) proposals (presented on 11 March 2004) that would have limited the free movement of workers from the new EU member states. Most social partner organisations had been opposed to the proposed transitional rules, though the Swedish Confederation of Trade Unions (*Landorganisationen* – LO) suggested a number of other measures to prevent any potential abuses.

[37] For further discussion on this point, see S. Carrera and A. Turmann (2004).

[38] According to para. 13 of the Accession Treaty, Austria and Germany are allowed to apply in their whole territory national measures restricting the provisions of certain services listed in the Annexes attached to the Act of Accession.

market of a particular member state for an uninterrupted period of 12 months or longer, continue to have access but only to the labour market of that particular member state.

Second, by 2006 the European Commission will review the situation, which will subsequently be examined by the Council of Ministers. The EU-15 member states will notify the Commission whether or not they plan to retain the barriers on the free movement of workers from the new member states or to continue applying the bilateral agreements for up to a further three years (i.e. 2009).

Finally, by 2009 none of the national governments should apply any transitional measures limiting access to their labour markets. Yet any member state facing particular difficulties that may lead to "disturbances of the labour market or a threat thereof" can ask the Commission for a further two-year extension based on exceptional or unexpected circumstances.[39]

Therefore, for a period of up to seven years (what has been officially called the '2+3+2 formula'), which may potentially last until 2011, not much will change for workers and service providers from the eight new member states who may wish to fully exercise their free movement rights and fundamental freedoms. The derogations will only apply to the free movement of workers and not to the freedom of establishment or to carry out self-employed economic activities; nor will it apply to students, pensioners, tourists or other persons of independent means. The Act of Accession does not provide the concrete content of the national transitional measures limiting these freedoms. Thus EU-15 states have complete discretion in that regard. From 2011 onwards all these people will finally acquire without limitation the full package of benefits that were carefully attached by the TEU to the very heart of EU citizenship.

A series of studies have focused on the inadequacy of these transitional periods from a purely economic perspective.[40] In addition to the uncertain justification and economic logic of these restrictive arrangements in view of the expected migration flows from these countries and the labour-market effects,[41] these periods represent a real and unnecessary obstacle to the principles of free movement of persons and non-discrimination on grounds of nationality, which lie at the root of the concept of EU citizenship. As the ECJ has reconfirmed in the *Gaumain-Cerri* and *Maria Barth* judgments,[42] the status of Union citizenship enables all nationals of the member states to enjoy the same treatment in law.[43] Yet during this rather lengthy transition period, EU legislation on the free movement of workers and the far-reaching interpretations given by ECJ case law to the latter will regrettably not apply to new member-state nationals. Any of them who may wish to enter an EU-15 member state in search

[39] Further, if after that two-year period a member state decides to stop applying the derogations, a 'safeguard clause' will still exist, which may allow the reintroduction of the work permit requirement if there are 'unexpected serious economic difficulties'.

[40] Among others, a recent paper published by the European Foundation for the Improvement of Living and Working Conditions (Dublin) has confirmed the view that post-enlargement flows to the EU-15 are unlikely to have a major impact (see H. Kreiger, 2004). The report concludes that 1% of the new member states' working-age population, i.e. approximately 200,000 people per year, can be expected to migrate from the accession countries over the next five years, most of whom will be young, educated to tertiary level or still studying, and living as single persons without dependents. Apart from Germany, which presently attracts 60% of the inflows, Italy and Austria are expected to be the major countries of destination.

[41] See for example A. Turmann (2004), p. 13.

[42] See Joined Cases C-502/01 and C-31/02, *Silke Gaumain-Cerri v. Kaufmännische Krankenkasse – Pflegekasse and Maria Barth v. Landesversicherungsanstalt Rheinprovinz*.

[43] See para. 28 of Case C-224/98, *Marie-Nathalie D'Hoop v. Office national de l'emploi* [2002] ECR I-06191.

of employment will not have the right to take up any available paid employment under the same conditions as the nationals of the host state or other EU-15 nationals. Those falling within the personal scope of the transitional arrangements will be hence treated as second-class citizens.

These visible barriers to free movement rights in an enlarged EU have drawn much criticism. Their compatibility with the rights foreseen in the Europe Agreements between the EC and the CEECs have also been seriously questioned. These agreements provided the framework for a free trade area between the European Community and the member states on the one hand and partner countries on the other, among which we may find the ten new EU member states. In addition to the liberalisation of trade, the Europe Agreements also contained provisions on the free movement of workers, services, payments and capital in respect of trade and investments. For instance if we look at the Europe Agreement with Poland,[44] Art. 37.1 stipulates that "the treatment accorded to workers of Polish nationality, legally employed in the territory of a member state shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals". In the *Beata Pokrzeptowicz-Meyer* case,[45] the ECJ expressly held that this Art. has direct effect and therefore Polish nationals who assert it may rely on it before national courts of the host member state.[46] Also, the ECJ recognised that even though Art. 37.1 of the Europe Agreement only confers a right to equal treatment as regards the conditions of employment once they are legally employed within the territory of a member state, there is a prohibition of any kind of discrimination against Polish workers based on their nationality affecting their conditions of employment.[47] The transitional arrangements agreed under the Accession Treaty do not confer the same treatment upon the nationals of the host state involved and the nationals of the CEECs, or between the latter and the EU-15 citizens. That notwithstanding, the question remains open as to whether the sort of discrimination posed by the transitional periods falls within the material scope of these agreements and the interpretation delivered by the ECJ.

One of the main reasons for imposing the transitional arrangements has been the fear of a massive inflow of economic migrants from the new member states who would compete with the nationals of the EU-15 for jobs, as well as the risk of 'social-welfare tourism'. As mentioned earlier, only three member states – the UK, Ireland and Sweden – decided not to impose transitional periods to the free movement of workers. It is too early to give a conclusive and definitive answer at this stage, but some preliminary governmental figures from these countries show that they have not been flooded by jobseekers from the new member states. For example, figures provided by the UK Home Office on the number of CEEC nationals registering to work in the country indicate that most of them were already

[44] See the Europe Agreement establishing an association between the European Communities and their member states, of the one part, and the Republic of Poland, of the other part – Protocol 1 on textile and clothing products, Protocol 2 on ECSC products, Protocol 3 on trade between Poland and the Community in processed agricultural products not covered by Annex II to the EEC Treaty, Protocol 4 concerning the definition of the concept of originating products and methods of administrative cooperation, Protocol 5 on specific provisions relating to trade between Poland, of the one part, and Spain and Portugal, of the other part, Protocol 6 on mutual assistance in customs matters the Final Act and Joint Declarations, Official Journal L 348 , 31/12/1993 pp. 0002–0180.

[45] See Case C-162/00, *Land Nordrhein-Westfalen v. Beata Pokrzeptowicz-Meyer* [2002] ECR I-01049.

[46] See point 30 of the judgment.

[47] See point 42 of the judgment; see also the Case C-63/99, *The Queen v. Secretary of State for the Home Department, ex parte Wieslaw Gloszczuk and Elzbieta Gloszczuk,* of 27 September 2001 [2001] ECR I-06369.

inside the country before 1 May 2004.[48] A similar situation has occurred in Sweden, where from the date of accession until the end of July 2004 a total of 3,179 applications for residence permits have been made, which is only 801 more than for the same period of the previous year.[49] The only exception may be the case of Ireland. According to the Irish Department of Social and Family Affairs, a total of 22,933 people from the new member states have sought employment after the date of enlargement.[50] An increase in the number of people from the CEECs asking for social welfare benefits will not happen anyway because of the introduction by the UK and Ireland of a law requiring habitual residence by new labour-market entrants in order to have access to non-contributory social-welfare payments (such as the jobseekers allowance). Further, the newcomers will not be eligible for social benefits (e.g. unemployment benefits) for the added reason of lack of past contributions to social funds in these countries.

Finally, as the Commission highlighted in its *Third Report on Citizenship of the Union* (European Commission, 2001), the right to equality and the prohibition of discrimination on grounds of nationality belongs to the core catalogue of EU citizens' rights. Yet during the transition periods workers from these countries will be treated as second-class EU citizens or 'quasi-outsiders', not having equal access to all the benefits and privileges that a European area of freedom should confer to every national of an EU member state.

2. Recent legal developments on free movement rights in the EU

The general rules on free movement continue to be developed to a great extent by the proactive jurisprudence of the ECJ as well as by the EU legislative machinery.

2.1 The latest case law of the ECJ

The ECJ has played a fundamental role in proactively interpreting the principle of free movement of persons and enhancing the protection of the individual versus the state. The Court soon recognised in the *Royer* case that the right of entry and residence of those holding the nationality of an EU member state into the territory of another member state is a right conferred directly by the EC Treaties.[51] The decisions by the ECJ have indeed greatly enhanced the scope of the rights and obligations granted by EC law to EU citizens and their families to move and reside within EU territory. It has also substantially widened the scope of beneficiaries and removed some practical obstacles on the ground.

The relevant case law of the ECJ on free movement rights is too long to list here. Yet, among the most significant recent judgments we may highlight is the *Martinez Sala* case. This judgment represents a very important step forward in terms of judicial recognition of the

[48] The Worker Registration Scheme shows that over 24,000 applicants applied to register in May and June 2004 and only over 8,000 applicants arrived in the UK since the date of accession; see "New EU citizens Working and Contributing", Home Office Press releases, 7 July 2004; see also www.statistics.gov.uk.

[49] See *Migration News Sheet*, a monthly information bulletin on immigrants, refugees and ethnic minorities, Migration Policy Group, September 2004, p. 3.

[50] This total reflects 6,932 in May 2004, 7,289 in June 2004 and 8,712 in July 2004, and includes for example 10,853 people from Poland, 1,433 from the Czech Republic and 2,102 from Slovakia; see "Missionaries, Old Age Non-Contributory Pension and Habitual Residence Condition", Irish Department of Social and Family Affairs, Press Release, 20 August 2004.

[51] See Case 48/75, *State v. Royer* [1976] ECR 497, para. 31.

concept of EU citizenship and the freedom of movement.[52] The case dealt with a Spanish national, Ms Martinez, who had lived in Germany since 1968, and since 1989 had received social assistance from the German state. In 1993, at a time when she did not have a residence permit, Ms Martinez applied for a childcare allowance. Because German law required the possession of a residence permit in order to have access to these funds, the benefit was refused. The ECJ held that although Ms Martinez did not have a residence permit, she was authorised to reside in Germany. Therefore, as a national of a member state lawfully residing in another member state and also as an EU citizen, she fell within the personal scope of the provisions of the EC Treaties and benefited from the rights covered by them. For a member state to require a national of another member state to produce a document to entitle them to receive a benefit such as the allowance in question, while its own nationals are not required to produce any document, this condition amounts to unequal treatment and discrimination on the grounds of nationality as prohibited by Art. 12 of the EC Treaties.[53] As Oliveira (2002) points out, in this key decision the ECJ enlarged the scope of the provisions on free movement in two respects: first, the sole condition that Ms Martinez was a citizen of the EU lawfully residing in Germany was enough for her to fall under the personal scope of the EC Treaties. Second, the Court ruled that a benefit previously granted exclusively to workers should also be given to persons other than workers.

Two important ECJ rulings have recently dealt with the freedom of movement and citizenship of the Union, i.e. the *Collins* and *Pusa* cases. In the first one, Mr Collins, a dual Irish and American national, moved to the UK to find a job and claimed jobseekers allowance. It was refused on the grounds that he was not a habitual resident in that country.[54] In contrast to the *Martinez Sala* case, in which the plaintiff had very close connections of long duration with the host state, the ECJ held that Mr Collins' position should rather be compared with that of any national of a member state looking for his or her first job in another member state. In a previous case, *Lebon*,[55] the ECJ had upheld that equal treatment regarding social and tax advantages applies only to workers,[56] and those who move in search of employment qualify for such equal treatment only with regard to access to employment. Therefore, it decided that the right of a jobseeker to equal treatment concerning access to the labour market in a member state does not preclude national legislation that makes entitlement to a jobseekers allowance conditional on a residence requirement, insofar as that requirement may be justified on the basis of objective considerations. These considerations, however, must be independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions.[57] The objective consideration in this particular case was to avoid the risk of becoming a destination for means-tested 'social-security shoppers'. As regards the second of the recent rulings, in the *Pusa* case the ECJ considered whether the Finnish tax legislation on pensions could place certain of its nationals at a disadvantage simply because they had exercised their freedom to move and reside in another member state, and hence leading to inequality of treatment.[58]

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[52] See Case C-85/96, *Maria Martinez Sala v. Freistaat Bayern* [1998] ECR I-2691.

[53] See Art. 12 of the EC Treaty.

[54] See Case C-138/02, *Brian Francis Collins v. Secretary of State of Work and Pensions*.

[55] See Case 316/85, *Centre public d'aide sociale de Courcelles v. Marie-Christine Lebon* [1987] ECR 2811.

[56] See Case C-278/94, *Commission v. Belgium*, of 12 September 1996 [1996] ECR I-4307, paras. 39 and 40.

[57] See Case C-274/96, *Bickel and Franz* [1998] ECR I-7637.

[58] See Case C-224/02, *Heikki Antero Pusa v. Osuuspankkien Keskinäinen Vakkuutusyhtiö*.

2.2 Directive 2004/38/EC on the rights of citizens of the Union and their family members to move and reside freely

A substantial policy development that has revisited free movement rights and indirectly EU citizenship, has been the adoption of Directive 2004/38/EC on the rights of citizens of the Union and their family members to move and reside freely within the territory of the member states.[59] The Directive establishes the compendium of conditions and rules for the exercise of the right of free movement (the right of exit and entry) and residence (for up to and more than three months) within the EU by Union citizens and their family members.[60] The member states have been asked to transpose it onto their national legislations by 30 April 2006.[61]

What are the most important new features presented by the Directive? Among others, we underline the following five:

First, it abolishes the sector-by-sector or piecemeal approach to free movement rights. It replaces, integrates and supplements the existing Community legal instruments dealing separately with the categories of workers, self-employed persons, students and other economically inactive groups. This is a very positive step forward because it goes beyond the current narrow approach of dealing with each category of persons separately, which often resulted in a fragmentation of the concept of EU citizenship. In addition, the Directive codifies the main principles recognised and developed by the ECJ's jurisprudence. By doing so, it simplifies and strengthens the right of free movement and residence of all Union citizens by reducing the disparities that seem to persist between the treatment of nationals of the host member state and EU citizens exercising their free movement rights in that state.

Second, the Directive allows more flexible conditions for movement, offering the possibility of acquiring a new right of permanent residence in the host member state.[62] At present, EU citizens who reside in another member state need to fulfil the requirement to prolong their residence permits regularly. Following Art. 16 of the Directive, those EU citizens and their family members who have resided legally for a continuous period of five years in the host member state shall acquire a right of permanent residence there. The continuity of residence will not be affected by any temporary absences. That right will only be lost after an absence of more than two consecutive years.[63]

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[59] See Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158/77, 30 April 2004.

[60] Art. 3 of the Directive entitled "Beneficiaries" states that "1. This Directive shall apply to all Union citizens who move to or reside in a member state other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them."

[61] See also the Corrigendum to Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the member states, OJ L 229/35, of 29 June 2004.

[62] Art. 1 of the Directive states that "This Directive lays down: (b) the right of permanent residence in the territory of the member states for Union citizens and their family members".

[63] After having verified the duration of residence the member state concerned will issue a document certifying the permanent residence to Union citizens and a permanent residence card to their family members who are third-country nationals within six months of the submission of the application. The permanent resident card will be renewable automatically every ten years. See Arts. 19 and 20 of the Directive.

Third, it provides a significant simplification and improvement of the administrative formalities connected to the right of entry and residence. As far as the right to entry is concerned, Art. 5 stipulates that member states shall allow the entrance of EU citizens with a valid identity card or passport and their family members who are third-country nationals with a valid passport. This has changed in comparison to the present regime under Art. 2.1 of the old Council Directive 68/360/EEC, which asks for the production of an identity card or passport both for the EU citizen and her/his family members.[64] The requirement for those family members who are not nationals of a member state to have an entry visa continues to be applicable.[65] Moreover, para. 4 of the same Article integrates in a very positive manner what the ECJ held in the *Royer* case.[66] The Court ruled in this judgment that the mere failure by a national of a member state to complete the legal formalities on access, movement and residence does not justify a decision ordering expulsion.[67] In light of this, the new Directive inserts this important principle by providing that "the member state concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents". The harmonised administrative formalities applied to the right of residence are different according to length of residence. For a period of more than three months Art. 8 says that the host member state will have the possibility to require EU citizens to register with the relevant authorities (the 'registration certificate'), without it being necessary to follow the current administrative practice of issuing a resident permit.[68] Member states shall now issue a 'residence card of a family member of a Union citizen' to such family members no later than a period of six months from the date in which the application was submitted.[69]

Fourth, the Directive extends the concept of family members of EU citizens. Under the traditional regime (still applicable at present) outlined by Art. 10 of the Regulation 1612/68/EEC on freedom of movement for workers within the Community,[70] the following categories of persons have the right to install themselves with an EU worker in another member state: her/his spouse and their descendants who are under the age of 21 years or are dependants, as well as the dependent relatives in the ascending line of the worker and his spouse.[71] The new Art. 2.2 positively expands that list of people by including "(b) the partner with whom the Union citizen has contracted a registered partnership on the basis of the legislation of a member state, if the legislation of the host member state treats registered

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[64] Art. 2.1 of the Council Directive of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of member states and their families, 68/360/EEC, of 15 October 1968.

[65] See Art. 5.2 of the new Directive 2004/38; Art. 3 of the old, but still applicable Directive on the abolition of restrictions on movement and residence within the Community for workers of member states and their families, (68/360/EEC), states that "2. No entry visa or equivalent document may be demanded save from members of the family who are not nationals of a member state. Member states shall accord to such persons every facility for obtaining any necessary visas".

[66] See Case C-48/75, *Jean Noël Royer* [1976] ECR 00497.

[67] See point 38 of the judgment.

[68] According to Art. 8.2, the deadline for registration may not be less than three months from the date of arrival and a registration certificate shall be issued immediately. The requirements for the registration certificate to be issued are provided in point 3 of this Art.

[69] See Art. 10 of the Directive.

[70] Regulation (EEC) No. 1612/68 of the Council on freedom of movement for workers within the Community as amended by Regulation 312/76, OJ Sp. Ed. 1968, No. L257/2, p. 475.

[71] In addition, Art. 10 says in point 2 that member states shall facilitate (and therefore they are not under the obligation to do it) the admission of any member of the family not coming within the provisions of para. 1 if dependent on the worker or living under her/his roof in the country where he comes.

partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host member state".[72] Furthermore, in relation to those family members of a Union citizen, the recent *Hacene Akrich* case deserves special attention. This ruling is one of the latest dealing with the free movement of persons and the right to remain of a non-EU national who is the spouse of an EU worker.[73] A Moroccan citizen, Mr Akrich married a British citizen while residing unlawfully in the UK. He then applied for the right to reside in that country, whereupon he was detained and deported; in accordance with his wishes he was sent to Dublin, where his spouse was established. More than a year later he applied for revocation of the deportation order and for entry clearance as the spouse of a person settled in the UK. The ECJ held that when the marriage between a national of a member state and a national of a non-member state is genuine, the fact that the spouses installed themselves in another member state with the sole intention to obtain the benefits of rights conferred by EC law is not relevant to an assessment of their legal situation by the competent authorities of the latter state.[74] The ECJ also recognised the need for the member states to take into consideration the respect for family life as provided by Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which in the opinion of the Court is one of the fundamental rights also protected under EC law.[75]

Finally, the right of free movement of those falling within the category of EU citizens may be derogated on grounds of public policy, public security or public health, following the 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 as well as Arts. 39.3 and 46.1 of the EC Treaties.[76] The ECJ held in the *Baumbast* case that those limitations must be in compliance with the limits imposed by Community law, in accordance with the principle of proportionality and based on the exclusive personal conduct of the individual involved.[77] They must also be necessary and appropriate to attaining the objective pursued.[78] These and other key ECJ rulings dealing with

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[72] See Case 59/85, *State of the Netherlands v. Ann Florence Reed* [1986] ECR I-01283, point 30, in which the ECJ held that "a member state which permits the unmarried companions of its nationals, who are not themselves nationals of that member state, to reside in its territory cannot refuse to grant the same advantage to migrant workers who are nationals of other member states".

[73] See Case C-109/01, *Secretary of State for the Home Department v. Hacene Akrich*, of 23 September 2003.

[74] In a previous Case C-370/90, *The Queen v. Immigration Appeal Tribunal et Surinder Singh*, of 7 July 1992, the Court held that Art. 43 of the EC Treaty and Council Directive 73/148 on the abolition of restrictions on movement and residence within the Community for nationals of member states with regard to establishment and the provision of services, of 21 May 1973, should be interpreted as requiring a member state to grant leave to enter and remain in its territory to the spouse, of whatever nationality, of a national of that state who has gone with that spouse, to another member state in order to work there as an employed person as envisaged by Art. 48 of the EC Treaty and returns to establish him/herself in the state of which he or she is a national.

[75] See point 58 of the judgment. Art. 8 of the ECHR signed in Rome on 4 November 1950 reads as follows: "Everyone has the right to respect for his private and family life, his home and correspondence". See also Case C-60/00, *Carpenter v. Secretary of State for the Home Department*, of 11 July 2002.

[76] Art. 39.3 of the EC Treaties provides that the freedom of movement of workers shall entail a number of specific rights by subject to limitations justified on grounds of public policy, public security or public health. Art. 46.1 of the EC Treaties that deals with the right of establishment says that "the provisions of this chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health".

[77] See Case C-413/99, *Baumbast and R. v. Secretary of State for the Home Department* [2002] ECR I-07091 and Case 67/74, *Carmelo Angelo Bonsignore v. Oberstadtdirektor der Stadt Köln* [1975] ECR 00297.

[78] See also Joined Cases C-259/91, C-331/91 and C-332/91 *Alluè and Others* [1993] ECR I-4309, para. 15.

the 'legitimate' grounds of exclusion and expulsion, such as the *Bouchereau* case,[79] have been incorporated into the main text of Directive 2004/38/EC. In comparison to the present legal regime, the new Directive confers greater protection against expulsion, more procedural guarantees/safeguards and judicial redress depending on how long the individual concerned has resided in the territory,[80] her/his social and cultural integration into the host country, state of health, age, family and economic situation.[81] One may wonder, however, at the ways in which the host member state will evaluate the degree of integration achieved by the person involved. The Directive does not give any indication regarding the content of the social and cultural integration test. The legislation of the member state concerned shall freely determine the threshold for granting more legal protection against expulsion. This will lead to divergent national practices concerning the integration conditions applicable to Union citizens. The new integration element may also result in discrimination and unequal treatment in an enlarging EU.

3. Obstacles and exceptions to the exercise of mobility

What are the visible and hidden obstacles to the full exercise of the freedom of movement, along with the exceptions and derogations that still persist? Despite the progress achieved so far by the EC Treaties, secondary legislation and ECJ jurisprudence, the freedom to move still lags far behind the other European freedoms and suffers several restrictions on the ground. As highlighted above, the right to move and reside is still very much dependent on a degree of financial self-sufficiency of the person moving. Residence rights will not be granted to those EU citizens who lack sufficient resources to cover themselves in the host member state. Access to residence, education and the employment market is still subject to excessive economic conditions and practical frictions. The right of movement should be reviewed without reference to the financial considerations that at present still impede its full exercise. A full transition from market citizen to Union citizen should effectively take place in an enlarged EU. In the same vein, the restrictive transitional periods applied to workers coming from the CEECs should be abolished.

During the 1990s the European Commission launched an ambitious programme to deal with the restrictions on the right of freedom of movement and residence by setting up a High Level Panel on the free movement of persons to investigate the practical, legal and administrative problems. As the report of the High Level Panel underlined (European Commission, 1997), the real barriers derive mostly from what has usually been called 'indirect obstacles' or 'indirect discrimination' to full achievement of free movement, and from the standard of reference defined by national treatment.[82] At present there are still many instances of an

[79] See Case C-30/77, *Régina v. Pierre Bouchereau* [1977] ECR 01999, para. 35.

[80] Following Art. 28.3(a) of the Directive, a decision of expulsion will not be taken "except on imperative grounds of public security", if the person involved has resided in the host member state for the previous ten years.

[81] Art. 28 states that "Before taking an expulsion decision on grounds of public policy or public security, the host member state shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host member state and the extent of his/her links with the country of origin". See Chapter VI of the Directive, entitled "Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health", Arts. 27-33.

[82] Indirect discrimination occurs whenever a member state imposes less favourable treatment of a group of people in which the majority are non-nationals. The ECJ held in Case 359/87, *Pietro Pinna v. Caisse d'allocations familiales de la Savoie* [1989] ECR 00585, that equal treatment prohibits not only "overt

incorrect transposition of the secondary legislation on free movement as well as substantial legal and administrative national disparities (Kadelbach, 2003). Such poor national implementation has often led to unnecessary delays and high administrative costs. The European Parliament has greatly deplored the obstacles that still stand in the way of the right to move and reside freely in the Union.[83] All these visible and hidden barriers need to be addressed urgently to make free movement and residence rights more inclusive in an enlarged EU and to extend the benefits of an area of freedom, security and justice to all.

The implementation of the new Directive 2004/38/EC will overcome some of these obstacles to the freedom rationale. A rapid and accurate transposition of the Directive onto the national legislations of the member states would bring about very beneficial improvements. The various circles in which citizens wishing to exercise their rights all too often find themselves trapped would almost disappear.[84] It is, however, quite likely that this brand new legal instrument will also encounter problems at times of national implementation. As pointed out by the European Commission's Communication on the assessment of the Tampere programme, "the right of freedom of movement must be fully guaranteed by careful monitoring of the member states' implementation of the recent Directive governing this issue. This will also make it easier to check whether further measures are needed" (European Commission, 2004a). Yet a number of critical points can already be identified in the text of Directive 2004/38/EC. First, the wording of this new legal tool improves and simplifies the administrative formalities for Union citizens and their families who ask for the right of residence for a period of more than three months. But it does not completely solve one of the main current problems for the achievement of full equal treatment, i.e. the requirement to provide proof of adequate means of subsistence and health insurance.[85] Art. 8.4 of the Directive states that "member states may not lay down a fixed amount which they regard as sufficient resources, but they must take into account the personal situation of the person concerned". Therefore, one of the major difficulties that for example students, retired persons and those dependant on social allowances as well as those in atypical employment or economic situations currently face while trying to produce evidence of adequate means of subsistence will continue to exist under the new regime. The much-criticised economic aspect of EU citizenship will remain untouched.

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discrimination based on the nationality but also all covert forms of discrimination which by applying other distinguishing criteria arrive at the same result". Additionally, see the famous Case C-415/93, *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman, Royal club liégeois SA v. Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v. Jean-Marc Bosman* [1995] ECR I-04921, in which the transfer system developed by national and transnational football associations was found to violate the non-discrimination requirement stated by the Art. 39 of the EC Treaties. See also the recent case C-224/01, *Gerhard Köbler v. Republik Österreich*, of 30 September 2003.

[83] See the report by the European Parliament (2002).

[84] An exhaustive compilation of the gaps that still exist in practice was carried out by the European Citizen Action Service (ECAS) hotline, which represented a very useful tool to prove how the free movement of persons does or does not work in practice. Moreover, some aspects of the regime are characterised by a lack of transparency and accountability. On 26 March 2000, on the occasion of the fifth anniversary of the entry into force of Schengen, a free telephone number was advertised throughout Europe following a press conference to enable people (EU and non-EU nationals) to phone up the organisation to express their concerns.

[85] Art. 7 of the Directive provides that "1. All Union citizens shall have the right of residence on the territory of another member state for a period of longer than three months if they: (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host member state during their period of residence and have comprehensive sickness insurance cover in the host member state".

Second, there continue to be huge legal and administrative gaps between those family members who are EU citizens and those labelled as third-county nationals under the new Directive.[86] Family members who are not EU nationals will be required to have an entry visa to enter the host member state.[87] Also, the lengthy waiting period of six months provided in Art. 10 of the Directive for issuing the residence card to family members of Union citizens who are third-country nationals may be considered as rather excessive.[88]

Finally, concerning the so-called 'legitimate' exceptions or derogations of the right of entry and residence, Directive 2004/38/EC seems to offer a higher level of protection and more judicial safeguards than the current system of Directive 64/221/EEC on the coordination of special measures related to the movement and residence of foreign nationals that are justified on grounds of public policy, public security or public health.[89] That notwithstanding, we need to keep in mind that the member states too often misinterpret (or interpret too liberally) the Community concepts of public policy and public security, and hence undermine the fundamental guarantees enshrined by ECJ case law, EC Treaties and Directive 64/221/EEC (European Parliament, 1995). By doing so, limitations on the freedom of movement rationale may easily become serious obstacles and endanger its very existence. If we look at the use made at times by some member states of the notions of public policy and national security under the Schengen umbrella, there continues to be wide room for their discretion to freely determine the necessity to restrict or derogate mobility. Art. 2.2 of the Schengen Convention allows member states to decide in a rather discretionary manner whether reintroducing border checks on individuals is justified by special security concerns.[90] In some very particular instances, the member states have unilaterally re-introduced internal border controls and checks on persons on the grounds of special security concerns or a state of emergency.[91]

It should also be emphasised that even while complying fully with the legal rules presented under the Schengen regime, the member states have still kept a number of escape routes or open-door clauses to recover national competence over their external borders whenever they consider it necessary for national security or public policy. For instance, France still frequently maintains border checks or selective spotchecks on persons moving between France and the other Schengen states, particularly on persons travelling to France from the

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[86] For an in-depth study on the scope of EU rules concerning the entry of third-country nationals into the EU territory and the distinctions made therein on the basis of nationality, see R. Cholewinski (2002).

[87] The entry visa will be in accordance with Council Regulation No. 453/2003, 6 March 2003 amending Regulation (EC) No. 539/2001, listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement. Art. 5 of the new Directive 2004/38/EC says that "member states shall grant to such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure."

[88] Following Art. 11, the residence card will be valid for a period of five years from the date of issue.

[89] Art. 31 (procedural safeguards) of the new Directive 2004/38/EC provides that "1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host member state to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health".

[90] Art. 2.2 reads as follows: "1. Internal borders may be crossed at any point without any checks on persons being carried out. 2. However, where public policy or national security so require a Contracting Party may, after consulting the other Contracting Parties, decide that for a limited period national border checks appropriate to the situation shall be carried out at internal borders. If public policy or national security require immediate action, the Contracting Party concerned shall take the necessary measures and at the earliest opportunity shall inform the other Contracting Parties thereof."

[91] For a precise list of cases in which Art. 2.2 of the Schengen Convention has been used in practice see J. Apap and S. Carrera (2003c), pp. 2-6.

Netherlands. Yet as the ECJ held in the case *Commission v. Belgium*,[92] those spotchecks at the border asking EU citizens for an additional residence permit are permissible only if they do not constitute a condition for entry and they are not carried out in a systematic, arbitrary or unnecessary manner.

A recent good example that shows the wide discretion and flawed interpretation of the concepts of public policy and national security are the Commission's infringement proceedings against Spain, for refusing visas and entry to its territory to the family members of Union citizens, on the grounds that their names had been entered in the SIS for the purposes of non-admission. The European Commission rightly considered that by doing so the Spanish practice infringed the basic guarantees that the member states need to observe while restricting the free movement rights for reasons of public security or public policy. An SIS alert refusing entry cannot be issued on those persons benefiting from the freedom of movement. In the Commission's opinion, "there are a whole series of reasons which justify an SIS alert, but fail to meet the requirements of Directive 64/221" (European Commission, 2002). Moreover, the Spanish authorities denied entry without knowing precisely the reasoning behind the alert (the grounds of exclusion) and without duly informing the complainants of the existence of an SIS alert.

3.1 Balancing openness with control? The Schengen Information System II

The Schengen Information System was conceived as the very first step in the proper implementation and management of Schengen as a whole, and particularly as one of the compensatory (control) measures to allow the freedom to move (openness). The SIS established a matrix capable of identifying (by the issue of an alert), and hence excluding, those persons who may be considered as 'security threats' inside the common territory of the EU. It is a 'hit/no hit system' allowing for information exchange with a view to policing the free movement of persons as well as maintaining public security, and in particular assisting national authorities in the fight against transnational forms of crime. The system equally allows the competent national authorities to acquire a wide range of information regarding those individuals qualified as 'inadmissible foreigners'.[93]

In response to the increased European concerns about security in the aftermath of 11 September 2002 in the US as well as 11 March 2004 in Madrid, there has been an over-zealous application of security measures in relation to mobility, immigration and asylum policies.[94] The principle of free movement of persons has been equally affected by security policies intending to fight what has been commonly labelled as 'international terrorism'. These restrictions have been justified on behalf of our safety and security (Solana, 2003).

In its Communication on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, the Commission reconfirmed the importance given at the Laeken and Seville European Councils[95] as well as in its Comprehensive Plan[96] to

[92] See Case 321/87, *Commission v. Belgium* [1989] ECR 997, paras. 14 and 15.

[93] For a precise description on how the SIS operates such checks, see Justice (2000).

[94] See S. Carrera and D. Bigo (2004); with regard to how the legal status of immigrants and asylum-seekers has been modified on the grounds of anti-terrorism measures, see E. Brouwer, P. Catz and E. Guild (2003).

[95] The Seville European Council Presidency Conclusions (European Council, 2002), point 30, on measures to combat illegal immigration state that "the European Council calls on the Council and the Commission, within their respective spheres of responsibility, to attach top priority to the following measures contained in the plan:

establishing the second generation of the Schengen Information System (SIS II) to better fight against terrorism. The future development of a more flexible SIS II continues to be a highly contested topic (Apap et al., 2004). One of the main original objectives in developing SIS II was to establish a system allowing the integration of new member states in the EU's network. Also, the technology of the current version of SIS was considered to be outdated and failing to provide the necessary capacity for easily adding wider functions. Nevertheless, the exact content (the new categories of alerts on property and persons) as well as the real limits on the functions and the users that will be incorporated into SIS II have not yet been openly decided by the Council.[97] It is presently uncertain what shape the system will finally take in the long-term. Yet the schedule to implement it has already been set for early 2007. The Council has recently defined the potential functional requirements that the system could have in a preliminary stage.[98] This compendium of functions would broadly include:

1. those already offered by the current first generation of the SIS;
2. the functions set out in the Council Regulation concerning the introduction of some new functions for the SIS, in particular the fight against terrorism; this Regulation, adopted on the initiative of Spain, calls for access to certain types data by Europol and the national members of Eurojust;[99]
3. the interlinking of alerts and the inclusion of new categories of alerts (objects and persons);[100]
4. the insertion of biometric identifiers/data (e.g. photographs and fingerprints) (European Commission, 2004b);
5. access by new authorities to these data (European Commission, 2004c); and
6. the storage of information described in Art. 8 of the Framework Decision on the European Arrest Warrant and the surrender procedures between member states.[101]

To what extent are pro-security policies such as the SIS II as well as an enhanced interoperability between European databases and information sharing fully compatible with the right of freedom of movement and mobility in general in the EU? The flexibility attached

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introduction, as soon as possible, of a common identification system for visa data, in the light of a feasibility study to be submitted in March 2003 and on the basis of guidelines from the Council; a preliminary report will be presented before the end of 2002". See also the Laeken European Council Presidency Conclusions (European Council, 2001), point 42.

[96] Comprehensive Plan to combat illegal immigration and trafficking of human beings, 2002/C142/02, 14 June 2002, OJ C142/23.

[97] See the European Parliament's recommendation to the Council on the second-generation Schengen information system (SIS II), A5-0398-2003, 7 November 2003.

[98] See SIS II functions, Council of the European Union, 10125/04, Brussels, 3 June 2004.

[99] See Council Regulation (EC) No. 871/2004, concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism, of 29 April 2004, Initiative of the Kingdom of Spain with a view to adopting the Council Regulation (EC) concerning the introduction of some new functions for the Schengen information system, in particular in the fight against terrorism, 2002/C 160/06, 4 July 2002.

[100] The European Commission will soon prepare a communication on the interoperability between European databases: the SIS II, the Visa Information System, EURODAC, etc.

[101] Art. 8.1 of the Framework Decision lists the information that the European arrest warrant needs to contain, such as the identity and nationality of the requested person, evidence of an enforceable judgment, the nature and legal classification of the offence, a description of the circumstances in which the offence was committed, etc. See Council Framework Decision of 13 June 2002 (2002/584/JHA), published in OJ L 190 of 18 July 2002; see also J. Apap and S. Carrera (2004).

to very essence of these new security measures may become a very dangerous feature for the safety of a European area of freedom.[102] The broad enhancement of the SIS II functions may put into place a new European investigative and reporting tool that monitors the mobility of all, leading to an imposing degree of security around mobility. By doing so, these instruments will become a real turning point in the full exercise of the freedom of movement paradigm. The data that the second generation of the SIS may store are very broad and sensitive indeed. There is at present a worrying absence of a framework providing a set of human rights guarantees that would complement the potential functions of these security systems. There is also a lack of transparency in the relevant decision-making procedure. These gaps may facilitate a situation in which the SIS II becomes a tool focusing mainly on the surveillance of mobility and on the monitoring of social movements of the population as a whole.

As the Schengen Joint Supervisory Authority has repeatedly pointed out, the near-future development of the SIS II needs first to be based on an exhaustive assessment of the adequacy of both data security and safeguards for the rights and fundamental freedoms of individuals.[103] Without providing a parallel framework protecting the 'freedom dimension', this security system could lead to a scenario in which the information stored could be easily used for purposes that are substantially different from the ones originally intended. The lack of coherency of these policies with EU and international human rights standards in general, and the respect of the data protection rights of EU and non-EU citizens in particular, has been a matter of concern to a number of non-governmental organisations across Europe.[104]

At present, the question of whether these security tools, justified by the familiar heading of the 'fight against terrorism', may lead to a mega-European matrix of control, monitoring and surveillance of the movement of all remains open. An increase in a security rationale does not always guarantee an increase of internal safety and freedom. The misinterpretation and over-use of exceptions (i.e. concepts of public policy and national security) to free movement rights that are purely justified on behalf of security may undermine the very roots of an area of freedom in the EU.

4. Conclusions

The general rules on free movement rights under EC law continue to be developed to a great extent by the proactive jurisprudence of the ECJ as well as by the EU legislative machine. Since the SEA first introduced this freedom into the EC Treaties important progress has been made on the right to move. Nowadays the status of Union citizenship covers not only economic rights but also a broader range of political, social and judicial freedoms. Nevertheless, the free movement of persons is still economically linked to a great extent. The correct and rapid transposition at the national level of the new Directive 2004/38/EC would be a very positive step towards the achievement of a full right to move throughout the EU. Yet the financial ingredient will regrettably continue to play a fundamental role. The right of movement should instead be reviewed without so much reference to the economic considerations that continue to impede its full exercise in a number of cases. A full transition from EU common-market citizen to Union citizen should effectively take place for the benefit of all in an enlarged EU. Member states should also steer clear of inadequate national

[102] Flexibility has been expressly included by the European Commission as one of the requirements of the SIS II; see European Commission (2003), p. 6.

[103] See Schengen Joint Supervisory Authority (2002).

[104] Statewatch News (online), "SIS II database takes on an ominous shape", 4 April 2002.

implementation in order to avoid unnecessary delays and significant administrative costs, which may endanger these fundamental freedoms. Moreover, the restrictive transitional periods applied to workers coming from the CEECs should also be abolished in conformity with the right of equal treatment and non-discrimination on grounds of nationality, as enshrined by the EC legal framework and the proactive case law of the ECJ.

All the visible and hidden obstacles described in this paper need to be openly debated and urgently overcome to make free movement and residence rights more inclusive in a enlarging EU. The personal scope of the benefits provided by an area of freedom, security and justice need to become wider and more open.

The compatibility of security policies such as the Schengen Information System II with the right of freedom of movement in particular, and social mobility in general, remains highly uncertain. The development of the SIS II needs first to be based on an exhaustive and careful civil rights assessment of its adequacy in terms of both data security (the right of data protection) and safeguards for the fundamental freedoms of individuals. Without the establishment of a parallel framework providing a high level of protection and guarantees of the freedom dimension, the SIS II and all the rest of the security tools based on a technology of surveillance[105] may lead to a scenario in which undue and disproportionate control, monitoring and surveillance of the movement of all is freely carried out in the EU. The respect of fundamental rights and freedoms of every human being needs to be taken as a point of departure in every security initiative adopted on behalf of our safety. This continues to be a challenge for the EU.

[105] See among other key official documents the Declaration on Combating Terrorism, European Council, Brussels, 25 March 2004; see also, the Extraordinary Justice, Home Affairs and Civil Protection Extraordinary Council Meeting Brussels, 20 September 2001 and the Conclusions and Plan of Action of the Extraordinary Council Meeting on 21 September 2001.

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