

FREE MOVEMENT OF PERSONS IN THE EU SINCE THE TREATY OF MAASTRICHT

Thesis submitted to the
Institute of Social Sciences
in partial fulfillment of the requirements
for the degree of

Master of Arts

in

International Relations

by

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June 2005

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For my family and my friends

APPROVAL PAGE

I certify that this thesis satisfies all the requirements as a thesis for the degree of Master of Arts.

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AUTHOR DECLARATIONS

1. The material included in this thesis has not been submitted wholly or in part for any academic award or qualification other than that for which it is now submitted.
2. The program of advanced study of which this thesis is part has consisted of:
 - i) Research Methods course during the undergraduate study
 - ii) Examination of several thesis guides of particular universities both in Turkey and abroad as well as a professional book on this subject.

Kerem Alpin Tok

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ABSTRACT

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June 2005

FREE MOVEMENT OF PERSONS IN THE EUROPEAN UNION SINCE THE TREATY OF MAASTRICHT

The European Union is a significant subject of international relations, and the right of free movement for persons is one of the major topics in the EU. The main purpose of this thesis is to examine the free movement of persons, especially after the Treaty of Maastricht which introduced the union citizenship and extended the scope of free movement of persons. This thesis consists of four chapters following the Introduction. The first chapter briefly examines the historical background of the EU and the treaties up to 1992. The second chapter focuses on the treaties of Maastricht, Amsterdam and Nice in the context of freedom of movement. The union citizenship is also defined in this chapter. The third chapter is an analysis of the terms 'persons', 'workers' and 'free movement'. The secondary legislation and case-law are among the subjects that are covered in this chapter. The final chapter analyses the transitional arrangements for the new member states in respect of free movement of workers.

Key Words:

Free movement of persons, EU Citizenship, Maastricht Treaty, Workers, Transitional period, Poland

KISA ÖZET

KEREM ALPİN TOK

Haziran 2005

MAASTRICHT ANTLAŞMASI'NDAN BU YANA AVRUPA BİRLİĞİ'NDE KİŞİLERİN SERBEST DOLAŞIMI

Avrupa Birliği, Uluslararası İlişkilerin önemli bir konusu olup, kişilerin serbest dolaşım hakkı da AB içindeki en öncelikli konulardan biridir. Bu tezin temel amacı, özellikle, birlik vatandaşlığını düzenleyen ve kişilerin serbest dolaşımının kapsamını genişleten Maastricht Andlaşması sonrası dönemde kişilerin serbest dolaşımını incelemektir. Bu tez, Giriş bölümünü takip eden dört bölümden oluşmaktadır. İlk bölüm, Avrupa Birliği'nin tarihi arkaplanını ve 1992 tarihine kadar imzalanmış antlaşmaları incelemektedir. İkinci bölüm, serbest dolaşım hakkı çerçevesinde Maastricht, Amsterdam ve Nice antlaşmaları üzerinde durmaktadır. Birlik vatandaşlığı kavramı da bu bölümde ele alınmaktadır. Üçüncü bölüm, 'kişiler', 'işçiler' ve 'serbest dolaşım' gibi kavramları tahlil etmektedir. İkincil hukuk ve içtihat hukuku, bu bölümde üzerinde durulan konular arasında yer almaktadır. Son bölüm, işçilerin serbest dolaşımı kapsamında yeni üye ülkelere yönelik olarak AB'nin getirdiği geçici düzenlemeleri incelenmektedir.

Anahtar Kelimeler:

Kişilerin serbest dolaşımı, AB yurttaşlığı, Maastricht Antlaşması, İşçiler, Geçiş dönemi, Polonya

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LIST OF ABBREVIATIONS

CFSP	Common Foreign and Security Policy
EC	European Community
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EDC	European Defence Community
EEA	European Economic Area
EEC	European Economic Community
EU	European Union
EURATOM	European Atomic Energy Community
JHA	Justice and Home Affairs
NIS	National Integration Strategy
QMV	Qualified Majority Voting
SEA	Single European Act
SIS	Schengen Information System
The UK	The United Kingdom
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
WEU	Western European Union

ACKNOWLEDGEMENTS

I owe special thanks to my thesis advisor Assist Prof. Berdal Aral, who motivated me during my studies. He was source of inspiration from the beginning of my Master education. He assisted and guided me in a determined way during the preparation and writing period of my thesis. I also want to mention my lecturers Prof. M. Lütfullah Karaman and Assoc. Prof. Bülent Aras for their patience and contribution during my Master education.

I am also thankful to my MA colleagues, Oğuz Baykal and Mehmet Durmuş who created a beneficial and enjoyable environment during my education and assisted me for writing my thesis.

INTRODUCTION

The evolution of the European Union (EU) has for long been one of the major issues in international relations. Notwithstanding occasional setbacks, Europe is getting more integrated and new countries are waiting to join the EU, like Turkey. There are many subjects to discuss about the EU. For my part, I have decided to make a research about the free movement of persons which is one of the fundamental freedoms guaranteed by Community law. It is perhaps the most important right under Community law for individuals and an essential element of European citizenship. After the enactment of the Maastricht Treaty which is formally known as the **Treaty on European Union (TEU)**, the union citizenship became a reality and the freedom of movement became an even more important and considerable issue in the EU law. In this dissertation, the free movement of persons especially after the Maastricht Treaty will be examined. Especially in the last decade, the EU has developed even further and become an important issue in world political arena. What is more, Turkey is seriously involved with the EU, and, since December 2004, Turkey is on its way to become a EU member state. It is a fact that the free movement of persons and labour is one of the major issues causing delay for the membership of Turkey. The significance of the movement of persons can not be denied. The people of the European countries with the right of free movement, have the chance to socialize with other EU people and get acquainted with their culture.

What is more, they have the chance to work or reside in other countries according to their jobs, talents and interests. That right of movement is vitally important to develop the economic and social life, and also the common sense, among the European countries.

This study examines the free movement of persons with focus on the historical background, the treaties, secondary law, and judicial cases. Also, the current developments will be presented. My purpose is to express the importance of free movement of persons which is one of the 31 chapters of the EU acquis. It is an important and extended subject which is not only related to economy, but to social and cultural life of the people living in the member states as mentioned above. The EU was premised on economic integration when it was first established after the World War II. In 1957, the Treaty of Rome (also known as the EEC Treaty, now the EC Treaty) established the European Community - EC (now the European Union - EU). As a matter of fact, its economic aspect is more dominant, and when we examine the free movement of persons, it is clear that the freedom for workers is particularly significant especially in terms of case-law. When those cases and the new regulations and directives which they rely are investigated, it is obvious that workers are always on top of the list. In this dissertation, the situation of the workers will be examined extensively. In the term 'free movement of persons', the term 'person' includes workers, as well as tourists, students, self-employed people and

providers of services. Free movement of persons is one of the founding principles of the EU. It constitutes one of the four fundamental freedoms of the Internal Market. At the same time, it represents one of the most important rights of individuals under Community law. In this study, web sites, articles and fact sheets, some books about international law and EU are used as resource materials. Web sites have many articles and data about this subject. There are various information especially for the case law and definitions of the terms on the internet. I made use of them. The official web site of the EU is the primary resource for the fact sheets.

In this dissertation, the history and general policies of the EU and EC are not analysed in detail but rather a short description of them will be given. The EC has international legal personality, but the EU appears not to have it. Thus, all international agreements are concluded in the name of the EC. But in terms of politics, in the relations with third countries, EU is used rather than EC. Furthermore, the 'EU' is generally used to express the European identity as a whole. In this study, instead of the arguments and views of individual authors, the readers will find facts without much comment as the articles of treaties are quoted from the original texts. The main aim is to present the development of free movement of persons related to European integration in the light of primary and secondary legislation. Both of the subjects, free movement and European integration, are very wide and there is much to examine. This dissertation will

give brief information about almost every step in the development of European integration and the right of free movement for persons in Europe. The founding treaties are the major subjects to be analysed because the articles of those treaties gave persons the right to move and reside freely within the European community. Before describing each chapter, the major terms which will be used in this dissertation need to be explained in a brief overview. First, it must be noticed that the subject, 'free movement right', is related to law. The primary sources of EC law (after the TEU, it is the EU law) are the EC Treaties themselves, and there are various types of secondary legislation passed by the Council and Commission. The major ones are regulations, directives and decisions. What is more, there is a very important point about the EC Treaties, regulations and directives about whether they are directly applicable and/or directly effective. If a provision of EU Law is directly applicable, it means that it is automatically incorporated into national law and it may be relied upon in the domestic courts. If it is directly effective, then it means that the provision creates rights that an individual may rely upon in the courts, either against governments (vertical direct effect) or against other citizens and organizations (horizontal direct effect). These are not mainly related to my subject because my purpose is not to analyse the EC Law, but it is to examine the law which is related to the free movement of persons. Therefore, the dissertation will focus on the treaties and secondary law not in a general analysis but in the context of

free movement. I will express how the treaties and the secondary legislation have developed the free movement right for persons while Europe was in the process of enlargement and integration. Treaties are the highest sources of EC law and they automatically become part of domestic law. Provisions contained in the treaties and regulations enacted by the Council of the European Community have the 'direct applicability' which means that they become part of the law of a member state without further intervention by the member state. Here, an essential information must be given about the United Kingdom (the UK). Signing a treaty does not mean that this treaty instantly becomes a law in the UK. When the Parliament produces legislation to enact the treaty commitments, only then do those commitments become law. Therefore, citizens can not rely on them in proceedings brought in the UK courts. However, the treaties set up in the European Communities are directly applicable in British courts and can be relied on to create rights and duties. This theme will be referred to in the third chapter when some cases are to be analysed. The secondary legislation played a crucial role in the development process of the European integration, and free movement and residence of persons in particular. Regulations have general application and they are binding in their entirety and directly applicable in all Member States. A **regulation** is effective immediately in national law. They become part of the law of each member nation as soon as they come into force, without the need for each country to make its own legislation. **Directives** have

to be integrated into national law to have effect. Unlike regulations, they are not directly applicable and they require further enactment by a member state before they can take effect within its domestic law. In many cases, the European Court of Justice (ECJ) held that a directive can have direct effect but there are a lot of limits. The secondary legislation as well as treaties, then, are interpreted and clarified by the ECJ which is the EU's supreme judicial authority. It also has a great role on the European enlargement and enhancement of the rights of citizens in the EU.

The **First Chapter** of this dissertation explores the historical background of the free movement of persons as manifested in the EU. Consequently, all of the treaties and agreements before the signing of the Treaty of Maastricht will be examined one by one in brief, with particular focus on the terms they contain about the free movement of persons. These are the Treaty of Paris of 1951 , the Treaty of Rome of 1957, the Merger Treaty of 1965, the Single European Act of 1987, and the Schengen Agreement of 1985. This last agreement is essential and unique because it created a special area without border checks in Europe in the 1980s, so that it merits particular attention on the subject of free movement.

The **Second Chapter** is an analysis of the treaties of Maastricht, Amsterdam, Nice and the European Constitution. The most significant treaty is the Maastricht Treaty because it stated out the **union citizenship** for the first

time. What is more, the economic community was turned into a union. After the Maastricht Treaty, the concept of the free movement of persons was extended and the free movement of union citizens was born. Almost five years later, the Treaty of Amsterdam meant a greater emphasis on citizenship and the rights of individuals, more democracy in the shape of increased powers for the European Parliament, a new title on employment, a Community area of freedom, security and justice, the beginnings of a common foreign and security policy, and the reform of the institutions in the run up to enlargement. The articles of the treaties, especially Maastricht and Amsterdam, concerning the free movement of persons will be explored and presented in this chapter. It is a fact that the term 'citizenship' will be used in this dissertation many times in relation to the free movement of persons after 1992. As a result, that term is explained in this chapter, together with the Maastricht Treaty. In addition, the Treaty of Amsterdam introduced a new numbering system for the articles. In this dissertation, the new numbers will be used alongside old numbers especially when talking about the previous treaties. When the new numbering system is used, the old numbers will be given in parenthesis in order not to confuse readers. For instance, the significant and famous article which regulated the free movement of persons in the TEU is called **Article 8a**; but after the enactment of the Treaty of Amsterdam, it is called **Article 18 of the EC Treaty**.

The **Third Chapter** is about the definitions, scopes and limitations, including the case law. This chapter will be a conceptual study of the free movement of persons. What does it mean to be 'free' to move, and who is considered as the 'person'? These questions are discussed within the definitions of the terms, 'free movement' and 'persons'. The term 'person' includes workers (employees), self-employed persons, providers of services, students and persons who wish to travel as tourists. The situation of workers and the case-law about them are among the major subjects of inquiry in this dissertation. It is doubtless that the basis for the free movement of persons is the free movement of workers, as European integration owes a great deal of its existence to the movement of this category of people. The readers will notice that the free movement of workers issue has been given a greater proportion for analysis in comparison with that of students, self-employed people or tourists. Therefore, this chapter will present the regulations and directives about the free movement of workers in the EU. Freedom of movement of EU nationals requires that obstacles to their mobility be eliminated. As a result, there are numerous regulations and directives which seek to facilitate the free movement of EU nationals who wish to reside in a member state other than their own (employees, self-employed persons, providers of services), and students. These laws grant rights to their families and relatives as well. In summary, those regulations and directives are steps for

the development of the subject. The reason of their emergence was to fulfil the insufficient points of the treaties establishing the EC and the EU.

Chapter Four deals with the current developments about free movement of persons, especially workers. It will be very useful to have a look at relevant recent developments. I will try to show what the new member countries experienced during the transitional period. For instance, Poland can be a good case to study because it can be claimed that it is similar to Turkey in terms of the size of its agriculture and population. In this chapter, free movement of workers during the transitional period following the accession of new member states in 2004 will be analyzed in detail through various examples. One of the aims of this chapter is to explain how the transitional period after membership which has been agreed for workers will operate. The 2+3+2 regulation will be explained. The seven-year period is the key to the transitional period and Turkey is on the way to be a membership of the EU. Thus, the same conditions of the transitional period are almost sure to be applied to Turkey. As a result, the readers can understand why the transitional period is analysed in a separate chapter. Furthermore, this chapter will also raise some questions regarding the specific arrangements for the free movement of persons in the new Member States. To illustrate, the kind of questions such as "How do the transitional arrangements operate? What is covered and what is excluded in them?" are raised to clear out the issue.

The **Conclusion** is a brief overview of the subjects and discussions raised in the dissertation. In summary, this dissertation will present how the free movement of persons developed throughout the history of the EU, especially after the Maastricht Treaty, with emphasis on secondary law and current developments as reflected in the case-law, regulations, directives and the transitional arrangements with the new Member States.

CHAPTER 1

THE HISTORY OF FREE MOVEMENT OF PERSONS UNTIL THE TREATY OF MAASTRICHT (1992)

Before discussing the free movement of persons, the historical background of the European Union and the free movement concept must be examined briefly. The historical roots of the EU lie in the World War II. The idea of European integration was conceived to prevent such killing and destruction from ever happening again. It was first proposed by the French Foreign Minister Robert Schuman on 9 May 1950. This date, the 'birthday' of what is now the EU, is celebrated annually as Europe Day.¹ In a speech inspired by Jean Monnet, Schuman proposed that France and Germany and any other European country wishing to join them pool their coal and steel resources. This plan of economic integration looked for developing the approach between France and Germany, moving definitively away from the haunt of war in Europe.

Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity. The coming together of the nations Europe requires the elimination of the age-old opposition of France and Germany. (...)²

Schuman Declaration
9th May 1950

¹ The European Union at a glance, http://europa.eu.int/abc/index_en.htm (5 February 2005)

² The History of the European Union the European Citizenship, <http://www.historiasiglo20.org/europe/1945-1950> (9 February 2005)

That same year, the French government proposed the establishment of an European Defence Community (EDC). This project was aborted in 1954, when the French Legislative Assembly vetoed its application. The EDC, that implied a strong military and political integration, was substituted by the Western European Union (WEU). Since NATO and WEU overlap, it has had a minor role in European defence.

The treaties³ are the steps for the development of the EU. Chronologically, these are the Treaty of Paris (founding treaty), the Treaties of Rome (founding treaty), the Merger Treaty (amending treaty), the Single European Act (amending treaty), the Treaty of Maastricht - TEU (founding treaty), the Treaty of Amsterdam (amending treaty) and the Treaty of Nice (amending treaty). Furthermore, there is the European Constitution which is still not fully ratified. Every treaty amending each other developed and extended the scope of the EU and freedom of movement for persons as well. The treaties are the major stones used to build up the European integration since 1950s. This dissertation focuses on the free movement of persons after the TEU. Consequently this chapter will cover the treaties up to the TEU in order to show the historical background of EU and free movement of persons until 1992. Lastly, the

³ See <http://europa.eu.int/eur-lex/lex/en/treaties/index.htm> for the basic legal texts on which the European Union and the European Communities are founded. (08 April 2005)

Schengen Agreement which is a unique and significant subject about free movement, will be explored in this chapter.

Before the analysis of the treaties and historical background, a significant question needs to be explained; which is the correct term: European Union – EU or European Community – EC? They are both correct for different occasions and usage. The EU came into existence with the entry into force of the TEU in 1993. Prior to this date, the term EC or its predecessor EEC – European Economic Community should be used. The EU is used more generally to express the European identity as a whole, embracing all three pillars of the TEU. EC exists as the first and most important foundation of the EU and also it has international legal personality. Therefore, EC is still used especially in certain documents of a legal character such as official acts adopted on the basis of the Treaty establishing the European Community; all international agreements are concluded in the name of the EC rather than the EU. What is more, the Treaty of Rome was originally called the EEC Treaty but when it was amended by the TEU, its name was changed to the EC Treaty as it is used in this dissertation. As a result, when we refer to the EC Treaty, it means the Treaty of Rome (as amended). In 1967 the Merger Treaty joined together the EEC (Common Market), Euratom, and the European Coal and Steel Community as the European Community (EC). The basic significance of the TEU is that it altered

the structural system and three pillar system was established. This pillar system and all the above mentioned treaties which developed the European integration will be analysed in the following part.

1.1. The Treaties

The main goal of this chapter is to present the background of the EU and free movement of persons by analyzing the treaties briefly. Not only their importance about the free movement of persons but also the major points of them will be highlighted in order to let the readers have an idea about the historical development of the European integration process.

The first step is the **Treaty of Paris** which was signed on April 18, 1951 between Belgium, France, West Germany, Italy, Luxembourg, and the Netherlands. This treaty established the **European Coal and Steel Community** (ECSC), which subsequently became part of the European Union. The treaty expired on 23 July 2002, exactly fifty years after it came into effect.⁴ For the first time, a group of states agreed to work towards integration. The Treaty made it possible to lay the foundations of the Community. A Parliamentary Assembly, a Council of Ministers, a Court of Justice and a Consultative Committee was established by this treaty. The main points of this treaty were the free movement of products and free access to sources of

⁴ Treaty of Paris, [http://encyclopedia.lockergnome.com/s/b/Treaty_of_Paris_\(1951\)](http://encyclopedia.lockergnome.com/s/b/Treaty_of_Paris_(1951)) (5 February 2005)

production; permanent monitoring of the market to avoid distortions which could lead to the introduction of production quotas; respect for the rules of competition and price transparency; support for modernization and conversion of the coal and steel sectors.⁵

The EU, formerly called European Economic Community (EEC) or European Common Market, came into existence on March 25, 1957 at the conclusion of the **Treaty of Rome** or **EEC Treaty** or latterly called **EC Treaty**. The main objective of this Treaty was to promote a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of standard of living and closer relations between the states belonging to it. After ECSC, the six founding member states attempted to further their integration by signing two treaties. The Treaty of Rome refers to the treaty which established the **European Economic Community (EEC)** and was signed by France, West Germany, Italy, Belgium, the Netherlands and Luxembourg on March 25, 1957. Its original full name was **Treaty establishing the European Economic Community (TEC)***; however the Treaty of Maastricht amended it and among other things removed the word 'economic' from the name of both the community and the treaty. The treaty of Rome is therefore now generally called the Treaty establishing the European

⁵ European Parliament Fact Sheets, The First Treaties
http://www.europarl.eu.int/facts/1_1_1_en.htm (10 April 2005)

* TEC is used rarely. Treaty of Rome or EC Treaty are used in common.

Community or the EC Treaty. Another treaty was signed the same day establishing the **European Atomic Energy Community (Euratom)**. Their conjunction is known as the **Treaties of Rome** and both came into force on 1 January 1958.⁶ In the articles of the Treaties of Rome, the free movement of persons is stated for the first time. It has since been amended by the Treaty of Maastricht and Amsterdam. In contrast to the restricted scope of the Treaty of Paris, the Treaty of Rome aimed to establish a common market within Europe⁷ based on four basic freedoms: **Free movement of persons, free movement of goods and services, free movement of capital and free movement of labour**. Those freedoms were, as a rule, unconditional as from the end of the so-called transitional period. This meant that an individual or a corporation could avail itself directly before a national court of the benefit of these freedoms if faced with a national law or regulation which restricted the full exercise of the same. In the third title of Treaty of Rome (Free movement of persons, services and capital), under Article 48 free movement of persons with particular focus on the workers is mentioned. That article will be analysed in the third chapter.

In 1960s, another treaty came into force, **the Merger Treaty**, also known as the Treaty of Brussels. It was signed in Brussels on 8 April 1965, and entered into force from 1 July 1967. It consolidated the organizational structures of the

⁶ Treaty of Rome, http://encyclopedia.lockergnome.com/s/b/Treaty_of_Rome (5 February 2005)

⁷ Jorge Juan Fernandez Garcia, Jess E. Clayton and Chirstopher Hobley, *The Student's Guide to European Integration*, Great Britain, Polity Press, 2004, p.15.

three European Communities (the European Coal and Steel Community, Euratom and the European Economic Community). It created the European Commission and the Council of the European Communities to be the governing bodies for all three institutions, and it also had them share a single budget.⁸ There is a particular significance of this treaty since it is regarded by some as the real beginning of the modern European Union. The term **European Communities** or EC also came into use from this time onward.

There was a tremendous amount of discontent among European Community members in the 1980s. Leaders from the business and political worlds were eager to harmonize laws between countries and resolve policy discrepancies. A commission formed to analyze whether a common market was possible in Europe, and further, what steps would need to be taken to achieve that goal. The commission put forth the proposals that became the **Single European Act (SEA)**, which was the first major revision of the Treaty of Rome. The goal of that act was to remove remaining barriers between countries, increase harmonization so that it would increase the competitiveness of European countries. What is more, it changed the title of the Communities from the EEC to the EC.⁹

The SEA was signed at Luxembourg on February 17, 1986, and at The Hague on February 28, 1986. It went into effect on July 1, 1987, under the

⁸ Merger Treaty, http://www.bbcity.co.uk/rd/lawwiki/index.php/Merger_Treaty (10 March 2005)

⁹ Garcia, Clayton and Hopley, *op.cit.*, p. 21.

Delors Commission. This act was the first modification of the foundational treaties of the European Communities, that is to say, the Treaty of Paris of 1951 and the Treaties of Rome of 1957. The Article 8A clearly defines the objective of the Act, which is to progressively establish the internal market over a period expiring on 31 December 1992. The SEA defined the Single Market as “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”.¹⁰ The SEA provided for the transformation of the Common Market into a Single Market on 1 January 1993. Also, the SEA opened the way to political integration and economic and monetary union to be enshrined in the Treaty of Maastricht on the European Union by creating new Community competencies and reforming the institutions.¹¹

In the beginning of 1990s, **Treaty of Maastricht** played a crucial role in the development of the EU. This treaty is definitely a significant milestone for the free movement of persons. Being formally known as the Treaty on European Union (TEU) or The Treaty of the European Union, it introduced for the first time a systematic concept of **citizenship** and it constituted a turning point in the European integration process. By modifying the previous treaties – Paris, Rome and Single European Act-, the initial economic objective of the

¹⁰ The Single European Act, http://europa.eu.int/scadplus/treaties/singleact_en.htm (15 March 2005)

¹¹ Ibid.

Community, building a common market, was outstripped and, for the first time, a social and political union was proclaimed. The TEU changed the official denomination of the EEC. Henceforth, it would be known as **European Union**. The term 'union' is used from the very beginning of this treaty to clearly convey the advancement in a historical project. The Article 2 of the TEU affirmed that 'This Treaty marks a new stage in the process of creating an ever close union among the peoples of Europe...'¹²

The Treaty was signed on February 7, 1992 at Maastricht in the Netherlands. It is the place where the final negotiations had taken place during December 1991. The treaty entered into force on November 1, 1993 and has been amended to a degree by later treaties of Amsterdam and Nice.¹³ The structure of the Maastricht Treaty is complicated. The preamble is followed by seven titles. Title I has the provisions shared by the Communities, common foreign policy and judicial cooperation. In title II, there are the amendments to the EEC Treaty, while Titles III and IV amend the ECSC and EAEC Treaties respectively. Title V introduces provisions concerning common foreign and security policy (CFSP) and title VI contains provisions on cooperation in the fields of justice and home affairs (JHA). The final provisions are set out in Title VII. TEU led to the creation of the **Euro (€)**, and introduced the three pillar structure (the

¹² The history of the EU - The European Citizenship, <http://www.historiasiglo20.org/europe/maastricht.htm#TUE> (29 March 2005)

¹³ Maastricht Treaty, http://en.wikipedia.org/w/index.php?title=Maastricht_Treaty&redirect=no (11 March 2005)

Community pillar, the Common Foreign and Security Policy or CFSP pillar, and the Justice and Home Affairs pillar or JHA). The central pillar is the Community Pillar, in other words the EC Treaty (as amended) which created the EEC. The free movement of persons is included in this first pillar, the Community. What is more, the CFSP pillar was built on the foundation of European Political Cooperation, but brought it under a treaty and extended it. Lastly, the JHA pillar introduced cooperation in law enforcement, criminal justice, civil judicial matters, and asylum and immigration. These pillars are the key points of the TEU. Ratification of the treaty was fraught with difficulties in various states. For instance, a referendum in France only narrowly supported it, with 51.05% in favour. In Denmark, the original treaty was rejected. In the United Kingdom, ratification was done by Parliament, where the 'Maastricht Rebels' nearly defeated John Major's government's policy on the matter. Some believed that, if ratification were to be rejected, this would have brought down the government.¹⁴ TEU represents a key stage in European construction. By establishing the European Union, by creating an economic and monetary union and by extending European integration to new areas, the Community has acquired a political dimension. One of the major innovations established by TEU is the creation of European citizenship over and above national citizenship. The **union citizenship** and the right of freedom of movement for the citizens will

¹⁴ Ibid.

be studied with a presentation of the Articles of the TEU in the second chapter of this dissertation.

There are two more treaties to be examined in the second chapter. The Treaty of Amsterdam which was signed in 1997, amended and renumbered the EC and the EU Treaties. In 2001, the Treaty of Nice was signed and in this treaty, the former Treaty of the EU and the EC have been merged into one consolidated version.

1.2. The Schengen Agreement

In addition to the treaties establishing the EC and EU, another important milestone about the free movement of persons was the Schengen Agreement which was not a revision of the previous treaties but a treaty signed for the **gradual abolition of border controls** among the Member States which signed it. In this chapter, the Schengen Agreement is examined separately under a subtitle because it is not a treaty establishing the EU as it is mentioned above, and when it was first signed, it did not cover all the European countries but only the ones which signed the agreement. The Schengen Agreement laid down the arrangements and guarantees for implementing freedom of movement. It is related to free movement of persons in a serious way. That is why it needs to be explored in this chapter in which the historical background of free movement of persons is studied.

Some Member States felt that free movement of persons should apply to the citizens of the EEC only. It would involve keeping internal border checks in order to distinguish between citizens of the EEC and non-EEC nationals. The Member States argued in favour of free movement for everyone, which would mean an end to internal border checks. While some Member States found it impossible to reach an agreement, France, Germany and the Benelux countries (Belgium, Luxembourg and the Netherlands) decided in 1985 to set up a zone without internal borders which would be known as the '**Schengen Area**'.¹⁵ Formally, the Schengen Treaty is an agreement originally signed on June 14, 1985 by five European countries mentioned above. It was signed aboard the ship Princesse Marie-Astrid on the Moselle River near Schengen which is a small town in Luxembourg on the border with France and Germany.¹⁶ The main goal of the agreement was, as it was mentioned above, to end border check points and controls within the Schengen Area (also known as Schengenland or Schengen zone) and harmonize external border controls. It was originally separate from the EC, but has since become an EU competence.

On 19 June 1990 the Convention Implementing the Schengen Agreement was signed on 19 June 1990 and entered into force on 1 September 1993. It

¹⁵ The Schengen aquis and its integration to the Union, http://www.euroseptic.com/sources_of_information/articles/The_Schengen_acquis.htm (15 March 2005)

¹⁶ Schengen Treaty, http://en.wikipedia.org/wiki/Schengen_treaty (9 March 2005)

was concerned with "harmonizing provisions relating to entry into and short stays in the Schengen area by non-EU citizens (uniform Schengen visa); asylum matters (determining in which Member State an application for asylum may be submitted); measures to combat cross-border drugs-related crime; police cooperation (hot pursuit); cooperation among Schengen states on judicial matters."¹⁷ Additional countries have since also signed the convention, making the total number of signatories twenty-six. For each member country there has been a delay between signing the treaty i.e., becoming a member and actually implementing it. The Convention thus took practical effect on 26 March 1995 for the original Parties to the Schengen Agreement as well as for Spain and Portugal. Since 1995 Italy, Greece, Austria, Denmark, Finland and Sweden have acceded to the Convention, which only entered into force for the three Nordic countries on 25 March 2001. A Schengen cooperation agreement was concluded with the non-EU members of the Nordic Passport Union (Norway and Iceland) in 1996. Norway and Iceland have also fully implemented the Schengen regime since 25 March 2001.

After describing the agreement, the conditions of the free movement need to be explained. For instance, once checks at common borders are completely abolished, the holder of a uniform visa is entitled to stay in the countries which

¹⁷ The Schengen Agreement and the Convention Implementing the Schengen Agreement, <http://www.auswaertiges-amt.de/www/en/willkommen/einreisebestimmungen/1> (9 March 2005)

apply the Convention Implementing the Schengen Agreement for a maximum of up to 90 days per six month period during the visa's period of validity.¹⁸ In brief, the main key point which is related to the free movement of persons can be stated as the citizens of countries implementing the Schengen Agreement can cross the internal borders of the implementing countries at any point without checks. The visa, with no territorial restrictions is granted to a third country national by one implementing country which entitles the holder, for the same purpose and for the duration of the visa's validity, to enter without border checks to into other implementing countries as well. However, there are some restrictions. For instance, asylum-seekers are not entitled to travel freely between the Schengen countries and the rules concerning settling and working in another country are not covered by the Schengen Agreement. In connection with the freedom for movement of persons, the Schengen system which was originally developed outside the EU as mentioned, was integrated into the European Union's policies with the Treaty of Amsterdam in 1997. The aim was to facilitate movement of persons within the EU borders, while at the same time maintaining border controls at the external borders. As from 1 May 1999, the Schengen Protocol to the Treaty of Amsterdam incorporated Schengen cooperation into the framework of the EU.¹⁹ The EC thus acquired competence for large areas of the Schengen acquis as well as its further development. For

¹⁸ Ibid.

¹⁹ <http://www.auswaertiges-amt.de/www/en/willkommen/einreisebestimmungen/1> op.cit

EU citizens and third country nationals living in the EU, the Schengen Agreement has resulted in substantially increased freedom of travel and improved safety within the Schengen countries and at their external border. There is something extraordinary about the Schengen zone. This is the **Schengen Information System (SIS)**, an automatic network which was set up at the heart of the Schengen mechanism. It is a very beneficial system that allows all police stations and consular agents from Schengen group Member States to access data on specific individuals or vehicles and objects that are lost or stolen.²⁰

At this point, participation of Ireland and the United Kingdom to the Schengen area needs to be examined briefly. In accordance with the protocol to the Treaty of Amsterdam, Ireland and the United Kingdom can take part in all or part of the Schengen arrangements if the thirteen Schengen group Member States and the government representative of the country in question vote unanimously in favour within the Council. In March 1999 the United Kingdom asked to take part in some aspects of Schengen. These aspects were the police and legal cooperation in criminal matters, the fight against drugs and the SIS. A Council Decision approving the request of the United Kingdom was reached on

²⁰ Free movement of people within the Schengen zone, http://www.oasis.gov.ie/moving_country/moving_abroad/schengen_agreement.html (20 April 2005)

the 29 May 2000. It was a bit late because of the dispute between Spain and the United Kingdom regarding Gibraltar and that conflict delayed the process of the UK to enter the Schengen area.²¹ Ireland asked to take part in some aspects of Schengen by letters to the President of the Council of the European Union on 16 June 2000 and 1 November 2001. The Commission and Council issued their opinion which emphasized that Ireland's partial participation should not undermine the overall consistency of the Schengen provisions. Ireland asked inter alia to take part in all the provisions concerning the implementation and operation of the SIS. On 28 February 2002 the Council adopted a decision on Ireland's request which came into force on 1 April 2002. Ireland is party to the Schengen Agreement, but not for visa purposes which means that Irish nationals will be required to bring their passports with them when they travel within the Schengen area.²²

In summary, it can be asserted that the Schengen Agreement was a major and unique step for the development of free movement of persons in the EC. The significance of Schengen comes from the fact that it created a specific area where the nationals of the participating EC Member States have the right to move among those states without any border control.

²¹ The Schengen acquis and its integration into the Union,
<http://europa.eu.int/scadplus/leg/en/lvb/l33020.htm> (12 May 2005)

²² http://www.oasis.gov.ie/moving_country/moving_abroad/schengen_agreement.html, op.cit.

CHAPTER 2

TREATIES OF THE EU SINCE 1992 WITH REGARD TO THE FREE MOVEMENT OF PERSONS

The treaties of Maastricht, Amsterdam and Nice consolidated the Treaty of Rome (The Treaty establishing the European Economic Community) as well as one another. Consequently, they are the major steps for the enlargement of the EU and the development of the free movement of persons. The European Constitution is the last treaty but it has not come into force yet. The TEU is the locus of analysis for the free movement of persons in this dissertation. It can not be denied that it is a very important treaty which changed the EC by introducing new subjects. The most significant one concerning the free movement of persons can be stated as the establishment of **union citizenship**.

2.1. The Treaty of Maastricht (The Treaty on European Union)

Below is the Article 8a of TEU (is called as Article 18 of the EC Treaty after Treaty of Amsterdam), laying down that every citizen has the right of freedom for movement in the EU.

Article 8a

1. 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. (emphasis mine)
2. The Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1; save as otherwise provided in this Treaty, the

Council shall act unanimously on a proposal from the Commission and after obtaining the assent of the European Parliament.²³

The main idea of the free movement is to give a right to enter, leave and stay in every Member state and also perform economic activity there. The free movement has great importance for the economic, social and political development of the Union. A person who is a citizen has the right to enter, travel around and leave his country. A union citizen has similar rights in the EU. This is a good example of the extra rights granted by the TEU to the nationals of the Member States. It is clear that the Union citizenship, which is established by the TEU, is an additional status for the state citizenship of a person in the EU.²⁴ Every person who is a Union Citizen (both economically active and economically inactive) can claim the right to free movement based on Article 18.

TEU placed asylum policy, the crossing of the Union's external borders and immigration policy among the matters of common interest to the Member States. This treaty clearly determined that every person being a union citizen can move freely within the Member States. This is the key point of TEU. However, there are some limitations and conditions which were first declared by the Treaty of Rome. It means these are not unlimited rights, and the exceptions to the rights of free movement regarding public policy, public security and public health continue to apply to those already covered under Articles 39-55 (ex

²³ Treaty on European Union, <http://europa.eu.int/en/record/mt/title2.html> (04 April 2005)

²⁴ Ercüment Tezcan, *Avrupa Birliği Hukuku'nda Birey*, İstanbul: İletişim Yayınları, 2002, p.27.

Article 48). Article 48 and the restrictions to the free movement on grounds of public health and security will be examined in the next chapter.

The major issue regarding the free movement of persons in the TEU is the establishment of a union citizenship. In fact, citizenship was not a policy innovation of the TEU. The concept of European citizenship was considered from a very early stage in the development of the Communities. The free movement provisions of the EEC Treaty, and in particular those concerning the free movement of workers, were seen as being the first steps in creating 'an incipient form of European citizenship'. The contribution of the Treaty of Maastricht was, of course, the introduction of the formal provisions on citizenship in the Community ambit through Articles 17 to 22 (ex Article 8). The relevant articles of the TEU are the following:

CITIZENSHIP OF THE UNION

Article 8

1. Citizenship of the Union is hereby established.

Every person holding the nationality of a Member State shall be a citizen of the Union. (emphasis mine)

2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.²⁵

It is understood from the TEU that a Union citizen can be simply defined as any person having the nationality of a Member State. Also, the family members of a citizen are important in the analysis of free movement of workers. This issue will be studied in the next chapter. Union citizens can enjoy a series of

²⁵ Treaty on European Union, http://europa.eu.int/eur-lex/en/treaties/dat/EU_treaty.html (01 April 2005)

general rights in various areas such as the free movement of goods and services, consumer protection and public health, equal opportunities and treatment, access to jobs and social protection. There are four categories of specific provisions and rights attached to citizenship of the EU: freedom of movement and residence throughout the Union; the right to vote and stand as a candidate in municipal elections and in elections to the European Parliament in the state where he/she resides; protection by the diplomatic and consular authorities of any Member State where the State of which the person is a national is not represented in a non-member country; the right to petition the European Parliament and apply to the Ombudsman. Below, the related articles of the TEU are given:

Article 8b

1. Every citizen of the Union residing in a Member State of which he is not a national shall have the **right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State**. This right shall be exercised subject to detailed arrangements to be adopted before 31 December 1994 by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State. (emphasis mine)

2. Without prejudice to Article 138(3) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements to be adopted before 31 December 1993 by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

Article 8c

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Before 31 December 1993, Member States shall establish the necessary rules among themselves and start the international negotiations required to secure this protection.

Article 8d

Every citizen of the Union shall have the **right to petition** the European Parliament in accordance with Article 138d.

Every citizen of the Union may apply to the **Ombudsman** established in accordance with Article 138e.²⁶

These two last rights above, the petition right to the Parliament and application to the Ombudsman, can also be applied to every person who is a resident in the Member States even if that person is not a national of the Member State. EU citizenship is in fact a rather limited concept. It gives some additional rights and protection but does not in anyway take the place of national citizenship.²⁷ One of the latest developments about free movement of persons including the Union citizenship, will be presented at the end of this chapter.

2.2. The Treaty of Amsterdam

The Treaty of Amsterdam is one of the most important recent developments in the EU. On 17 June 1997 the leaders of every Member State of the European Union agreed on **a new treaty for Europe**. This treaty amending the TEU, the

²⁶ Ibid.

²⁷ Dominick McGoldrick, *International Relations Law of the European Union*, Great Britain: Longman, 1997, p. 179.

Treaties establishing the European Communities and certain related acts, commonly known as the Treaty of Amsterdam, was signed on October 2, 1997, and entered into force on May 1, 1999. This new treaty made substantial changes to the TEU.²⁸ There are quotations presented below in order to show the major aims and effects of this treaty which is generally called as the New Treaty for Europe. These are what the President of the European Commission, Jacques Santer stated in the preface of the treaty: "The Treaty of Amsterdam establishes a more democratic Europe, a Europe that addresses social needs. It also makes clear progress on matters relating to the Union's foreign policy and the **free movement of its citizens...**"²⁹ (emphasis mine)

This Treaty is for you. It lays the foundations for the Europe we want to build in the twenty-first century. It sets out the rules of the game Governments will have to observe and it establishes rights for all the citizens... This is what the booklet "Amsterdam, a new Treaty for Europe" is about."...A lot has been done since then. In 1957, the Treaty of Rome set up the European Economic Community. In 1987, the Single Act gave fresh impetus to the internal market, after which the Maastricht Treaty of 1991 paved the way for Economic and Monetary Union. It also introduced the pillar of European foreign policy and the desire to create an area of free movement in safety...³⁰

Jacques SANTER,
President of the European Commission

As it is mentioned in the preface by J. Santer, Treaty of Amsterdam was a significant step for the development of free movement of persons in the EU, in other words; for the citizens of the EU. This treaty consolidated each of the

²⁸ Treaty of Amsterdam, <http://www.answers.com/amsterdam%20treaty> (17 March 2005)

²⁹ Amsterdam: A new treaty for Europe, <http://europa.eu.int/en/agenda/igc-home/intro/preface/en.htm> (15 April 2005)

³⁰ Ibid.

three great pillars which have been the foundation for the Union's work since the TEU, primarily by bringing part of the Justice and Home Affairs pillar into the Community pillar and redefining the scope of the previous third pillar.

The Treaty of Amsterdam had four main objectives. First, placing employment and citizens' rights at the heart of the Union. Another one is sweeping away the last remaining obstacles to freedom of movement and to strengthen security. Thirdly, it aimed to give the EU a stronger voice in world affairs. The last objective was to make the Union's institutional structure more efficient with a view to enlarge the Union with new Member States.³¹ As a result, when the main amendments of Treaty of Amsterdam is analysed, it is noted that four key chapters are affected. In brief, they can be listed as: citizenship and fundamental rights; the establishment of an area of freedom, security and justice; the CFSP; and the reform of the institutions.³²

The Treaty of Amsterdam completed the list of civic rights of Union citizens and clarified the link between national citizenship and European citizenship. Some amendments have been made to Articles 17 and 21 (ex-Articles 8 and 8(d)) of the EC Treaty, which define the European citizenship. The treaty clearly and unequivocally stated that 'citizenship of the Union shall complement and not replace national citizenship.' It can be concluded that, first of all, in order to

³¹ The four major objectives of the new Treaty for Europe, <http://europa.eu.int/en/agenda/igc-home/intro/intro/en.htm> (20 April 2005)

³² Treaty of Amsterdam, http://en.wikipedia.org/wiki/Amsterdam_Treaty (17 March 2005)

enjoy citizenship of the Union, it is necessary to be a national of a Member State. (This was also mentioned in the Maastricht Treaty which established the Union citizenship). Secondly, European Citizenship will supplement and complement the rights which are conferred by national citizenship.³³ Furthermore, Treaty of Amsterdam established a new right for the European Citizens. After this treaty, every person being a union citizen can write to the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee, the Committee of the Regions or the Ombudsman in one of the twelve languages of the Treaties and receive an answer in the same language.³⁴ In order to remind, those languages are Danish, Dutch, English, Finnish, French, German, Greek, Irish (Gaelic), Italian, Portuguese, Spanish and Swedish.³⁵

Moreover, there is another significant point about the Treaty of Amsterdam. It introduced a **new numbering system** for both the overall Treaty and Title II, the Treaty establishing the European Community. The articles of the previous treaties were renumbered in the process of simplification and consolidation. The new numbering system was mentioned before.

³³ The Treaty of Amsterdam: a Comprehensive Guide - Citizenship of the European Union, <http://europa.eu.int/scadplus/leg/en/lvb/a12000.htm#a12003> (17 February 2005)

³⁴ Ibid.

³⁵ Ibid.

For the free movement of persons, a new title has been added to the EC Treaty (new Articles 61-69) incorporating areas which were previously part of the third (JHA) pillar of the TEU. This new title covers visas, asylum, immigration and judicial co-operation in civil matters.³⁶ In brief, it can be stated that the aim of this new title was to establish an area of freedom, justice and security in the EU as declared by Jacques Santer. Below are the articles of Treaty of Amsterdam under title IV concerning the free movement:

TITLE IV (ex Title IIIa)

VISAS, ASYLUM, IMMIGRATION AND OTHER POLICIES RELATED TO FREE MOVEMENT OF PERSONS

Article 61 (ex Article 73i)

In order to establish progressively **an area of freedom, security and justice**, the Council shall adopt:

(a) within a period of five years after the entry into force of the Treaty of Amsterdam, measures aimed at ensuring the **free movement of persons** in accordance with Article 14, in conjunction with directly related flanking measures with respect to **external border controls, asylum and immigration**, in accordance with the provisions of Article 62(2) and (3) and Article 63(1)(a) and (2)(a), and measures to prevent and combat crime in accordance with the provisions of Article 31(e) of the Treaty on European Union;

(b) other measures in the fields of asylum, immigration and safeguarding the rights of nationals of third countries, in accordance with the provisions of Article 63;

...

(emphasis mine)

Article 62 (ex Article 73j)

The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

³⁶ Ibid.

(1) measures with a view to ensuring, in compliance with Article 14, the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders;

(2) measures on the crossing of the external borders of the Member States which shall establish:

(a) standards and procedures to be followed by Member States in carrying out checks on persons at such borders;

(b) rules on visas for intended stays of no more than three months, including:

(i) the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement;

(ii) the procedures and conditions for issuing visas by Member States;

(iii) a uniform format for visas;

(iv) rules on a uniform visa;

(3) measures setting out the conditions under which nationals of third countries shall have the freedom to travel within the territory of the Member States during a period of no more than three months.³⁷

Finally, the Treaty of Amsterdam annexed the Schengen acquis into the EU, as it is mentioned in the analysis of the Schengen Agreement, in the first chapter of this dissertation. Below is an excerpt from the original text of the **protocol integrating the Schengen acquis** into the framework of the European Union:

THE HIGH CONTRACTING PARTIES,

NOTING that the Agreements on the gradual abolition of checks at common borders signed by some Member States of the European Union in Schengen on 14 June 1985 and on 19 June 1990, as well as related agreements and the rules adopted on the basis of these agreements, are aimed at enhancing European integration and, in particular, at enabling the European Union to develop more rapidly into an area of freedom, security and justice,

³⁷ *The Rome, Maastricht,, Amsterdam and Nice Treaties Comparative Texts*, 2003, Cornwall: Europa Publications Taylor&Francis Group, pp. 56-57.

DESIRING to incorporate the abovementioned agreements and rules into the framework of the European Union,
CONFIRMING that the provisions of the Schengen acquis are applicable only if and as far as they are compatible with the European Union and Community law,
TAKING INTO ACCOUNT the special position of Denmark,
TAKING INTO ACCOUNT the fact that Ireland and the United Kingdom of Great Britain and Northern Ireland are not parties to and have not signed the abovementioned agreements; that provision should, however, be made to allow those Member States to accept some or all of the provisions thereof,
RECOGNISING that, as a consequence, it is necessary to make use of the provisions of the Treaty on European Union and of the Treaty establishing the European Community concerning closer cooperation between some Member States and that those provisions should only be used as a last resort,
TAKING INTO ACCOUNT the need to maintain a special relationship with the Republic of Iceland and the Kingdom of Norway, both States having confirmed their intention to become bound by the provisions mentioned above, on the basis of the Agreement signed in Luxembourg on 19 December 1996,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty establishing the European Community, ...³⁸

2.3. The Treaty of Nice

Below is the description of the structure of Treaty of Nice by Vaughne Miller who prepared a research paper about that treaty for the Library of House of Commons of the English Parliament in 2001, before the treaty came into force.

“The full title of the Treaty of Nice is the Treaty of Nice amending the Treaty on European Union, the Treaties Establishing the European Communities and certain related Acts. The Treaty was published in the Official Journal of the European Communities and as Command Paper 5090 in the UK in March 2001. Nice is an amending and not a primary Treaty: that is to say, it consists of

³⁸ Ibid., p.213.

amendments to the existing EC Treaty that will, after ratification, be incorporated into the latter. The Treaty is divided into two parts containing substantive amendments in the first part and transitional and final provisions in the second. There are around 90 amendments in all to the Treaty Establishing the European Community and the TEU, and more if the ECSC and the Euratom Treaties are taken into account.”³⁹

The Treaty of Nice is a treaty adopted in Nice by the European Council to amend the two founding treaties of the European Union as said in the research paper above. Treaty of Nice was signed on 26 February 2001 and came into force on February 1, 2003.⁴⁰ The principal issues debated at Nice can be stated as the 'left-overs' from the Treaty of Amsterdam concerning the changes needed to the institutions of the Community for enlargement of the EU. To illustrate, the size and composition of the Commission, the re-weighting of votes in the Council of Ministers and the possible extension of qualified majority voting. One of the main issues was the change in the weighting of the votes in the Council to more accurately reflect the size of population of each Member State. What Treaty of Nice has developed is the interests of the Union and also it increased the role of the Community in several ways including the introduction

³⁹ The Treaty of Nice and the Future of Europe Debate, <http://www.parliament.uk/commons/lib/research/rp2001/rp01-049.pdf> , 1 May 2001 (02 June 2005)

⁴⁰ Treaty of Nice, http://en.wikipedia.org/wiki/Treaty_of_Nice (12 April 2005)

of the Eurojust system, the development of enhanced co-operation, and the extension of qualified majority voting in thirty-nine areas.⁴¹

Moreover, under the Treaty of Nice, visa, asylum and immigration (these subjects were discussed during the analysis of Treaty of Amsterdam in this dissertation) policies were to be decided by the co-decision procedure. The shift to qualified majority voting is provided for under Article 63 of the EC Treaty for matters concerning asylum and temporary protection, but subject to prior unanimous adoption of common framework legislation on asylum.⁴² At the end of the statement signed by the heads of state and government, the shift to qualified majority voting and co-decision took place on 1 May 2004 (without the need for a unanimous decision) for Article 62 of the EC Treaty, for measures setting out the conditions for free circulation of non-Member State nationals legally resident on EU territory, for Article 63 of the EC Treaty, for illegal immigration and the repatriation of illegally resident persons.⁴³

In summary, this new treaty amended the Treaty of Amsterdam provisions on the EU Institutions in order to prepare the Union for enlargement. It also increased the number of treaty articles that would be subject to Qualified

⁴¹ British Management Data Foundation, <http://www.bmdf.co.uk/nicekey.html> (25 May 2005)

⁴² Free movement of persons: introduction, <http://europa.eu.int/scadplus/leg/en/lvb/l14001.htm> (07 March 2005)

⁴³ Ibid.

Majority Voting rather than unanimity, and amended provisions on closer cooperation and a range of other Articles. The Treaty of Nice aimed to amend the EC Treaties in two main respects. The First one is fulfilling the requirements of Treaty of Amsterdam by introducing new institutional and decision-making arrangements to prepare the enlargement of the EU up to 27 member states. The other one is amending the existing institutional arrangements where there have been perceived weakness. The institutional changes required by Treaty of Amsterdam, the 'Amsterdam leftovers', concerned the size of the Commission, the weighting of votes in the Council of Ministers and the extension of Qualified Majority Voting (QMV). Other institutional issues, such as the future distribution of seats in the EP, also needed clarification.⁴⁴ The Treaty provided for an increase after enlargement of the number of seats in the European Parliament to 732, which exceeded the cap established by the Treaty of Amsterdam. The question of a reduction in the size of the European Commission after enlargement was resolved by a fudge, the Treaty providing that once the number of Member States reached 25, the number of Commissioners would be reduced by the Council to below 25, but without actually specifying the target of that reduction.

⁴⁴ <http://www.parliament.uk/commons/lib/research/rp2001/rp01-049.pdf>, op.cit.

Furthermore, this treaty provided for the creation of subsidiary courts below the European Court of Justice and the Court of First Instance⁴⁵ to deal with special areas of law such as patents.⁴⁶ There was some disappointment about the Treaty that the package of measures being moved to QMV is considerably smaller than the one contained in the preparatory lists. Some have argued that the Treaty of Nice fails to simplify an already complex situation in the Treaty of Amsterdam concerning the free movement of persons, asylum and immigration. Below, the Articles which were moved to co-decision or QMV by the Treaty of Nice are presented:

Article 13 § 2 TEC: combating discrimination: incentive measures (co-decision).

Article 18 § 2 TEC: citizenship, the right to move and reside within the Union (normal co-decision; Suppression of unanimity as set out in the Treaty of Amsterdam). Does not cover the provisions on passports, residence permits or similar documents, nor the provisions concerning social protection or social security.

Article 24 TEU (new wording): conclusion of international agreements if QMV is foreseen (Common Foreign and Security Policy: implementation of a joint action or common position) and in police and judicial co-operation (no role for the European Parliament). Unlike the arrangements under the Treaty of Amsterdam, these agreements are binding on the institutions and could transform the EU, which at present has a legal "mini-personality", into a fully-fledged legal entity.

Article 67 TEC: Visas, asylum and other policies linked to the free movement of persons (Title VI of the TEC): various provisions move from unanimity to QMV or co-decision :

⁴⁵ The Court of First Instance, created in 1988, is a court of the European Union. It hears employment disputes brought by employees of the EU, and other matters (such as disputes brought by those refused a trade mark by OHIM, the EU Trade Mark and designs registry). Appeals are sent to the European Court of Justice,
http://en.wikipedia.org/wiki/Court_of_First_Instance

⁴⁶ http://en.wikipedia.org/wiki/Treaty_of_Nice, op.cit

Article 62.2.a)TEC: checks on persons at external borders. When? Once an agreement has been reached on the scope of measures concerning the crossing by persons of the external borders of the EU Member States.

Article 62.3 TEC: conditions governing the free movement of nationals of third countries (by co-decision). When? As from 1 May 2004.⁴⁷

2.4. European Constitution

For the first half-century of the history of the European Union, its constitutional law was the result of successive treaties, the most important among these being the Treaty of Rome and the Maastricht Treaty, as they have already been examined in detail in this dissertation. When the structure of the Constitution is analysed, it can be seen that it is based on those two primary existing treaties as they were both modified by the more recent treaties of Amsterdam (1997) and Nice (2001). The Constitutional treaty of 2004 is in large part a consolidation of these treaties of the EU. Formally, **the Treaty establishing a Constitution for Europe**⁴⁸, commonly referred to as the European Constitution, is an international treaty signed in 2004 and currently awaiting ratification, intended to create a constitution for the EU.⁴⁹

Towards the end of the 20th century, it was clear for most of the European leaders that the EU required a re-foundation and renovation. Consequently, from

⁴⁷ Treaty of Nice Analysis and Preliminary Comments, December 2000
<http://www.ciginfo.net/CIGinfo/files/igcinfo5en.doc> (17 May 2005)

⁴⁸ See for detailed information: http://europa.eu.int/constitution/index_en.htm

⁴⁹ European Constitution,
http://en.wikipedia.org/wiki/Treaty_establishing_a_Constitution_for_Europe (12 April 2005)

an initial agenda that included the distribution of competencies, simplification and the incorporation of the Charter of Fundamental Rights, the Convention on the future of Europe produced a proposal for a Constitution or Constitutional Treaty for Europe. The negotiation and final approval of this document were led by Italian and Irish Presidencies. The Heads of State or Government of the 25 Member States and the 3 candidate countries signed the treaty establishing a Constitution for Europe on 29 October 2004.⁵⁰ It needs to be ratified by all 25 member states of the enlarged Union; but nowadays there is a conflict about it.

The need to review the EU's constitutional framework, particularly in light of the impending accession of ten new member states in 2004, was highlighted in a declaration annexed to the Treaty of Nice. The agreements at Nice had paved the way for further enlargement of the Union by reforming voting procedures, but the treaty was widely regarded as not having gone far enough. The opportunity was taken to declare that after Nice, the possibility of simplifying and consolidating the existing treaties should be looked into.

It is generally accepted that the debate on the future of Europe, especially for a constitution, began in 2000, with the speech of Joschka Fischer who was German Foreign Minister. He called for a debate on the finality of the integration. This process started after the Laeken Declaration in December

⁵⁰ The European Constitution, http://www.unizar.es/euroconstitucion/Treaties/Treaty_Const.htm (20 June 2005)

2001, when the European Convention was established to produce a draft of the Constitution, which was eventually published in July 2003. After the negotiations in which disputes arose over the proposed framework for qualified majority voting, the final text of the proposed Constitution was agreed upon in June 2004. There may be a debate about what happened in 2005. Following rejection of the constitution in referendum in France and the Netherlands, the future of the constitution and the implementation of its provisions is highly uncertain.

The rejection of the Constitution needs to be briefly discussed. 57 percent of French voters rejected the constitution, in a referendum held on 29 May 2005, while only 43 percent supported the proposal. Since the European Union's constitution cannot go into force without the backing of all member states, and the French government has been one of the main pillars for greater European integration, the momentum for a more integrated Europe has suddenly been stopped. It is a fact that the EU Constitution can not come into effect unless it is ratified by all 25 EU members, so the future of ratification of the constitution is uncertain.

2.5. Latest Developments

Free movement for Union citizens is transformed into fundamental right by virtue of Article 18 EC. In particular, the case-law has created more extensive

rights to free movement and equal treatment for Union citizens than Member States appeared to have intended.

A major recent development about Union Citizenship and the right of free movement is the European Parliament and Council **Directive 2004/38/EC**⁵¹. Before describing and analyzing that Directive, first a brief historical overview is needed. In the early days of the European project, since the Treaty of Rome, only workers benefited from free movement. Over the years, this right has been extended through legislation and case law to encompass all categories of citizens. People can now move to another Member State to retire, study, or live without engaging in economic activities, as well as moving to work abroad. Even though there were advances, the European Commission had to deal with many complaints, i.e. EU citizens faced problems when they moved to another Member State.

Also, common concerns include lengthy administrative procedures in obtaining residence documents and problems associated with the application of the rights of family members, especially when they are third country nationals. In order to overcome those difficulties which people experienced about free movement, in May 2001, the European Commission presented a proposal, with the aim of updating existing legislation in order to make it easier for citizens to

⁵¹ See Corrigendum to Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, [http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32004L0038R\(01\):EN:HTML](http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32004L0038R(01):EN:HTML) (26 May 2005)

move around the European Union. After two years of negotiations, the Directive was adopted on 29 April 2004 by the European Parliament, and the Council Member States must bring into force the laws, regulations and administrative provisions necessary to comply with the Directive before 30 April 2006.⁵²

It is formally known as "**DIRECTIVE 2004/38/EC of the European Parliament and of 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."⁵³ (emphasis mine)

The Directive 2004/38/EC represents an important step in the definition of a strong concept of citizenship of the Union. It was adopted for the right of citizens of the Union to move and reside freely within the Member States. This directive brought together the piecemeal measures found in the complex body of legislation that has governed this matter to date. The new measures were designed to encourage Union citizens to exercise their right to move and reside freely in the Union. What is more, this directive cuts back administrative formalities to the bare essentials, provides a better definition of the status of

* See Chapter 3, 3.2.1. Workers, p.59.

⁵² Free movement and residence of Union citizens within the European Union, http://inas.cisl.it/sportelloinaseuropa/documenti/free_movement_281004_en.pdf (25 May 2005)

⁵³ Ibid.

family members and also limits the scope for refusing entry or terminating the right of residence.⁵⁴

The proposal of the directive was designed to regulate the following matters: the conditions in which Union citizens and their families exercise their right to move and reside freely within the Member States; the right of permanent residence; restrictions on the aforementioned rights on grounds of public policy, public security or public health.⁵⁵ The main provisions of the directive can be listed as follows: right to move, right of residence for up to three months, right of residence for more than six months, right of permanent residence, common provisions on the right of residence, right of permanent residence, and restrictions on the right of entry and residence on grounds of public policy, public security or public health.⁵⁶ Below, the General Provisions and the first three articles of the Directive are presented from the original text:

CHAPTER I GENERAL PROVISIONS

Article 1

Subject

This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

⁵⁴ Free Movement of Workers, Right of Union citizens and their family members to move and reside freely within the territory of the Member States,

<http://europa.eu.int/scadplus/leg/en/lvb/l33152.htm> (15 June 2005)

⁵⁵ Ibid.

⁵⁶ Ibid.

- (b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;
- (c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.

Article 2

Definitions

For the purposes of this Directive:

1. 'Union citizen' means any person having the nationality of a Member State;
2. 'family member' means:
 - (a) the spouse;
 - (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 partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
 - (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
 - (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);
3. 'host Member State' means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

Article 3

Beneficiaries

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.
2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
 - (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
 - (b) the partner with whom the Union citizen has a durable relationship, duly attested. The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.⁵⁷

⁵⁷ Official Journal of the European Union, 29.6.2004, http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_229/l_22920040629en00350048.pdf (25 May 2005)

In the Article 38 of the Directive, the repeals are laid down. According to it, after 30 April 2006, Articles 10 and 11 of Regulation (EEC) No 1612/68 , Directive 64/221/EC , Directive 68/360/EC , Directive 72/194/EEC, Directive 73/148/EEC , Directive 75/34/EEC , Directive 75/35/EEC, Directive 90/364/EEC , Directive 90/365/EEC and Directive 93/96/EEC will be repealed. Finally, Article 41 stated that the Directive will enter into force on the day of its publication in the Official Journal.⁵⁸

⁵⁸ Ibid.

CHAPTER 3

CONCEPTUAL ANALYSIS IN THE LIGHT OF SECONDARY LEGISLATION AND CASE-LAW

Chapter 3 aims to describe the terms and present some of the regulations, directives and cases to clear out the issues concerning the conceptual exposition and practical implementation of freedom of movement for persons. The 'free movement of persons' is one of the four basic freedoms of the internal market. The term suggests in particular the removal of all legal or practical barriers that could dissuade anybody from moving to another member state, whether for work, to provide service, to study or for tourism. Workers are by far the most privileged category among migrating Union citizens. Besides the general rule of free movement in Article 18 of the EC Treaty (ex-Article 8a of TEU), they can rely on Article 39 (ex-Article 48 of the EEC Treaty)⁵⁹. The rights are also developed in secondary legislation in numerous regulations and directives. Some of the significant ones are illustrated in this chapter to present the development of the subject. The free movement of workers means that the citizens of the EU have the same access to the labour market of any member state as the citizens of that state, i.e. without any restrictions, permits or other conditions that citizens of that country need not comply with. This chapter shall inquire into the

⁵⁹ In the introduction of Chapter 3, since general information is given, no footnoting is considered necessary.

related articles of the treaties, as well as the EEC Regulations and Directives. What is more, the case-law of the Court of Justice is examined as an important source. The free movement of workers is not an issue which came into existence after the TEU. It was already an important subject of the European integration and community. Therefore, this chapter focuses on the period after the Treaty of Rome up until the early 1990s. In these years, the significant regulations and cases which aimed to solve the conflicts about the free movement of workers, have emerged. In addition, the articles of the EC Treaty need to be listed in order to illustrate the main topics about free movement of persons, particularly workers. The Articles 39 – 42 are about workers and Articles 43-46 regulate the right of establishment, and lastly Articles 49-54 are about services. The Article 39 will be used many times in this chapter and that article will be presented from the original text in the subtitle 'restrictions' of the chapter. What is more, although self-employed people and providers of services are the subjects of free movement of services, they will also be examined briefly in this chapter because they are also related to the freedom of movement. This dissertation aims to analyse the free movement of persons in general. Naturally, each type of person must be explained. It is a fact that the concept of the freedom to perform services is closely linked to the right of establishment. Freedom to perform services allows nationals or Community businesses to provide services in another Member State. The right of establishment includes

the possibility for self-employed persons and Community businesses to set up and perform their activity in another Member State. In both cases, the non-nationals or Community businesses from these states must be given national treatment.

3.1. What is meant by 'Free Movement'?

The free movement has the significance both for the economic and political development and also for the social development of the Union as well. There is not only free movement of persons but also free movement of goods, services and capital. Therefore, the right of free movement has an extreme importance for the enlargement and integration of the EU. What does it mean to move 'freely' in the EU? In order to answer that question, the terms "free" and "movement" need to be discussed. Being free means that, persons can go wherever they desire to go without any interrogation; in other words, there is an elimination of controls and formalities on persons who wish to move from one country to another in the Union. Consequently, nationals of a Member State have the right to travel without any visas unlike the nationals of non-EU states. As it is examined in the first chapter, the Schengen zone is a very good example of free movement of persons. A general definition for the term 'movement' can be stated as travelling among other countries for purposes of working, studying, visiting a relative or a friend and tourism, which is possibly the most usual aim

of travelling. When the issue of 'free movement of persons in the EU' is considered, the term needs a more specific and academic explanation. The term 'movement' can be defined as travelling among the countries in the Union for any purpose as a worker; a self-employed person; provider of a service or as a student, and also as a tourist. That right of travelling also includes the right to reside excluding tourists who do not have the tendency to settle down. The free movement conditions of all these above mentioned persons will be analyzed in this chapter under the light of primary(Art 48 of the EEC Treaty) and secondary legislation. As it is laid down in the articles of the treaties establishing the EEC and the EU, a person from a member state must also possess the nationality of the said. He/she would then have the right to move and reside freely within the Member States.

In conclusion, "the right to free movement means that every EU citizen is entitled to **travel freely** around the Member States of the European Union, and **settle** anywhere within its territory. No special formalities are required to enter an EU country. This fundamental right extends to members of the EU citizen's **family**, and applies regardless of their situation or the reason for travel or residence."⁶⁰

⁶⁰ Free movement within the EU — a fundamental right, http://europa.eu.int/comm/justice_home/fsj/freetravel/fsj_freetravel_intro_en.htm (18 May 2005)

3.2. Who are 'persons'?

Who is the person having the right of freedom of movement in the EU? According to the EU Law, a person is a national of the Member State. Since this dissertation is examining the free movement of persons, the social and economic groups which fall into the scope of the term 'person' need to be explained. Persons living in the EU can be categorized as economically active nationals of the Member States and economic inactive nationals of the Member States. Who are the economically active persons? They are workers (laid down in Article 39), self-employed people (laid down in Article 43)⁶¹ and the ones providing services. There are also persons who do not perform any economic activity and their status will not be examined in this dissertation. These people can be pensioners or housewives. Also, there are young people, the students who can study in all the Member States in the EU. Students will be briefly analyzed in this chapter. Above all, the workers are the major actors in the cases relevant to free movement of persons. As a result, this dissertation deals mostly with the situation of the workers living in the EU.

⁶¹ Consolidated Version of the Treaty Establishing the European Community,
http://europa.eu.int/eur-lex/en/treaties/dat/C_2002325EN.003301.html (17 April 2005)

3.2.1. Workers

The free movement of workers existed since the foundation of the European Community in 1957. It is laid down in Article 39 (ex-Article 48) of the EC Treaty and it entails the right to look for a job in another Member State; the right to work in another Member State; the right to reside there for that purpose; the right to remain there and the right to equal treatment in respect of access to employment, working conditions and all other advantages which could help to facilitate the worker's integration in the host Member State. The concept and implications of this freedom have been interpreted and developed by the case-law of the European Court of Justice, including the concept of worker itself.

Article 48 of the Treaty of Rome does not define the term 'worker'. A definition of the term has been left to the secondary legislation and, especially, to the interpretation by the ECJ. A comprehensive definition of the term 'worker' can be found in **Lawrie-Blum v. Baden-Wurttemberg Case** (Case 66/85 Deborah Lawrie-Blum v. Land Baden-Wurttemberg, [1986])⁶², where the Court held that a worker is "any person performing for **remuneration** work the nature of which is not determined by himself and under the control of another,

⁶² See Case Deborah Lawrie-Blum v Land Baden-Württemberg, http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=61985J0066&model=guichett (20 June 2005)

regardless of the legal nature of the employment relationship.”⁶³ This case needs to be explained and analyzed in brief.

In the Case 66/85 Lawrie-Blum v Land of Baden-Württemberg, the Court held that the term ‘worker’ must be defined by three objective criteria. Mrs. Lawrie-Blum, a British national, was discriminated against by German rules because of her nationality in the preparatory-service stage leading up to her becoming a teacher.⁶⁴ The preparatory-service stage was essential and necessary for her to obtain a diploma. To be considered a worker, the Court held: “The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.”⁶⁵ The Court regarded Mrs. Lawrie-Blum as a worker within the meaning of Article 39(1) EC Treaty. Community law does not provide for any additional conditions in order to be considered a worker. It is not necessary for the employer to be an undertaking. All that is required is the intention to create an employment relationship and it will be enough to be considered as a worker.

⁶³ Derrick Wyatt and Alan Dashwood, *The Substantive Law of the EEC*, The UK:Sweet&Maxwell Ltd., 1987, pp. 162-165.

⁶⁴ Katarina Kristensen, “Why Transitional Rules? Reflections on the Enlargement and the Free Movement of Persons”, <http://www.handels.gu.se/epc/archive/00003944/01/200466.pdf> (20 May 2005)

⁶⁵ Ibid.

In the **Case Levin(53/81)**⁶⁶ , the Court held that a person who only works to a limited extent (i.e. part-time) can be considered as a 'worker'. The Court found that part-time work is employment and provides an income even if a part-time worker receives a lower pay. However the Court circumscribed this judgment to cover a narrow group, only those who pursue a genuine and effective economic activity.⁶⁷ The work must be considered to be a true and genuine economic activity. It doesn't matter if it is a poorly paid half-time job. Even someone engaged in a traineeship, which is used as practical preparation for an occupation, can be sufficient enough to be regarded as a worker. There is only one thing required, which is that the work performed is not of marginal significance. **Kempf (139/85)Case**⁶⁸ shows the width of the generous concept of being a worker, and what could be considered marginal and ancillary work. Mr. R . H .Kempf was a German music teacher who worked part-time in Holland.⁶⁹ He had a very low income and therefore he also received social allowance. The Dutch authorities thought he couldn't support himself and therefore he was denied a residence permit. The ECJ concluded that it isn't relevant if a person, in addition to his salary, gets money from somewhere else

⁶⁶ See Case D.M. Levin v Staatssecretaris van Justitie.
<http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61981J0053:EN:HTML> (16 May 2005)

⁶⁷ Kristensen, op.cit.

⁶⁸ See Case R. H. Kempf v Staatssecretaris van Justitie,
http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=61985J0139&model=guichett (23 May 2005)

⁶⁹ Ibid.

(for example social benefits) as long as the work he performs is an actual and genuine economic activity. According to the ECJ, Kempf should therefore be considered as being a worker. The salary does not have to be money; bed and board could be enough.

Based upon the right conferred by Article 48 of the EEC Treaty, any national of a member state can move freely to any other member state to take up employment. Such an individual does not have to obtain work permit in order to undertake employment in another state, as usually is required by states with respect to foreigners, and he may seek work on the same basis as nationals of the host state. Workers also can bring their families into a state where a job is located, including unemployed spouses. Freedom of movement applies to all workers in the EU. In accordance with Article 40 of the EC Treaty (ex-Article 49), secondary legislation has progressively been introduced in order to bring this about.

Following two provisional schemes (these are regulations and directives of 16 August 1961 and 25 March 1964 – Regulation No.38/64), permanent arrangements on freedom of movement were introduced with **Regulation 1612/68** of 15 October 1968 (regulation of the Council of 15 October 1968 on freedom of movement for workers within the community, amended by

Regulations 312/76 and 2434/92) and Directive 68/360 of the same date.⁷⁰ In addition to this legislation, it is worth mentioning the extensive case-law of the Court of Justice, particularly the **Van Duyn judgment of 4 December 1974 (41/74)**,⁷¹ which affirmed the direct applicability of freedom of movement when the transitional period ended (1 January 1970). Directive 68/360 conferred on the workers an essential right which was not foreseen by the EEC Treaty. Community nationals were entitled to travel to other Member States to seek employment and to remain there for this purpose for up to three months.⁷² The provisions of Directive 68/360 aimed to facilitate the freedom of movement and also the abolition of obstacles for workers and their family members. It made clear what a State requires formally for the right of entry and residence of non-nationals. What is more, this directive stated what kind of documents are required to be produced by an EC worker to enter another Member State. The issue of residence permits to workers and their families are also provided in this directive. Article 7 deals with unemployment and Article 10 states the derogations on grounds of public policy, public security and public health.⁷³

⁷⁰ European Parliament Fact Sheets 3.2.2. Free movement of workers, http://www.europarl.eu.int/facts/3_2_2_en.htm, 24.07.2003 (20 April 2005)

⁷¹ Yvonne van Duyn v Home Office, http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=61974J0041&model=quichett (12 April 2005)

⁷² Berdal Aral, Free Movement of Workers between Turkey and the EEC, unpublished Mphil Thesis, University of Kent at Canterbury, December 1989, p.25.

⁷³ Why Transitional Rules? Reflections on the Enlargement and the Free Movement of Persons, <http://www.handels.gu.se/epc/archive/00003944/01/200466.pdf>, p.26. (21 May 2005)

Regulation 1612/68/EEC is the central Act providing for the shaping of several aspects of the principle of equal treatment, including access to and conditions of employment, social benefits or the definition of family members being beneficiaries of the principles of free movement of workers.⁷⁴ That regulation does not create any new rights for persons protected by the Community law. It only provides for the scope and details of the rules for exercising those rights. It states in its preamble that "mobility of labour within the Community must be one of the means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement."⁷⁵ The underlying principle is that of **equal treatment**, with every citizen of a Member State enjoying the right to take up paid employment in another Member State under the conditions applicable to that Member State's own nationals. Article 1 of that regulation referred to the right to 'take up an activity as employed person'.⁷⁶ Freedom to take up a job in another Member State must not be jeopardised by special requirements concerning entry into and residence within Member States, and migrant workers are entitled to remain in the territory of a Member State after working there. A number of Directives restrict Member States' right of expulsion, particularly by

⁷⁴ Free movement of workers, <http://www.eftasurv.int/fieldsOfWork/fieldPersons/freemovementworkers/> (20 April 2005)

⁷⁵ Free movement of workers: Introduction, <http://europa.eu.int/scadplus/leg/en/cha/c00004.htm> (10 February 2005)

⁷⁶ Wyatt and Dashwood, op.cit.

giving workers from other Member States the right of recourse to the courts if they are the subject of a deportation order.⁷⁷ In brief, the basic rights to move and work freely are guaranteed by the Regulation 1612/68.

Between 1973 and 1975, the provisions on the free movement of workers were extended to cover the self-employed. As far as living and working conditions are concerned, migrant workers have the same rights as nationals of the host country (trade union membership, social benefits etc.). In the 1990s, **Directive 96/71/EC** of 16 December 1996 was issued which clarified the status of the **workers being posted** to another Member State. This directive allowed such workers to benefit from a basic of compulsory rules in the host country. In other words, it required that each Member State must ensure that a worker posted to its territory from an undertaking in another Member State is guaranteed the terms and conditions of employment which the employees are guaranteed under the law of that Member State.⁷⁸ Article 2 defines the term 'posted worker' as "a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works".⁷⁹

⁷⁷ General Provisions for movement and residence of workers and their families, <http://europa.eu.int/scadplus/leg/en/lvb/l23011a.htm> (11 February 2005)

⁷⁸ Posting of Workers, http://europa.eu.int/comm/employment_social/labour_law/postingofworkers_en.htm (23 April 2005)

⁷⁹ Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, http://europa.eu.int/comm/employment_social/labour_law/docs/directive96_71_en.pdf (23 April 2005)

What is more, for the purpose of encouraging freedom of movement, Article 41 of the EC Treaty suggested that Member States should encourage the exchange of young workers within the framework of a joint programme. This was first carried out through the PETRA programme, which lasted from 1988 to 1994. It was aimed at young people between the ages 16 and 28 undergoing non-university vocational training, and provides grants to enable them to spend from three weeks to three months doing vocational training in another Community country. Some 45000 young people benefited from this programme. After 1994 the PETRA machinery was integrated into the wider framework of the Leonardo da Vinci programme.⁸⁰

Furthermore, in 1990, the Community adopted three specific directives conferring a general right of movement and residence on the retired persons, students, and those with independent means, provided that they have sufficient resources and medical insurance. These measures were the first signs of a gradual erosion of the link between economic activity and the right of free movement.⁸¹ In order to encourage worker mobility, the EURES (European Employment Services)⁸² network was launched in 1994. This was set up by Commission Decision 93/569/EEC of 22 October 1993 implementing Regulation

⁸⁰ http://www.europarl.eu.int/facts/3_2_2_en.htm, op.cit.

⁸¹ Free Movement of Workers and Jurisdiction Issues in Employment Law Disputes, http://www.11kbw.com/index.php?category_id=000006&art_id=000389 (17 March 2005)

⁸² EURES: the European network for information on employment and worker mobility, <http://europa.eu.int/scadplus/leg/en/cha/c10505.htm> (13 February 2005)

1612/68 mentioned above, to facilitate access to information by workers seeking a job in a Member State other than their own. This network is a data bank of job vacancies and applications (incorporating data from national administrations) and of living and working conditions in the Member States.⁸³

When the general rights of a worker are described, it can be stated that any national of a Member State is entitled to take up and engage in gainful employment on the territory of another Member State in conformity with the relevant regulations applicable to national workers. What is more, he is entitled to the same priority as the nationals of that Member State as regards access to available employment, and to the same assistance as that afforded by the employment offices in that State to their own nationals seeking employment. His recruitment may not be dependent on medical, occupational or other criteria which discriminate on the grounds of nationality. The workers also have the right for equal treatment as it is stated above in the analysis of Regulation 1612/68. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers as regards working and employment conditions (dismissal and remuneration in particular) because of his nationality. He also has the same entitlement to occupational training and retraining measures. He is entitled to the same social and tax benefits as national workers. A national of one Member State working in

⁸³ http://www.europarl.eu.int/facts/3_2_2_en.htm, op.cit.

another is entitled to equal treatment in respect of the exercise of trade union rights, including the right to vote and to be eligible for the administration or management posts of a trade union. He may be excluded from the management of bodies under public law and from the exercise of an office under public law. He has the right of eligibility for workers' representative bodies within the undertaking.

After the summary of the rights of the workers, the articles of Regulation 1612/68 need to be presented within the rights of family members of workers. The Regulation is divided into three parts: Articles 1-6 consider eligibility for employment, Articles 7-9 provide for equal treatment while employed, and Articles 10-12 supply the rights of family members. Below, Articles 7-9 are shown in order to let the readers understand the issue of workers and their rights.

TITLE II Employment and equality of treatment

Article 7

1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment;
2. He shall enjoy the same social and tax advantages as national workers.
3. He shall also, by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres.
4. Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment,

remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States.

Article 8

1. A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy equality of treatment as regards membership of trade unions and the exercise of rights attaching thereto, including the right to vote; he may be excluded from taking part in the management of bodies governed by public law and from holding an office governed by public law. Furthermore, he shall have the right of eligibility for workers' representative bodies in the undertaking. The provisions of this Article shall not affect laws or regulations in certain Member States which grant more extensive rights to workers coming from the other Member States.
2. This Article shall be reviewed by the Council on the basis of a proposal from the Commission which shall be submitted within not more than two years.

Article 9

1. A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership of the housing he needs.
2. Such worker may, with the same right as nationals, put his name down on the housing lists in the region in which he is employed, where such lists exist; he shall enjoy the resultant benefits and priorities. If his family has remained in the country whence he came, they shall be considered for this purpose as residing in the said region, where national workers benefit from a similar presumption.⁸⁴

What about the families of the workers? They have rights as well. The family members of a worker employed on the territory of another Member State are entitled to establish themselves there with him, whatever their nationalities are.

Member States are required to facilitate the admission of any other member of

⁸⁴ Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community,
<http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31968R1612:EN:HTML>
(14 May 2005)

the worker's family who is dependent on him or lives with him in the country of origin. The family members admitted to the territory of a Member State under the family reunification arrangements are entitled to equal treatment (right to work, access to education and vocational training, etc.). If the family members are citizens of a Member State, they may not be required to hold an entry visa and are also themselves entitled to be issued with a Residence Permit for a national of a Member State of the EC. What is more, if they are nationals of a third country, this time, they may need to have a visa but they receive a residence permit with the same validity as that of the worker.⁸⁵ The Articles 10-12 of Regulation 1612/68, as they were mentioned, are shown below:

TITLE III Workers' families

Article 10

1. 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 years or are dependants;
- b. dependent relatives in the ascending line of the worker and his spouse.

2. Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes.

3. For the purposes of paragraphs 1 and 2, the worker must have available for his family housing considered as normal for national workers in the region where he is

⁸⁵ http://www.europarl.eu.int/facts/3_2_2_en.htm, op.cit.

employed; this provision, however must not give rise to discrimination between national workers and workers from the other Member States.

Article 11

Where a national of a Member State is pursuing an activity as an employed or self-employed person in the territory of another Member State, his spouse and those of the children who are under the age of 21 years or dependent on him shall have the right to take up any activity as an employed person throughout the territory of that same State, even if they are not nationals of any Member State.

Article 12

The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory. Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.⁸⁶

3.2.2. Self-employed People

EU law on the free movement of persons covers not only workers, but also the self-employed and those wishing to provide/receive services. Self-employed people can be classified as the employers, entrepreneurs who make investment and also doctors or lawyers who can be also providers of services when they do not work as a self-employed person. In the EC Treaty, this subject is set by the following articles: Article 43 (ex-Article 52) EC on the freedom of establishment and Article 49 (ex-Article 59) EC on the freedom to provide services.

⁸⁶ <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31968R1612:EN:HTML>, op.cit.

The EC Treaty lays down the principle that the self-employed may freely exercise an activity in two ways. First, the person or firm may set up in another Member State (Art 43). Second, they may offer their services across frontiers in other Member States while remaining in their country of origin (Art 49).⁸⁷ Also, it can be stated that the beneficiaries are the persons who are nationals of the Member States. They are engaged in small-scale industry and professions.

The relevant article of the EC Treaty needs to be presented in order to show what the treaty exactly laid down for freedom of establishment. Below it is given:

RIGHT OF ESTABLISHMENT

Article 43

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as **self-employed persons** and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.⁸⁸ (emphasis mine)

⁸⁷ Freedom of establishment and provision of services and mutual recognition of diplomas, http://www.europarl.eu.int/factsheets/3_2_3_en.htm (12 May 2005)

⁸⁸ http://europa.eu.int/eur-lex/en/treaties/dat/C_2002325EN.003301.html, op.cit.

It can be argued that Article 43 seeks to ensure that the right of establishment (which covers the self-employed and those wishing to set up and manage undertakings) affords nationals of other EU States the same treatment as nationals of the host Member State. Non-discrimination on grounds of nationality is a common theme in EU law. For instance, Article 39 explains and justifies the fact that all the rights available to workers under Regulation 1612/68 can be applied to the self-employed in practice.⁸⁹

Freedom of establishment does not only include the right to take up an activity as a self-employed person. The ECJ has held that it extends to other elements connected to that right e.g. the right to rent premises, equal treatment as regards housing, and a right to access leisure facilities on a non-discriminatory basis. Article 43 therefore prohibits both direct and indirect discrimination on nationality grounds. What is more, the European Parliament has been instrumental in liberalizing the activities of the self-employed. The role of Parliament has grown with the application of the co-decision procedure (as provided for in the Maastricht Treaty) to most aspects of freedom of establishment and provision of services.⁹⁰

⁸⁹ The AIRE Centre, Advice on EU Law, http://www.airecentre.org/law_services.html (19 March 2005)

⁹⁰ http://www.europarl.eu.int/factsheets/3_2_3_en.htm , op.cit.

Moreover, there is "**DIRECTIVE 98/49/EC** of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community"⁹¹ It aimed at removing obstacles to the free movement of employed and self-employed persons and their families and also safeguarding their supplementary pension rights.

3.2.3. Providers of Services

As regards the free movement of persons, people who provide services are also important as workers. There aren't a lot of cases about service providers, whereas there are many directives that extend the rights of service providers and develop the issue of mutual recognition of diplomas and qualifications. The EU citizens have the right of providing services and establishment anywhere in the EU. These rights are among the fundamental principles of European Community law.⁹² This subject is a part of the free movement of persons but in this dissertation, the main goal is not to analyze the recognition of qualifications. Therefore, only the essential parts of that subject will be presented including the directives so that, what kind of developments have occurred can be better understood. In particular, the directives which were devised to facilitate the recognition of qualifications may be grouped into two main categories as

⁹¹ See for more details: Official Journal of the European Communities, Council Directive 98/49/EC, http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l_209/l_20919980725en00460049.pdf (21 May 2005)

⁹² Free movement of people-Professional qualifications-Overview, http://europa.eu.int/comm/internal_market/qualifications/overview_en.htm (17 March 2005)

Sectoral Directives and General Systems. The Sectoral Directives provide for the recognition of a few specific professional profiles as “doctors, dentists, nurses, architects, lawyers, midwives, pharmacists and veterinarians”.⁹³ These are known as the specific sectors. The General Systems determine some general criteria for the mutual recognition of those professional qualifications that fall within their scope. For example, they say that it is important to eliminate all obstacles to the free movement of persons and services within the community as well as to the right of citizens to practice their professions in a member state different from the one where they obtained their qualifications.

Doctors are important groups since all around the world, people need them for health problems. No one can deny the role of doctors in a society. Consequently their right to move freely and the directives related to them need to be examined. The free movement of doctors means that doctors from any EU country can seek work in another EU country without any obstacles as regards employment, remuneration and other conditions of work. There has been a specific EC law on doctors since 1975 which refers to the free movement of doctors, both those seeking employment as well as those wishing to be self-employed. Doctors qualified in any EU country are given automatic recognition in another EU country. The law outlines the training requirements that doctors

⁹³ Free movement of people-Professional qualifications-Specific-sectors, http://europa.eu.int/comm/internal_market/qualifications/specific-sectors_en.htm (19 March 2005)

must fulfill and the professional name and title in the different countries so that co-ordination and recognition are facilitated. The law also sets up an authority that issues qualifications and equivalence certificates and that receives and verifies documents of people wishing to practice the profession locally.

Doctors were the first of the professions to be allowed to move freely within the EEC. The so-called '**Doctors Directives**' **75/362/EEC** and **75/363/EEC** were adopted in 1975 and have been in force since early 1976, well before the establishment of the Single Market. These entitle doctors to full registration in any EU member state if they fulfill certain criteria. That criteria states that if the doctors are citizens of a member state, and also if they have completed primary training in a member state and hold a recognized qualification, then they will have the full registration.⁹⁴ There is "Directive 81/1057/EEC of 14 December 1981 supplementing Directives 75/362/EEC, 77/452/EEC, 78/686/EEC and 78/1026/EEC concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of doctors, nurses responsible for general care, dental practitioners and veterinary surgeons respectively, with regard to acquired rights."⁹⁵ In 1989, another directive came into force as Directive 89/594/EEC and in 1993, **Directive 93/16/EEC** was a significant

⁹⁴ Jane Richards, "Medical Issues within a European Dimension", 2000, <http://www.intellectbooks.com/europa/number9/medic.htm> (25 May 2005)

⁹⁵ Council Directive 81/1057/EEC of 14 December 1981, http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31981L1057&model=guichett (19 May 2005)

step. That directive of 5 April 1993 was "to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications."⁹⁶ Article 1 stated that "This Directive shall apply to the activities of doctors working in a self-employed or employed capacity who are nationals of the Member States."⁹⁷ Article 2 laid down that "Each Member State shall recognize the diplomas, certificates and other evidence of formal qualifications awarded to nationals of Member States by the other Member States in accordance with Article 23 and which are listed in Article 3, by giving such qualifications, as far as the right to take up and pursue the activities of a doctor is concerned, the same effect in its territory as those which the Member State itself awards."⁹⁸ What is more, there is a recent directive formally called as "Directive 2001/19/EC of the European Parliament and of the Council of 14 May 2001 amending Council Directives 89/48/EEC and 92/51/EEC on the general system for the recognition of professional qualifications and Council Directives 77/452/EEC, 77/453/EEC, 78/686/EEC, 78/687/EEC, 78/1026/EEC, 78/1027/EEC, 80/154/EEC, 80/155/EEC, 85/384/EEC, 85/432/EEC, 85/433/EEC and 93/16/EEC concerning the professions of nurse

⁹⁶ Council Directive 93/16/EEC of 5 April 1993, http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31993L0016&model=guichett (17 May 2005)

⁹⁷ Ibid.

⁹⁸ Ibid.

responsible for general care, dental practitioner, veterinary surgeon, midwife, architect, pharmacist and doctor⁹⁹

The Directives above are a consolidated version of all the directives aimed at facilitating the free movement of doctors which have been adopted since 1975. They apply to the activities of nationals of the Member States working in a self-employed or employed capacity. They make provisions for the automatic recognition in each Member State of the diplomas, certificates and other evidence of formal qualifications which have been awarded to nationals of Member States by the other Member States and certify the completion of basic training or specialist training common to all Member States or some Member States. Those Directives lay down minimum requirements for basic training and specialist training. They also make provision for the institution of specific training in general medical practice.

3.2.4. Students

Students are a big group of people and they are important as workers in the EU. There are many students who wish to travel and reside among the Member States. When they study in a different country, they have the chance to learn the local culture of that country as well as having a better education if their

⁹⁹ Directive 2001/19/EC of the European Parliament,
http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=32001L0019&model=guichett (24 March 2005)

home country does not have a good school for the subject that the students want to study. The free movement and residence of students can be accepted as one of the social and cultural vehicles of the European integration. Therefore, their right of residence needs to be explained in particular. There are regulations and directives for that right. Council **Directive 93/96/EEC**¹⁰⁰ of 29 October 1993 was for the right of residence for students.¹⁰¹ Recently, it was repealed by "Directive 2004/38/EC of the European Parliament and of 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."¹⁰² Under the terms of the Directive on the right of residence for students (93/96/EEC), students from one Member State wishing to study in another Member State has the right of residence in that Member State once certain conditions are fulfilled, including proof that they have health insurance covering all risks.¹⁰³

¹⁰⁰ Council Directive 93/96/EEC of 29 October 1993, http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Directive&an_doc=1993&nu_doc=96 (20 April 2005)

¹⁰¹ The Right of Residence for Students, <http://europa.eu.int/scadplus/leg/en/lvb/l23005.htm> (20 April 2005)

¹⁰² Ibid.

¹⁰³ Free movement of people: Commission decides to pursue infringement cases against France and Italy, http://www.lex.unict.it/cde/documenti/affari_italiani/98_99/16_12_98.htm (25 May 2005)

3.2.5 Tourists

It can be argued that people moving within the EU simply as tourists are performing free movement in its most common form. Tourism is an essential sector for almost every state in the EU. Every citizen of the union has the right to travel among the member states as it is laid down by the TEU. Tourists are not involved in jobs because they are not economically active people, instead they wish to spend their holiday in a different country. They wish to move from one country to another in order to have fun, not to find a job. Tourists are not job-seekers and they do not wish to reside in another country but only stay there for a while. As a result, tourists usually do not cause any problems and they are not involved with the Article 39 of the EC Treaty as workers are.

When EU citizens enter into another EU country, they have the right to pass freely. This is called as the **blue channel**¹⁰⁴, and those citizens are not subjected to customs controls as other third country nationals are supposed to be.¹⁰⁵ What is more, there is the Schengen area where all citizens of the states who signed the Schengen Agreement¹⁰⁶ may pass without any passport control.

For tourists, free movement within the EU means passport and customs-free travel throughout the EU territory. Tourists also enjoy a set of rights which have

¹⁰⁴ "Blue channels mean fewer queues: The blue EU channels at our airports mean British travellers remaining in the EU can clear passport control quicker than ever. No more waiting for others to have their visas checked!", <http://www.eplp.org.uk/travellers.pdf> (25 May 2005)

¹⁰⁵ Moving freely in the EU FAQs, <http://www.mic.org.mt/EUINFO/quea/q&a28.htm> (21 May 2005)

¹⁰⁶ See Chapter 1, 1.2, pp.21-26.

now been put together in an EU Charter of Passenger Rights. Also, within the EURO zone, European tourists no longer have to pay exchange rates or even change their money and will find it easier to compare prices when they visit another country which uses the same currency.

In the official web site of the EU, there is the following information for the EU citizens who wish to travel in the union:

You can cross many borders within the EU **without being checked** and the euro makes it easier to shop around for bargains. You have easy access to healthcare should you need it and pets need no longer be left at home. If you drive, your driving licence and motor insurance policy issued in one EU country are valid in all the others. And you can use your mobile phone everywhere.¹⁰⁷ (emphasis mine)

In brief, the tourists travelling in the EU do not cause much problem for the ECJ and that is why there is almost no case law for tourists and no serious problems. It is a fact that the third country nationals may have, and indeed they have had, conflicts or troubles when they want to enter an EU member state as tourists. These people faced problems during the process of getting a visa. This dissertation however examines the persons who are nationals of a EU member state. That is why the tourists coming from other states which are not EU member states are not included in this study. To conclude, the free movement of EU citizens who travel as tourists does not raise significant problems.

¹⁰⁷ Travelling in Europe 2005, http://europa.eu.int/abc/travel/index_en.htm (29 May 2005)

3.3. Restrictions, Exceptions, Limitations

As a matter of fact, there are some restrictions and limitations to regulate the free movement of persons. This issue is a very essential subject for the free movement of persons to be discussed in this dissertation. One should not think that persons, and especially workers, move and reside in other member states without any restrictions. It can not be denied that free movement for workers is always a more important issue than the free movement of other persons like tourists who only travel for holiday without seeking working. The Treaty of Rome which introduced the free movement of persons for the first time, recognized certain restrictions to the right of free movement.

Derogations from the provision of free movement of workers is only acceptable on grounds of public policy, public security, public health. Provisions are found in Article 39 (and also in other articles on free movement for establishment and services), and in secondary legislation (new Directive 2004/38, Art 27). Furthermore, Article 39/4 (ex-Art 48(4)) makes the right of free movement inapplicable to employment in the public service. Below is Article 48 of the EEC Treaty (Art 39 of EC Treaty, this is the most important article related to free movement right of workers) which regulated the right of workers:

TITLE III
FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL

CHAPTER 1

WORKERS

Article 48

1. Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
 - (a) to accept offers of employment actually made;
 - (b) to move freely within the territory of Member States for this purpose;
 - (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
 - (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.
4. The provisions of this Article shall not apply to employment in the public service¹⁰⁸.

In order to give the right of free movement as much scope as possible, the ECJ narrowly construed these exceptions. For example, in a case involving a Dutch scientologist, the Court rejected the United Kingdom's rationale for the refusing admission of Miss Van Duyn (Case 41/74)¹⁰⁹. The plaintiff, Yvonne Van Duyn declared that her purpose was to take up an offer of employment as a

¹⁰⁸ European Union – Selected instruments taken from Treaties,
<http://europa.eu.int/abc/obj/treaties/en/entr6d03.htm#112> (12 March 2005)

¹⁰⁹http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=61974J0041&model=guichett, op.cit.

secretary, made to her a few days earlier by the Church of Scientology of California, the headquarters of which are at Saint Hill Manor, in the County of Sussex. After an interview with the immigration authorities, she was returned to the Netherlands on the same day. The immigration officer handed her the document in which the ground of refusal of leave to enter the UK was stated. The decision was taken in accordance with the policy of the Government of the United Kingdom in 1968, considering that the activities of the Church of Scientology to be socially harmful. The document stated the following:

"You have asked for leave to enter the United Kingdom in order to take employment with the Church of Scientology but the Secretary of State considers it **undesirable to give anyone leave to enter** the United Kingdom on the business of or in the employment of that organisation."¹¹⁰ (emphasis mine)

In this case, Article 48 of the EEC Treaty and Article 3 of the Directive 64/221/EEC were submitted to the ECJ. That directive will be analyzed later. The fact that the United Kingdom considered it undesirable to admit anyone to its territory on the business of or in the employment of the Church of Scientology was not sufficient under the Treaty exceptional provision. It was because the measures taken on grounds of public policy or public security have to be based exclusively on the personal conduct of the individual concerned. In

¹¹⁰ Incorporated Council of Law Reporting VAN DUYN v. HOME OFFICE [Case 41/74], http://www.justis.com/titles/iclr_s7530027.html (14 May 2005)

this famous case, the Court ruled in favour of the UK. Below, the decision of the Court is presented:

On those grounds, the court in answer to the questions referred to it by the High Court of Justice, by order of that court, dated March 1, 1974, hereby rules:

(1) Article 48 of the E.E.C. Treaty has a direct effect in the legal orders of the member states and confers on individuals rights which the national courts must protect.

(2) Article 3 (1) of Council Directive No. 64/221 of February 25, 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 confers on individuals rights which are enforceable by them in the national courts of a member state and which the national courts must protect.

(3) Article 48 of the E.E.C. Treaty and article 3 (1) of Directive 64/221 must be interpreted as meaning that a member state, in imposing restrictions justified on grounds of public policy, **is entitled to take into account as a matter of personal conduct of the individual concerned**, the fact that the individual is associated with some body or organisation the activities of which the member state considers socially harmful but which are not unlawful in that state, despite the fact that no restriction is placed upon nationals of the said member state who wish to take similar employment with the same body or organisation.¹¹¹ (emphasis mine)

In this case, the Court recognized the direct effect of the provisions of both the Treaties (Article 48 of the EEC Treaty) and the directives that were laid down for their application (Article 3 of Directive No 64/221 of the Council). It explains the 'public policy' proviso which allows member states to derogate from the right of free movement for workers.¹¹² What is more, in Van Duyn Case, the ECJ decided that 'public order' can not be defined by the Member State. It has a

¹¹¹http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lq=EN&numdoc=61974J0041&model=guichett, op.cit.

¹¹² Judgment of the Court of Justice, Van Duyn, Case 41/74 (4 December 1974), <http://www.ena.lu/europe/european%20union/judgment%20court%20justice%20van%20duyn%20case%201974.htm> (18 May 2005)

community law definition. The restrictions taken on grounds of public policy or public order can never be general without reference to the individual person's conduct, and those restrictions can never have economic purposes. Restrictions are also supposed to have a motivation. Motivations that do not take into account the situation in the actual case or motivations that contain general preventive measures are not accepted.

The Court somewhat adopted a different stance after seven years when reviewing the case entitled **Adoui and Cornuaille (115-116/81)**¹¹³. Here the Court ruled that a Member State can not claim that the conduct of a foreign individual fulfils the test for derogations if it takes no repressive measures against similar conduct by its own nationals. This case was about two French prostitutes in Belgium one of whom, Rezguia Adoui, had applied for a residence permit; however her wish was refused on grounds of public policy. Dominique Cornuaille, for her part, was contacted by the police and there was a recommendation to deport her. As a result, the ECJ stated that **Belgium had not criminalized** prostitution. As Belgium did not take any repressive or other genuine and effective measures against its own nationals for similar conduct, such measures could not be taken against foreign Union citizens. Neither had Belgium formed an opinion on whether Adoui's and Cornuaille's personal conduct

¹¹³ Rezguia Adoui v Belgian State and City of Liège; Dominique Cornuaille v Belgian State, http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=61981J0115&model=guichett (11 March 2005)

was a threat to public order. A derogation based on public health permits the Member states to refuse access to their territory or residence there to persons whose access or residence would in itself constitute a danger to the public health. The only diseases that can motivate restrictions to the right of free movement are specified in Directive 2004/38/EC¹¹⁴ as diseases that can be epidemic according to World Health Organization. Before a Member State decides to expel a person from its territory, it must (Directive 2004/38, Art 28) take into account the length of that person's stay in the host state, his age, his health, and his family situation. According to Directive 2004/38, Article 31, concerned person shall have the right to legal remedies in the receiving state where he can appeal against the decision. What is more, diseases occurring more than three months after the entry can never be a reason for an expulsion.

In Van Duyn case, the Directive 64/221¹¹⁵ was an essential element of the judgement. It is formally known as "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"¹¹⁶. It was amended by two more directives; Directive 72/194/EEC and Directive 75/35/EEC. In 2004, it was

¹¹⁴ See Chapter 2, 2.5, pp.44-49.

¹¹⁵ Council Directive 64/221/EEC of 25 February 1964, http://europa.eu.int/smartapi/cgi/sqa_doc?smartapi!celexplus!prod!DocNumber&lq=en&type_doc=Directive&an_doc=1964&nu_doc=221 (23 May 2005)

¹¹⁶ Limitations on the movement and residence which are justified on grounds of public policy, <http://europa.eu.int/scadplus/leg/en/lvb/l23010.htm> (25 May 2005)

repealed by Directive 2004/38/EC. As it is mentioned, the EC Treaty entitles Member States to restrict the rights of residence and free movement on grounds of public policy, public security or public health, but Member States are nevertheless obliged to ensure that citizens are offered certain safeguards and guarantees laid down by Directive 64/221/EEC. Under the terms of this directive, Member States may only take measures to restrict or deny entry into the country, to issue or renew residence permits or expel the individual on the basis of the personal conduct of the individual concerned. Previous criminal convictions can not constitute grounds for taking those measures. Over the years the provisions of Directive 64/221/EEC have been interpreted by the Court of Justice in a number of judgements like Van Duyn Case. The relevant article of that directive in Van Duyn Case is given below;

Article 3

1. Measures taken on grounds of public policy or of public security shall be based exclusively on the **personal conduct** of the individual concerned.
2. **Previous criminal convictions** shall not in themselves constitute grounds for the taking of such measures.
3. Expiry of the identity card or passport used by the person concerned to enter the host country and to obtain a residence permit shall not justify expulsion from the territory.
4. The State which issued the identity card or passport shall allow the holder of such document to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.¹¹⁷ (emphasis mine)

¹¹⁷http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Directive&an_doc=1964&nu_doc=221, op.cit.

Moreover, in order to regulate the restrictions, Article 8a of the TEU (Art 18 of the EC Treaty) contains the following statement: '...subject to the limits and conditions laid down in this Treaty and by the measures adopted to give it effect'. Even though Article 18(1) states that every Union citizen shall have the right to move and reside freely within the territory of other Member States, that right is subject to limitations of the EC Treaty and secondary legislation. As a result, it is not an absolute and unconditional right.

There is a common argument about Article 18 of the EC Treaty whether it is directly effective or not.¹¹⁸ Also, the direct applicability of treaties comes into mind. This dissertation does not aim to discuss this argument. However; a brief overview will be beneficial because that debate is about the restrictions of the free movement and residence right of persons. A provision needs to satisfy three main criteria established by the ECJ in its famous judgment in **Case 26/62 NV Algemene Transporten Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen [1963]**¹¹⁹ in order to be directly effective. "First, it must impose clear and precise obligation on Member States; secondly, it must be unconditional, that means subject to no limitations; and, thirdly, its implementation must not depend on measures being subsequently taken by the Community institutions or Member States with

¹¹⁸ See Ercüment Tezcan, *Avrupa Birliği Hukuku'nda Birey*, İstanbul:İletişim Yayınları, 2002

¹¹⁹ Van Gend & Loos, Case 26-62 (5 February 1963), Judgment of the Court <http://www.ena.lu/europe/european%20union/judgment%20court%20van%20gend%20loos%20case%201963.htm> (11 April 2005)

discretionary power in the matter.”¹²⁰ Article 18 fits the first condition because its meaning is clear enough. In addition, there is an obligation on Member States being imposed implicitly to ensure the right of movement and residence. The rights that Article 18 contains are not unlimited and not unconditional. As a result, it fails to satisfy the second condition. Lastly, the third condition is not easy to determine because it concerns the issue of implementation. In summary, even if there are limitations or conditions that are subject to judicial control, the ECJ has accepted the direct effect of numerous provisions. Consequently, the measures which enable Member States to exclude Union citizens from their territories on grounds of public policy, public security and public health or on other objectively justified grounds, will not deprive Article 18 of its direct effect under the case-law of the EU.¹²¹ For the issue of direct effect, another case can be illustrated. In **Case 413/99 Baumbast and R v. Secretary of State for the Home Department [2002]**¹²², governments of Germany and the UK stated that a right of residence could not be derived directly from Article 18(1) in which the limitations and conditions were laid down. The ECJ ruled (at paragraph 3 of the judgment) as follows in this case:

A citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there

¹²⁰ Izolda Bulvinaite, “Union Citizenship and its Role in the Free Movement of Persons Regimes”, 2003, <http://webjcli.ncl.ac.uk/2003/issue5/bulvinaite5.html> (10 March 2005)

¹²¹ Ibid.

¹²² The Incorporated Council of Law Reporting – ICLR, *Baumbast and another v Secretary of State for the Home Department (Case C-413/99)*, <http://www.lawreports.co.uk/ecjsepb0.1.htm>

a right of residence by **direct application of Article 18(1)**. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities and, where necessary the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and, in particular, the principle of proportionality.¹²³

In that case, the Court held that the right to reside within the territory of the Member States under Article 18(1) EC is conferred directly on every citizen of the Union and it is a clear and precise provision of the EC Treaty.

This chapter can be considered as the core of this dissertation and a brief conclusion needs to be given. First, the term 'free movement' is the key of this study. According to the treaties establishing the EEC and EU, the persons being the workers and the EU citizens, have the right to enter the other Member States without any problems. What is more, they can reside there and enjoy some rights. Their movement among the EU states is free. However there are some limitations that are laid down in the articles of the establishing treaties, the so called EC Treaty. The workers in the EC/EU are the most significant ones among these persons because they are directly related to economy, and the major purpose of the European states is to establish an economic community which is integrated and enlarged. This enlargement and integration mostly relies on the free movement of workers, self-employed people and service providers. After presenting the cases that clarify the meaning of the term 'worker', an

¹²³ See Case Baumbast and R v Secretary of State for the Home Department, http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=61999J0413&model=guichett (18 April 2005)

overall definition can be made. First, the said worker is a person who is a national of an EEC/EC/EU Member State. A comprehensive definition of the term worker can be found in the Case Lawrie-Blum v. Baden-Wurttemberg. According to the ECJ, in order to be considered as a worker, a person must perform a work which he receives **remuneration** for a certain period of time under the direction of another person. In addition, the performed work must be an **actual and genuine economic activity** and it does not need to be a full time job. The free movement right of the workers in the EU is based on both the primary legislation that is Article 48 of the Treaty of Rome (so called EEC Treaty) and the secondary legislation, that is, Regulation 1612/68/EEC. Article 48 (Article 39 of the EC Treaty) did not define the term 'worker', but it laid down the right of free movement including the restrictions on grounds of public policy, security and health. Article 52 secured the right to go into business as a self-employed person in another Member State (the right of establishment). Regulation 1612/68 provided for full equality of treatment as to other activities of employed persons and the mobility of workers and their families. According to this regulation , "A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers as regards working and employment conditions (dismissal and remuneration in particular) because of his nationality. He also has the same entitlement to

occupational training and retraining measures.”¹²⁴ There are also self-employed people and providers of services whose rights have been regulated by the EC Treaty and directives. Freedom of establishment is important for these people because they do not only need to move freely, but must also establish themselves in another Member State to perform their jobs and services. Students also need the right of establishment to study in the other Member States. Readers can understand that the treaties and the secondary legislation, that is to say, regulations and directives, have been aimed to developing and amending the rights of free movement among the EU Member States. Furthermore, the ECJ is a significant actor vis-à-vis the regulation of the right of workers. The case law has been examined in this chapter to illustrate the legal issues involved in the enjoyment of the right to move freely within the EC/EU member states and to reside there. The cases examined in this study have shown that the free movement right is not easily applied to everyone. The Member States can impose restrictions for their public security, policy or health. As a result, cases emerged to solve these conflicts. The free movement and establishment of workers is the major subject of the case law during the European integration since the 1960s.

¹²⁴ Free movement of workers: general provisions,
<http://europa.eu.int/scadplus/leg/en/lvb/l23013a.htm>

CHAPTER 4

TRANSITIONAL ARRANGEMENTS FOR NEW MEMBER STATES WITH SPECIFIC REFERENCE TO POLAND IN RESPECT OF FREE MOVEMENT FOR PERSONS

The aim of this chapter is to explain and lay out in some detail how the transitional period and arrangements operate. During the enlargement process, there was a fear of a massive arrival of workers from the new Member States¹²⁵. It was argued that the free movement of persons will cause a huge labour migration. Because of these concerns, the present Member States want to protect their labour market by transitional rules. Thus the Accession Treaty laid down transitional arrangements for the issue of free movement of workers which has a priority in the enlarged and integrated Union. The right to free movement in the EU is open to everyone and it will not be affected by the transitional arrangement which is agreed for workers. Consequently, there are no additional limitations and restrictions for the persons for the purpose of study or residence whereas the movement of employees is restricted for up to seven years for the new Member States. In fact, the movement of workers is the only case being subject to restrictions. After the Accession Treaty, the transitional agreements are being employed to the new EU member states: the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia and Slovakia.

¹²⁵ The current Member States are: Austria, Belgium, Denmark, Germany, Greece, Finland, France, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom

However there are no restrictions for Cyprus and Malta on the free movement of workers, though Malta may make use of **the safeguard clause** if it fears possible large movement of workers.

In summary, according to the transitional rules, workers from the new EU Member States must obtain residence permits before starting work, in order to take up employment in a Member State. This requirement applies only to individual workers, and not to service providers (using posted workers), self-employed people and students. Malta and Cyprus are excluded from this requirement as set out in the Accession Treaty. In order to make clear the transitional period, the conditions for the new member states will be presented to let the readers understand this recent sensitive issue about free movement of workers.

Lastly, an information must be given to the readers about the usage of the terms for the states which will be mentioned in this analysis of the transitional period. For the states which are already members of the EU, the terms **current** or **present** Member State will be used. For the states becoming a membership of the Union after the Accession Treaty, the term '**new** Member States' will be used.

4.1. Transitional Period and Arrangements for New Member States

As it has been set out in the Accession Treaty, since 1 May 2004, there are transitional periods which limit the free movement of persons of the new Member States.¹²⁶ During the transitional period on the free movement of workers, a person can not move freely from the ten new Member States to the Member States. The transitional arrangements are also called as the **2+3+2 regulation**. After the accession of the new Member States, for the first two years, access to the labour markets of current Member States will depend on national measures and policies. Also the bilateral agreements will operate as well.

Two years after accession, the Commission will draft a report on the situation and after that the Member States will have to announce the system they wish to apply.¹²⁷ Besides the review of the Council, the Member States must inform the Commission about their intention for the next period of up to three years whether they will continue to apply national measures or to allow the free movement for workers from the new Member States. Therefore, it is expected that there will be free movement of workers after five years. However, there is a possibility that a Member State may ask the Commission for

¹²⁶ Free movement of workers after enlargement:FAQs,
<http://www.waleseic.org.uk/euronews/june2004/article5.htm> (20 May 2005)

¹²⁷ Free movement of workers after enlargement: Frequently Asked Questions,
<http://www.eubusiness.com/guides/enlargement-free-movement> (27 March 2005)

authorization to continue to apply national measures for two years more. This will occur under the condition of the said country experiencing serious disturbance on its labour market. In addition, this requirement is supposed to be justified objectively. As a result, there will be complete free movement for the citizens of new Member States seven years after the accession by 2011. Here, an important question may arise: **Who is covered by the transitional arrangements?**¹²⁸ There will be transitional arrangements for **anyone who wants to sign an employment contract with an employer** in one of the current Member States and these arrangements will not apply to persons who wish to reside in one of the current Member States for purposes such as study, or those who wish to establish themselves as self-employed persons. There is an exception of self-employed persons providing certain services, for example, in the construction sector of Austria and Germany. There is a right for the job-seekers that they will be entitled to assistance from public employment services from a future or current Member State. Also, the nationals of new Member States will have the chance to look for a work in another Member State for up to three months period as the nationals of current Member States have.¹²⁹

The safeguard clause needs to be described because it is a significant exception for the transitional period, especially states like Malta have a

¹²⁸ Free movement of workers after enlargement: Frequently Asked Questions, 5 February 2004, http://eures.dresden.de/eures-t/de/Publikationen/Publikationen/PDF/free-movement_faq.pdf (10 May 2005)

¹²⁹ Ibid.

possibility to rely on. After giving an end to apply measures and opening its labour market to the workers of new Member States, a current Member State may experience serious and considerable labour disturbances in its market. In this case, that current Member State can ask to have authorization to re-impose restrictions. Then, the Commission will have the responsibility to decide what sort of restrictions can be imposed for how long period.¹³⁰ Member States can ask the Council to annul or amend the decisions taken by the Commission. This situation needs to be agreed by a qualified majority. Even though in every accession treaty there used to be safeguard clauses, none of them have been invoked.

It can be argued that the transitional arrangement for the free movement of workers basically means that the present system in which persons from new Member States need to get a permit to work in the Union, still keeps on to operate for some years after accession. As it is explained above, it applies not only to 'blue-collar' workers but to anybody who wants to sign an employment contract with an employer in one of the current Member States.¹³¹

Moreover, some other discussions and questions can be brought forward to give further information about the transitional period. For instance, the issue of

¹³⁰ <http://www.eubusiness.com/guides/enlargement-free-movement>, op.cit.

¹³¹ European Commission Directorate – General Enlargement Hungary Team, Free movement of persons – A practical guide for an enlarged EU, 2002
http://europa.eu.int/comm/enlargement/negotiations/chapters/chap2/55260_practica_guide_including_comments.pdf (15 May 2005)

nationality is a common question that needs some explanation. The nationals from new Member States will not be discriminated against in the labour market because discrimination on grounds of nationality is against the Community law; hence it is forbidden.¹³² A worker from a new Member State must be treated in the same way as any domestic worker. What is more, the Member States are supposed to give workers of the new states priority over workers from third countries in the process of accession to a new job. What if someone is already working in one of the current Member States?¹³³ This is another question that people will ask to understand the issue. A national of a new Member State working legally in a current Member State at the date of accession and also fulfilling the work permit of 12 months authorization, will continue to have direct access to the labour market of that Member State.¹³⁴ This status will not however give him or her the right to have automatic access to the labour market of other current Member States. Something vital must be emphasized here. To illustrate, when a national of a new Member State moves to a current Member State after the accession date, he or she will have the same rights if the legal permission to work for 12 months or longer is gained. But, if that national of the new Member State leaves the labour market of that host current

¹³² Free Movement of Workers to and from the New Member States – How will it work in practice?,

http://www.ueapme.com/enter/dwnlds/IsProM_2.doc (16 May 2005)

¹³³ Ibid.

¹³⁴ Ibid.

Member State, then the right of access to that State will be lost until the end of the transitional period.

Furthermore, it needs to be pointed out that the transitional arrangement does not apply to Cyprus and Malta.¹³⁵ Thus, there will be complete free movement between current Member States and these countries and indeed between the other new Member States and Cyprus and Malta. Malta however has the right to apply safeguard if it fears large movements of workers into Malta. This is understandable when the scale of the Maltese labour market is considered.¹³⁶

Having described the transitional period, another vital question arises. One can ask how then will individuals who wish to work outside their home country be affected by the transitional arrangement? The answer to this question varies depending on the home country of the worker and the proposed destination. Four options present themselves: an individual from a current Member State wishes to work in another current Member State; an individual from a new Member State wishes to work in a current Member State; an individual from a current Member State wishes to work in a new Member State; and an individual from a new Member State wishes to work in another new Member State.¹³⁷

¹³⁵ FAQs on Malta and the EU, <http://www.mic.org.mt/EUINFO/qeua/q&a28.htm> (15 May 2005)

¹³⁶ Ibid.

¹³⁷ http://europa.eu.int/comm/enlargement/negotiations/chapters/chap2/55260_practica_guide_including_comments.pdf, op.cit., p.6.

Those four options will be examined one by one in order to clear out the circumstances for the persons belonging to current or future Member States and wish to work in a Member State or future Member State.

i) How will an individual from a current Member State who wishes to work in another current Member State be affected by the transitional arrangements?

There will not be any change. During the enlargement, Union citizens can work in any other current Member State without any restrictions. Also, Cyprus can be considered as a current Member State because it is not affected by the transitional arrangement.

The second question is a very important one which every person being a citizen of a future Member State desires to know very well.

ii) How will an individual from a future Member State who wishes to work in a current Member State be affected by the transitional arrangements?

In the transitional period, any person from a future Member State will face restrictions if they attempt to work in a current Member State. Cyprus and Malta are excluded from these restrictions. The reason for these restrictions is that all present Member States will keep on requiring work permits from the workers from future Member States at least for two years according to the treaty. However, there is **standstill clause**¹³⁸ which means that the present Member States cannot make access to their labour markets by workers from the new

¹³⁸http://europa.eu.int/comm/enlargement/negotiations/chapters/chap2/55260_practica_guide_including_comments.pdf, op.cit.,p.6.

Member States more restrictive than it was at the date of signature of the accession Treaty, 16 April 2003. As a result, when one of the present Member States has a quota of workers from one of the new Member States, then it can not go below that quota and this quota must be set out in a bilateral agreement dating from 2003 or earlier.¹³⁹ Briefly it means that the rights already granted can not be taken away. For instance, if Germany allows 500 people from Estonia to come to work every year, this arrangement must continue.¹⁴⁰

iii) How will an individual from a current Member State who wishes to work in a future Member State be affected by the transitional arrangements?

During the transitional period, when any EU citizen from a current Member State wishes to work in a future Member State (except for Cyprus) , that EU citizen will face restrictions. Here, one can argue that the current Member States seem stronger in the transitional arrangement because they do not let the workers of the new states to access their market. However, the workers from those powerful current Member States are not easily allowed to enter the new Member States. It is because new Member States have the option of applying the same equal restrictions to those current Member States.

iv) How will an individual from a future Member State who wishes to work in a future Member State be affected by the transitional arrangements?

¹³⁹http://www.ueapme.com/enter/dwnlds/IsProM_2.doc, op.cit.

¹⁴⁰http://europa.eu.int/comm/enlargement/negotiations/chapters/chap2/55260_practica_guide_including_comments.pdf, op.cit., p.6.

What is more, there is not any new Member State actually requesting a transitional period, but there is a concession that the EU has agreed to give future Member States the right to invoke safeguards against each other.¹⁴¹

4.2. Specific Case: Free Movement of Persons for Poland

Poland is chosen as a case to study in this chapter because in some respects, it is similar to Turkey. Poland's agriculture is important for its economy. What is more, the population of the country is about 40 million, and there was fear among present Member States of the EU about the accession of Poland to the Union.

For many years, both Polish governmental authorities and Polish society gave great importance to Poland's accession to the EU. For Poland, there are numerous advantages as well as challenges being represented by European integration. According to Polish popular opinion, one of the important opportunities seems to be the free movement of persons for the development of economic activity. This issue can be considered as the most controversial and significant problem in negotiations. Since the beginning of the accession negotiations, there is an isolation of areas of great controversy between current Member States and candidate countries and this isolation is caused by experts

¹⁴¹http://europa.eu.int/comm/enlargement/negotiations/chapters/chap2/55260_practica_guide_including_comments.pdf, op.cit., p.7.

and politicians. Free movement of persons for the pursuit of economic activity is one of these areas of controversy. Some Member States have considerable anxiety regarding the possible negative short-term effects on labour markets caused by free movement of persons. Particularly, Germany and Austria have a fear about their workplaces, the stability of their social security systems, the level of their incomes and the quality of services provided. Simply, there are two main ideas on which the concerns about increased immigration are based. These are income differentials and unemployment.¹⁴² When the candidate countries are considered, it is clear that Poland stands out as a rather important country role due to its demographic characteristics and proximity to Germany. The EU decided to present a transition arrangement to eleven candidate countries because the EU was worried that this issue may affect the overall public support for enlargement. There is 'National Integration Strategy' (NIS) which is the first official Polish document, and the free movement of persons for the pursuit of economic activity was regarded as one of the most difficult issues in this document.¹⁴³ As stated in the NIS, the Polish government declared that Poland will benefit greatly when the free movement is fully introduced, and this must be as soon as possible. Furthermore, according to the

¹⁴² Malgorzata Organa, (2004), "The Free Movement of Workers and Poland's accession to the European Union", <http://www.weltpolitik.net/Regionen/Europa/Polen/Analysen/The%20Free%20Movement%20of%20Workers%20and%20Poland%20s%20accession%20to%20the%20European%20Union.htm> (14 April 2005)

¹⁴³ Ibid.

government, the transitional periods concerning access to the labour markets of current Member States, need to be avoided or at least, a minimum period should be arranged. The European Parliament stated that there must be a regular report prepared by the Commission for Poland's progress towards accession. In this report, Poland was described as a country enjoying stable social and political conditions. It said that Poland aimed the progress of developing an efficient market economy. As a result, the resolution stated that during the negotiation period, there should not be any irrational fears or myths about labour and worker movements after accession. The European Parliament considered a survey which showed that the right to work in the EU is substantially important for 54% of Poles. In addition, according to the young Poles aged 18 to 24, being the most determined supporters of the Poland's accession to the EU, the right to work in the EU is an absolute priority. Poland's negotiation position was adopted by the Polish government on the 27th of July, 1999; it was then presented in Brussels on the 31st of July, 1999. In accordance with the issue discussed above, Poland accepted the whole of *acquis communautaire* in the field of the free movement of persons and also declared that the principle would be implemented in Polish legal system just on the day of accession.¹⁴⁴ The *acquis* covered the following four broad topics: mutual

¹⁴⁴ Ibid.

recognition of professional qualifications, citizens' rights, free movement of workers and coordination of social security schemes.¹⁴⁵

About the free movement of workers, Poland accepted the transitional arrangements proposed in the EU Common Position as presented in the document CONF-PL 60/01.¹⁴⁶ The Polish government wanted to ensure that the Member States liberalise the access to their national labour markets for Polish citizens immediately after accession, and to apply the *acquis* at the earliest possible stage. Consequently, Poland requested that relevant declarations of the Member States be attached to the Accession Treaty. What is more, Poland applied for being granted reciprocity in the free movement of workers during the transitional period. As it is mentioned in this chapter, the new Member States are able to apply to nationals from a present Member State national measures, and Poland can apply the same measures to older Member States in the context of the arrangement on free movement of workers and provision of services. When a present Member State applies national measures to nationals of a new Member State, Poland will be able to resort to safeguard provisions with regard to that new Member State. In this case, national measures both of a current Member State and of Poland will not fall behind the current status.

¹⁴⁵ European Parliament – Factsheet Poland,
http://www.europarl.eu.int/enlargement_new/negotiations/poland/pdf/poland_chap02_en.pdf
(18 May 2005)

¹⁴⁶ Poland's Negotiations Position Free Movement of Persons,
<http://www.negocjacje.gov.pl/neg/stne/pdf/stne2en.pdf> (18 May 2005)

The restrictions on the movement of workers from Poland to the EU will apply for two years after accession and could potentially remain in place for up to seven years. Negotiations on the freedom of movement of persons came to a close in December 2002. For mutual recognition of qualifications, a good progress has been made; however further legislation is required for full compliance with the *acquis*. As regards free movement of workers, since April 2002, EU nationals and their families do not require a work permit; and bilateral agreements prepared the basis for social security progress.

In summary, Poland accepted and started to implement the *acquis* in full, raising no negotiation problems and did not request transition periods or derogations in the area of free movement of persons. The future implementation of the principle of free movement of persons was facilitated by the already existing relevant laws on the date of the Accession Treaty's entry into force.¹⁴⁷ As agreed in negotiations, Poland will implement the provisions of regulations, directives, decisions, recommendations, and resolutions in order to complete the transitional period. In accordance with this declaration, Poland undertakes to implement the *acquis communautaire* in the area of free movement of persons so that the relevant laws may operate.

¹⁴⁷ Ibid.

One year after Poland joined the European Union, in the first quarter of 2005, a Ministry Official Zbigniew Kruzynski announced that 65 000 Poles have left Poland for the purpose of working in other Member States.¹⁴⁸ In a conference of local authority officials from 19 EU Member States, Mr. Kruzynski told the participants that "if seasonal workers are included in the tally, 450,000 Poles have worked in other EU member states in the 12 months since Poland joined the bloc on May 1 last year"¹⁴⁹. According to a survey published in April 2005, Poles today are not too eager to work in other Member States as they were before Poland joined the Union.

¹⁴⁸ "One year after joining EU, 65,000 Polish workers have taken jobs there", (2005, April 25), http://www.eubusiness.com/East_Europe/050425110541.59dk5ucn (22 May 2005)

¹⁴⁹ Ibid.

CONCLUSION

To conclude, a general statement can be made to define the subject of this dissertation. Free movement of persons is one of the four fundamental freedoms of the internal market and the Community Law. This right implies in particular the removal of all legal or practical barriers to the flow of workers to another member state, whether to work, to provide service, to study or for the purpose of tourism.

Half a century after the Treaty of Rome, the free movement of persons has become a reality in Europe. Being one of the 31 chapters of the EU acquis, the free movement of persons is a significant subject to examine in order to state out the development of freedom of movement for persons, especially for workers. This subject is also very important for Turkey because Turkey is a candidate for EU membership. I can argue that every treaty that has come into force since 1950s, amending each other, together with the acts and secondary legislation, developed the European community and the rights of the people living in the Member States. A unique development for free movement of persons in the 1980s is the Schengen Agreement which allows the citizens of countries that are party to the Agreement to move about freely without having to show passports when crossing internal frontiers. The internal frontiers are defined as the national boundaries between the countries taking part in the

Schengen Agreement, together with airports and seaports in the case of traffic to and from a Schengen country. As a result, travelers can cross the internal frontiers wherever and whenever they like without personal checks. However, anyone who enters or leaves the Schengen zone is carefully checked.

In the second chapter, the treaties signed after the Maastricht Treaty have been analysed. It is certain that the TEU was a turning point in the European integration by establishing a union citizenship for the citizens of the Member States. What is more, the three pillar structure was created to develop the community; the name was changed into the EU. After the TEU, all the Union citizens have been entitled to move and reside freely among the EU member states. In 1990s, another major step was the Treaty of Amsterdam which was part of an ongoing process to update the Treaties of European integration. This treaty amended the articles of the TEU and extended the scope of union citizenship and the rights accompanying it. The freedom of movement received further impetus after the Treaty of Amsterdam because it integrated the acquis of Schengen into EU Law. Both the TEU and Treaty of Amsterdam had one essential aim; establishment of an area of freedom, security and justice (Article 2 of TEU amended by Treaty of Amsterdam). It also extended the co-decision procedure and qualified majority voting and simplified and renumbered the articles of the Treaties. The Treaty of Nice dealt mainly with the institutional

adaptations required for the expansion of the Union to 25 Member States and also it confirmed citizens' rights. Treaty of Nice facilitated the legislation relating to free movement and residence by introducing qualified majority for the decision-making in the Council. This treaty was essentially devoted to the 'leftovers' of Treaty of Amsterdam, i.e. the institutional problems linked to enlargement which were not resolved in 1997. Lastly, there is another treaty for the European Constitution which has not come into force yet. Besides, it has been rejected in the referendums in France and the Netherlands.

The third chapter allows the readers to understand what the terms of the subject mean. Who are the 'persons'? The persons are the nationals of Member States according to the EU Law. There are different categories of persons as workers, self-employed persons, providers of services, students and tourists. It is important to examine employment opportunities and working conditions for EU citizens in other Member States. The right of free movement has, first and foremost, an economic character. That is why the free movement of workers is significant and there are case-laws and regulations which lay down new rights and definitions for the term worker. Based upon the right conferred by Article 48 of the EEC Treaty, any national of a member state can move freely to any other member state to take up employment. In other words, every national of a Member State has the right to take up an activity as an employed person and

pursue such activity within the territory of another Member State under the same conditions as nationals of the host state. The definition of the term 'worker' has been extended and enhanced throughout the years as integration in the EU deepened. The secondary legislation and case-laws define what a worker is. As a result, it can be argued that, according to the needs of the workers who are nationals and citizens of the Member States, new regulations and directives have been adopted to satisfy workers. The secondary legislation also contain restrictions and limitations for the free movement of workers as laid down in Article 48 of the Treaty of Rome. It is a fact that since its creation, European integration attempted to unite Europe politically, economically and socially. It can be definitely claimed that free movement of persons can be considered as a fundamental subject supporting the integration of Europe, because the right to free movement of the EU nationals may be accounted among the locomotives of the economic and social integration. In Europe, as it is stated in the TEU, it is a process of creating an ever closer union among the peoples of Europe. Thus, after the analysis of the subject, I have concluded that European states have succeeded in unifying Europe.

In the last chapter, a recent and essential subject is being explored: the transitional period for the new Member States. Following the enlargement of the European Union to 25 members on 1 May 2004, transitional periods are set which will limit the free movement of workers from new Member States, as laid

down in the Accession Treaty. It can not be denied that the free movement of workers is seriously and vitally important for Turkey's membership. There is a great deal of opposition among some founding member states of the EU to the free movement of 'Muslim' Turks, especially workers. The rejection of the EU Constitution in the referendum held in France is a clear example that shows the 'true' feelings of European people.

This chapter delves into the conditions for the workers of 'new' EU member states that gained accession in 2004. After their accession, the first two years concerning free movement of workers will depend on national measures and policies of the Member State where a worker of a new Member State wishes to perform economic activity. Following this period, reviews will be held and there will be a report drafted by the Commission. The transition period should come to an end after five years, but it may be prolonged for a further two years in those Member States where there are serious disturbances of the labour market or a threat of such disruption. At the end of the seven-year transitional period, there will be complete freedom of movement for workers who are Community nationals in the enlarged Union. Among the new Member States, Poland stands out as the state which has greatest similarity with Turkey on account of its sizeable population, workforce and agricultural sector. Because of this, the Chapter preceding the Conclusion examines at some length the case and experience of Poland in terms of its relations with the EU. Poland has accepted

the EU's transitional arrangement regarding the free movement of workers. Its accession negotiations with the EU were closed in 2002. Therefore the case of Poland can be usefully studied as a model before Turkey; in other words, Turkey can greatly benefit from the Polish example for its own negotiations with the EU.

Free movement of persons, in the beginning, served economic purposes: the economies of member states and the individual fortune of workers. The Treaty of Rome which was then known as the 'EEC Treaty', mostly aimed to establish an economic community. However, economy alone was not enough for true integration. Therefore, the Treaty of Maastricht emerged in the early 1990s as a result of the need for a union which is the sum of both economic and social dimensions. The union citizenship is a key point for the analysis of free movement of persons. After it is introduced by the Treaty of Maastricht on European Union, the citizenship played a crucial role in the development of free movement of persons. Since 1993, the free movement of persons can be called as free movement of the union citizens which is a title added to the people being a citizen of a Member State. The foremost purpose of the institutionalization of this new legal status was to strengthen and enhance the European identity and enable European citizens to participate in the Community integration process in a more intense way. What is more, Union citizenship

confers on every Union citizen a fundamental and personal right to move and reside freely without necessarily engaging in an economic activity in the Member States. Consequently, it is more than a purely economic right conferred upon workers and entrepreneurs by the EEC Treaty.

An examination of the process of European integration and the right of freedom of movement for persons, shows that the Europeans really aimed to establish a union among themselves. After the end of the World War II, the subject of European integration became an essential subject of world politics in the discipline of International Relations. In this dissertation, I have tried to present the evolution of free movement of persons, one of the major subjects in the EU, so that the readers will have an idea about what happened since 1950s. I have aimed to express the significance of the primary legislation consisting of founding and amending treaties, together with the secondary legislation consisting mainly of regulations and directives. The relevant articles of the treaties, regulations and directives have been accordingly studied. Therefore, the readers have had the chance to see the facts for themselves and to be aware that free movement is the subject of some limitations and restrictions. The readers will also come to understand that the workers of 'new' member states have not been granted an automatic right of free movement. Instead they will have to wait for a transitional period of a maximum of seven

years. It is clear that the European governments do not look happily at the prospect of absolute freedom of movement for workers from Central and Eastern Europe, let alone Turkey. Unemployment, social life and religion affect the citizens of Europe in a negative way. Turkey and Poland are somewhat feared by many European peoples since they are not small states with a small population. That Turkey is a 'Muslim' country complicates the situation further at Turkey's cost.

In conclusion, free movement of persons is one of the fundamental rights of citizens in Europe. Since 1950s this right has played a leading role in the enlargement process of European integration. For the New Member States, it is essential that their nationals have the right to circulate freely in the EU, in particular as a worker. Freedom of movement for workers is a fundamental aspect of the freedom of movement for persons and of the internal market of the EU. Lastly, in my view, free movement of persons is one of the basic dynamics of European integration, while it is in turn the result of further integration in the EU. There is no doubt that the free movement of workers will continue to be a very sensitive issue for the EU in the years to come.

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