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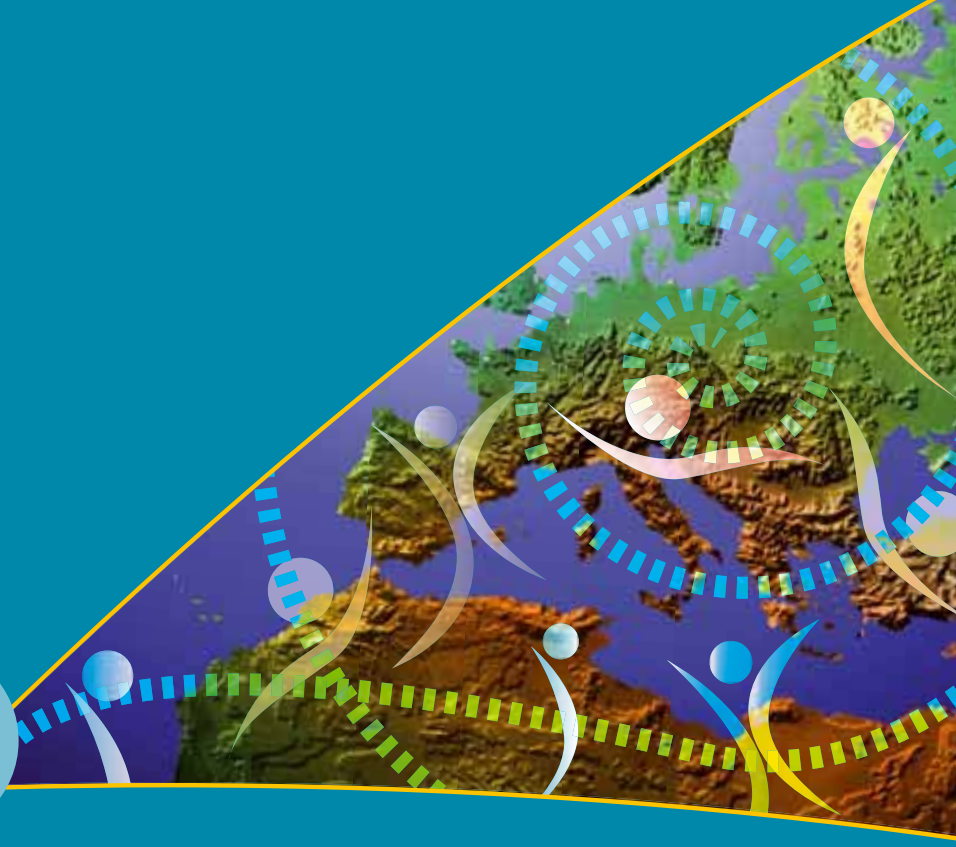

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UNESCO MIGRATION STUDIES

FREE MOVEMENT OF PERSONS IN THE EUROPEAN UNION AND ECONOMIC COMMUNITY OF WEST AFRICAN STATES

A comparison of law and practice

Kristina Touzenis

Free Movement of Persons in the European Union and Economic Community of West African States

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This research, however, has been carried out exclusively in my personal capacity and reflects my views and opinions only. It does not reflect and cannot be understood to reflect the views of the International Organization for Migration.

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Kristina Touzenis is currently working as Head of the International Migration Law Unit at IOM Geneva. She has an LLB and LLM from the University of Copenhagen. She has worked in Italy for seven years, including four for the International Organization for Migration and has been teaching both post and undergraduates at the Universities of Trieste and Pisa. Her research focuses on the human rights of women and children and she has published on both international human rights and international humanitarian law issues. She is currently researching issues related to transnational organised crime and human rights. She has managed programmes on irregular migration in West Africa, the Maghreb and the Middle East and is involved in various projects related to legal research on migration and trafficking laws in these regions.

Executive summary

Both the European Union and the Economic Community of West African States have created a legal framework for the free movement of persons and goods within their respective regions. Both of these free movement regimes were born out of a wish on the part of the states concerned to create stability and the conditions for prospect and peace within the external borders of the region.

At the founding of the European Economic Community, since renamed the European Community, the main concern was the creation of a peaceful and prosperous Europe after the Second World War, and the primary mechanism for achieving this was a common market. In 1968, legislation on the free movement of workers was already in place. Countries in the West African subregion, seeking to promote stability and development following their independence from colonial rule, were also determined to embrace a policy of regional economic and cultural integration. Their first regulations on free movement were adopted in 1979.

This research analyses the legal framework in the two regions relating to the free movement of persons, and on that basis examines how mobility is facilitated or hindered, together with the major problems in realising effective mobility within regions.

Part 1 focuses on the European Union, where legislation on the free movement of citizens is very detailed, having been elaborated over four decades, and the principle of free movement is considered to be one of the key policies of the EU.

Regulations on free movement have recently been based on the concept of 'European Union citizenship', which is comparatively new compared with the idea of free movement within the EU itself. Citizenship of the Union does not replace national citizenship, but complements it. In practice, this means that anyone who holds the nationality of an EU Member State is automatically a European citizen.

A specific set of rights is attached to EU citizenship: the right to move and reside freely within the EU – subject to certain limitations introduced by Community law; the right to vote for and stand as a candidate at municipal and European Parliament elections in whichever Member State an EU citizen resides; access to the diplomatic and consular protection of another Member State outside the EU if a citizen's Member State is not represented there; the right to petition the European Parliament and to complain to the European Ombudsman.

The introduction of EU citizenship in the 1992 Maastricht Treaty as a distinct concept guaranteeing additional rights, together with the subsequent interpretations of the European Court of Justice, which has been very active in giving substance to the concept, have greatly simplified the regulations pertaining to free movement since the right to reside was reformed in 2006 by Directive 2004/38/EC. There is still a focus on the free movement of workers, but now any Union citizen can reside in another Member State by fulfilling the basic requirement of not being a burden on the host state.

The very complex nature of legislation on moving from one country to another is also evident at a practical and personal level, such as the regulations influencing pension schemes, taxation or social security. The many Member States have very complex and detailed regulations on these matters, and that has to be reflected in legislation at regional level. Unfortunately, these complex regulations and issues create obstacles to effective free movement.

Part 1 passes from analysis of the legislation to an evaluation of the difficulties and incentives to move for EU citizens. Mobility between Member States is in fact quite low, even surprisingly so – about 2 per cent – whereas the number of regulations governing these 2 per cent of European citizens is vast.

There are differences in motivation for moving – some people move for employment, others for family reasons, and there are also differences in mobility patterns in the fifteen 'old' EU states and the 'new' states that have recently joined the Union. Although the free movement of persons is a fundamental precondition of the common market and an essential element of European citizenship, transition to full mobility of workers remains one of the most controversial issues regarding the accession of new Member States which have special 'transitional' measures.

Differences in culture and language add diversity and richness to European societies but, in spite of the increasing number of EU citizens who are multilingual, language is still one of the most significant barriers to mobility. Living and working in another Member State requires a person to have at least a working knowledge of the local language for successful integration into the community. Age is a major determinant of mobility, with the highest mobility among 20- to 40-year-olds. What may create the greatest obstacles to free movement are the regulations governing aspects that influence mobility, such as recognition of professional qualifications and pensions. The complexity of social rights across borders may also contribute significantly to hindering mobility. This is both a legal and practical obstacle.

The main obstacles to mobility have been identified as:

- lack of integrated European-wide employment legislation;
- differences in tax systems between Member States;
- lack of language skills;
- differences in benefit systems between Member States;
- immigration issues;

- differences in pension systems between Member States;
- lack of mutual recognition of professional qualifications;
- availability of information on international employment opportunities.

These practical difficulties show the need to facilitate the practical aspects of mobility, but it is also true that finding a job in another Member State, or retiring or studying there, would be much more difficult if these regulations were not in place. There can be no doubt that mobility for those who choose the challenge of living in another country has been significantly simplified by the regulations associated with Union citizenship.

Part 2 of the report focuses on the Economic Community of West African States, again starting with an analysis of current legislation and moving on to an evaluation of actual mobility and the constraints and facilitation of such mobility within the system.

With goals similar to those of the EU, ECOWAS was set up with the aim of promoting cooperation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations among the Member States and contribute to progress and development. And, again as with the EU, one of the means of achieving these aims was the establishment of a common market through the liberalisation of trade and the removal of obstacles to the free movement of persons, goods, service and capital between Member States.

Free movement in ECOWAS is mainly regulated by the 1979 ECOWAS Protocol A/P.1/5/79 relating to Free Movement of Persons, Residence and Establishment, which sets out the right of Economic Community citizens to enter, reside and establish themselves in the territory of Member States and establishes a three-phased approach over fifteen years to the implementation of (I) right of entry and abolition of visas, (II) residence and (III) establishment.

Phase I provided for the elimination, over five years, of the need for visas for stays of up to ninety days within ECOWAS territories by Community citizens in possession of valid travel documents and an international health certificate. Phase II aimed at extending residency, including the right to seek and carry out income-earning employment, to Community citizens in host ECOWAS states, provided that they had obtained an ECOWAS residence card or permit. Additionally, it obliged Member States to grant migrant workers, complying with the regulations governing their residence under ECOWAS, equal treatment with nationals in areas such as security of employment, participation in social and cultural activities and, in certain cases of job loss, re-employment and training. Phase III, the final five-year period, focused on the facilitation of business through the right of Community citizens to establish enterprises.

To date, only Phase I has been fully implemented in the Member States. This obviously means that regulations on free movement are not particularly detailed, or at a very advanced stage.

Nevertheless, in the thirty-four years since ECOWAS came into being, much has been accomplished in the area of free movement of persons (ECOWAS is the only subregional organisation that is visa-free), and intra-regional migration has been and still is part of the socio-economic evolution of the area, but many problems and difficulties remain in the actual implementation of the provisions.

Several elements have been identified as having a negative impact on the exercise of the right of free movement that should be enjoyed by all ECOWAS citizens, and which need to be addressed.

- Lack of basic structures and resources in order to better implement the provisions.
- Too great an emphasis on state sovereignty within the Community texts. Integration cannot move forward if Member States will not allow some flexibility and adaptation towards ECOWAS provisions.
- Poor dissemination of information on free movement and its management, both to officials and to citizens of the Community. Potential migrants unaware of ECOWAS provisions will often leave their country of origin in an irregular situation, although they are entitled to valid travel documents and to enjoy the right of freedom of movement within the Community. Widespread irregular migration also makes it difficult to collect accurate statistics and information on migration within the subregion.
- Ambiguity in legal texts.
- Lack of implementation of ECOWAS dispositions on the part of Member States.
- The paradoxical fact that irregularities exist within a region with a free movement regime.
- Difficulties in crossing borders, high fees and problems in accessing the formal labour market.
- Migration in the region is nevertheless rather high. In 2000, the overall population was estimated at 250,000, and the region was thought to host more than 42 per cent of international African migrants. This may be due mainly to the fact that migration is historically a way of life in West Africa. For generations, people have migrated in response to demographic, economic, political and related factors: population pressure, environmental disasters, poor economic conditions, conflicts, and the effects of macro-economic adjustment programmes.

Migrants in this region have traditionally paid little attention to national borders and this is one reason why the legal framework on free movement is poorly elaborated and implemented. The legal framework may not entirely correspond to the context in which it has to be inserted. And yet it is obvious that specific irregularities create unnecessary problems for migrants, who should be able to travel regularly without major problems. These problems indicate that a legal framework, effectively implemented, is far from being an irrelevance in this setting.

Part 3 compares the EU and ECOWAS systems in terms of regulations and obstacles to mobility. This comparison obviously had to take into account the differences in complexity and detail of the two legal systems, but similarities do exist in the following fields:

- Regulations on exit and entry: periods of allowed stay without any formalities, documents required.
- Residence and the right to equal treatment: the areas in which equal treatment must be guaranteed are similar, even if the jurisprudence is much more detailed within the EU system. The core right is however the same. Interestingly, the ECOWAS Protocol mentions treatment of irregular migrants and the protection of their rights. This would be inappropriate in the EU, as it is technically impossible for a Union citizen to be in an irregular situation, indicating how different experiences in different regions clearly influence and shape regional (as well as national) legislation.
- The concept of regional citizenship: although this was introduced much later in the EU than in ECOWAS, with recent developments and extensive case law it is much better implemented and effective in the EU.
- The definition of worker. In both regions those currently active in the labour market, those seeking employment and those at least temporarily unemployed are considered as 'workers' and benefit from the appropriate regulations.
- Protection from expulsion: even if at first glance the motives for which a citizen can be expelled are analogous, they are much more elaborate in the EU. EU citizens are also much more protected against expulsion than ECOWAS citizens, not only because of the detail of the regulations, but because the core content of the protection is very different in the two regions. ECOWAS clearly leaves a much wider margin of sovereignty to states wishing to expel other ECOWAS citizens than does the EU, thus leaving them less protected in this sphere. However, there are similar references to public health, public order and security.
- Regulations on residence: these have features in common but are much more elaborate in the EU.
- Implementation levels specific to the two regions are obviously very different. Whereas confusion regarding some regulations, especially social security and practical problems, may hinder free movement in the EU, lack of information on even the core provisions remains a problem in ECOWAS.
- Specific practical difficulties in the EU are very often linked to the more complex areas of law, whereas in ECOWAS even core provisions for free movement create practical difficulties. However, the dissemination of information on existing regulations to citizens seems to be ineffective in both systems.

Many of the core regulations of the two systems are thus comparable (visa waiving, no visa requirement for stay of up to ninety days, main regulations (on face value at least) on limits of expulsion). And it does not seem to be these regulations that limit movement within the EU, and even without effective implementation, they do not hinder irregular migration within ECOWAS – which obviously is something of a paradox.

There is often some reluctance on the part of states in general to relinquish power over migration matters to a supranational body. Such reluctance may be part of the reason why ECOWAS Member States have been slow in implementing even relatively basic regulations in the region. This is no longer the case in the EU, where Member States have long complied with rulings from the European Courts and with regional legislation.

In Europe, regulations on free movement are highly developed and notwithstanding the many obstacles to free movement, mainly practical but also legal and administrative, there can be no doubt that without this strong focus on the part of European legislators it would be much harder to move around within the Union. Nevertheless, regulations on free movement could be rendered more 'user friendly'.

Interestingly, the idea also emerges of how the differences between the two systems can influence the interaction between the regions and the perception of migration to the point where the focus is broadened to the migration between the two regions, in which the EU requires more control on the part of their African counterparts.

Introduction

Background

In recent years, the control of immigration and borders has become an important policy field. 'Managing' and 'controlling' migration flows by added security and apparently closed borders have had priority, especially after migration, irregular migration and international crime have to some extent been linked in popular discourse.

In general, immigrants have no right to enter a country other than their own. The right to leave a country, including one's own, is present in most international human rights instruments.[1] But the paradox of the immigrant, including those who are forced to migrate in order to survive economically (this definition applies to most immigrants), is that they are forced to exercise a right that is considered a freedom of choice (Goodwin-Gill, 2002, p. 7). This right has a significant defect – there is no corresponding obligation on any state to receive someone who has 'chosen' to leave their country – if not a refugee.[2] Thus, in today's world, most people are free to leave their country. But only a minority have the right to enter another country of their choice. The right to emigration will remain a problem as long as important restrictions on immigration keep people from migrating, or even travelling, to other countries (Pécoud and de Guchteneire, 2007, p. 2).

Seemingly opposed to the trend of closing borders to the external world is the relatively recent creation of organisations of states that have adopted regulations on facilitated or even free movement of goods and people between members. Examples of such coopera-

1 Article 13 of the Universal Declaration of Human Rights (UDHR), Article 5 of the Convention on the Elimination of Racial Discrimination (CERD), Article 12 of the International Covenant on Civil and Political Rights (ICCPR), Article 10 of the Convention on the Rights of the Child (CRC).

2 From a human rights point of view, however indirectly, the individual's rights can protect their interests on entering another state. The Committee on Human Rights has commented (paras 5, 7, General Comment, No. 15. UN doc. CCPR/C/21/Rev.1, 19 May 1989) that in certain circumstances a foreigner will benefit from the protection of the ICCPR even on entering a state, for example when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life are in question (also the European Court of Human Rights has affirmed the protection based on the right to family life: *Djeroud* vs *France* 1991, *Lamguindaz* vs *UK* 1993, *Beldjoudi* vs *France* 1992). Other than this, there is no right to enter a country as a 'simple' immigrant. But, once there, various rights apply. This means that the right to enter, which is crucial for refugees, is basically irrelevant for immigrants, whose human rights once admitted – or at least on arrival – are in danger. The violation of fundamental rights during the attempt to arrive is an indirect consequences of restrictive migration policies and thus relevant.

tion and the focus of this research are the Economic Community of West African States (ECOWAS) and the European Union (EU).

Seeking to promote stability and development following their independence from colonial rule, countries in the West African subregion determined to embrace a policy of regional economic and cultural integration. On 28 May 1975, a treaty establishing the Economic Community of West African States was signed in Lagos (Nigeria) by sixteen West African nations.[3] The treaty aimed both to strengthen subregional economic integration through the progressively freer movement of goods, capital and persons and to consolidate states' efforts to maintain peace, stability and security.

The ECOWAS 1979 Protocol A/P.1/5/79 relating to Free Movement of Persons, Residence and Establishment sets out the right of Community citizens to enter, reside and establish in the territory of Member States in a three-phased approach over fifteen years to the implementation of (I) right of entry and abolition of visas, (II) right of residence and (III) right of establishment.

Phase I provided for the elimination, over five years, of the need for visas for stays of up to ninety days within ECOWAS territories by Community citizens in possession of valid travel documents and international health certificate. Importantly, however, Member States reserved in Article 4 of the Protocol the right to refuse admission to any Community citizen who comes within the category of inadmissible immigrant under their domestic laws. This provision provided – and continues to provide – broad scope to Member States to undercut the purpose of the Protocol through the elaboration of overly restrictive domestic inadmissibility laws. Phase I has been fully implemented in the subregion.

Phase II, largely set out in the Supplementary Protocol adopted in 1985, was also foreseen to last five years. This phase purported to extend residency, including the right to seek and carry out income-earning employment, to Community citizens in host ECOWAS states, provided they had obtained an ECOWAS residence card or permit. Additionally, it obliged Member States to grant migrant workers, complying with the regulations governing their residence under ECOWAS, equal treatment with nationals in areas such as security of employment, participation in social and cultural activities and, in certain cases of job loss, re-employment and training.

Phase III, the final five-year period, focused on the facilitation of business through the right of Community citizens to establish enterprises (have access to, carry out and manage economic activities) in Member States other than their state of origin. Its realisation was intended to occur seamlessly, following the five years dedicated to implementing the right

3 The original members were Benin, Burkina Faso (then Upper Volta), Côte d'Ivoire, the Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, the Niger, Nigeria, Senegal, Sierra Leone and Togo. Cape Verde joined in 1976 and Mauritania withdrew its membership in 2002. ECOWAS today therefore consists of fifteen Member States.

of residence. However, the right of establishment has not yet been meaningfully implemented in the subregion. Progress on the second and third phases appears to have fallen victim to the subregional decline in economic performance in the 1980s and massive, prolonged displacement from the wars in Liberia and Sierra Leone through the 1990s and into the early twenty-first century. With those wars now apparently at an end and more favourable economic indicators apparent, there is renewed optimism in the subregion that the full promise of free movement, residence and establishment can be achieved. This in turn could promote increased political and economic stability in a virtuous circle.

The European Economic Community (EEC or 'Common Market') was founded in 1957 by the Treaty of Rome.[4] Renamed the European Community (EC) in 1993, it is the principal component of the European Union.[5] The main concern for the founders was the creation of a peaceful and prosperous Europe after the Second World War. The primary mechanism for achieving this was the common market, which was to be phased in over a period of twelve years. The EC thus had a free market emphasis from the outset, its primary function being to establish this market on the basis of the introduction of four freedoms: the free movement of goods, the free movement of people, the freedom to provide services and the free movement of capital. The single market was established by the 1991 Maastricht Treaty, formally known as the Treaty on European Union, which came into force in 1993. Through various treaties and developments the Community has 'spilled over' into other spheres, including citizenship and other social issues. But despite these developments the four freedoms have remained central to the EU and to how it attempts to achieve its goals. Community regulations on the free movement of workers also apply to Member States of the European Economic Area (EEA): Iceland, Liechtenstein and Norway. The relevant rights are complemented by systems for the coordination of social security schemes and the mutual recognition of diplomas.

In 2004, new challenges had to be faced with EU enlargement to twenty-five Member States. The Accession Treaty allows for the introduction of 'transitional measures'. Commonly referred to in EU circles as the '2+3+2-year arrangement', this scheme obliges Member States to declare their intentions in May 2006, and again in May 2009, on whether they will open up their labour markets for workers from the EU8 countries[6] (Poland, Lithuania, Latvia, Estonia, the Czech Republic, Slovakia, Hungary and Slovenia) or keep restrictions in place. The restrictions are due to be lifted on 30 April 2011.

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4 The first six Member States were Belgium, France, Federal Republic of Germany, Italy, Luxembourg and the Netherlands. Twenty-one countries have since acceded to the Union: Denmark, Ireland and the United Kingdom (1973); Greece (1981); Spain and Portugal (1986); Austria, Finland and Sweden (1995); Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia, then Bulgaria and Romania.

5 The others are the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (Euratom).

6 EU8 means all EU10 Member States with the exception of Malta and Cyprus; EU10 means all states that joined the EU on 1 May 2004 (fifth enlargement); EU15 means all states forming part of the EU before 1 May 2004.

A similar '2+3+2' scheme is in place with respect to workers from Bulgaria and Romania, which joined the EU on 1 January 2007.

The free movement of people in the EU basically means that EU Member States may not adopt or apply legal measures that restrict such free movement. The right to free movement means that every EU citizen is entitled to travel freely around the Member States of the 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. European citizens have, in principle, the right to enter the territory of EU states other than their own, and to remain there. Their most important right, once resident in another European country, is the right not to be discriminated against by the host state because of their nationality. Many detailed regulations are in place within the EU legal framework governing this freedom.

Aims and structure of the research

This research aims to establish which legal factors promote and/or impede the free movement of persons in the two regional systems, based on a legal analysis and subsequent critical comparison and assessment.

The first two parts consist of a comprehensive analysis of the legislation in place on free movement in the respective regions. This analysis includes the main treaties and protocols and subsequent legislation detailing regulations on free movement, including social security, labour market, etc. relevant to effective free movement, which does not only depend on visa-waiving and open borders, but also on regulations relating to the advantages and difficulties in moving from one state to another. The research thus examines in detail the legislation subject by subject and compares the two systems, clarifying what topics each system covers.

Migration flows in the two regions are seen to be influenced by the regulations in place – taking into consideration admission numbers and statistics on foreign populations in the states concerned, as well as indicators on migration between states. Bearing in mind that such data are never an exact science, they give some indication as to how easy or difficult free movement is.

At this point, Part 3 of the research suggests some common features in the legislation which may be seen to promote or deter free movement, based on the results (i.e. the actual movements of people) from the respective regions. It is also possible to see how the two systems differ and perhaps deduce what works (or not) in one setting and what works in the other. The differences can also help to illustrate how legal systems arise from different social settings and from the needs specific to particular countries or regions.

Difficulties were foreseen because the two systems are at very different phases of implementation, the EU being more elaborate and longer established. This factor should therefore be included in any consideration of the effectiveness of the systems. In fact, the prediction has proved well-founded, as shown by the length of the analysis of existing legislation in the EU and ECOWAS respectively. EU legislation is much more detailed and covers many more aspects of migrant's lives than does ECOWAS legislation. Implementation of EU legislation is also at a point where an in-depth analysis of why some regulations are not implemented is no longer appropriate, whereas the opposite is true for ECOWAS.

The advantage of such research, and its added value, lies in the comparative approach and in the evaluation of the worth of certain regulations. Whereas a vast body of research analyses the legal framework for free movement in the respective regions (especially in the EU), an attempt to compare the two regions and to use this comparison in a critical assessment is new. Further, most of the existing research on the EU treats the legal aspect, even if some recent studies also deal with the specific difficulties of free movement. Very little research combines the legal background and a legal analysis with numerical data, practical considerations and an assessment in one paper. It must be stressed however that the different stages of implementation and level of detail of the legislation have made the comparison difficult, but nonetheless interesting.

The research is mainly legal but only the first part is purely theoretical, based as much as possible on primary sources. The section on the EU is more legally oriented than the section on ECOWAS, partly because of the much more detailed legislation, partly because of the high level of implementation. Thus, details are given on the regulations, rather than consideration of the obstacles to implementation. The comparison and critical assessment in Parts 3 and 4 make use of facts on implementation and statistics.

Part 1: European Union

1.a Regulations directly governing the free movement of persons

Background

The development of the European Unions is, as mentioned above, very closely linked to the 'four freedoms': the free movement of goods; the free movement of persons (and citizenship), including free movement of workers, and freedom of establishment; the freedom to provide services; and the free movement of capital. These four freedoms underlie the creation of a common market and of the entire development of the European Community into its present form. Free movement has never been unlimited, however, and together with its implications for life in the host nation, has resulted in the development of a significant and complex body of law (Hailbronner, 2007, p. 313). The history of legislation on free movement is outlined in Table 1.

Table 1. EU legislation on free movement

Treaty of Rome	Main legislation concerning free movement of workers	Three directives: students, pensioners, non-actives	EU citizenship	Enlargement (transitional measures)	New residence Directive 2004/38/EC	Enlargement (transitional measures)
1957	1968	1990	1992	2004	2006	2007

When the European Economic Community was formed, the main concern, as mentioned above, was the creation of a peaceful and prosperous Europe after the Second World War, and the primary mechanism for achieving this was the common market. By 1968 legislation on the free movement of workers, such as European Council Regulation No. 1612/68 of 15 October 1968 on the Free Movement of Workers within the Community, was already in place, but it has since been superseded by Directive 2004/38/EC, in force from 2006 (EUROPA, 2006b; OJ, 2004). In the 1990s, three directives were adopted, which guarantee the rights of residence to categories other than workers: retired persons,

students, and economically inactive people. In 1992, the Maastricht Treaty introduced the concept of citizenship of the European Union.

With the establishment in 1993 of the single market and subsequent developments, the EU has 'spilled over' into other spheres, including social issues such as citizenship. But, despite these developments the four freedoms have remained central to treaty provisions (Maastricht, 1992; Amsterdam, 1997; Nice, 2001; and Lisbon, 2007)[7] secondary legislation and court decisions and to how the Union attempts to achieve its goals.

Box 1. Treaty of Lisbon (2007)

The Treaty of Lisbon amends the current EU and EC treaties, without replacing them. It will provide the Union with the legal framework and tools necessary to meet future challenges and to respond to citizens' demands.

1. *A more democratic and transparent Europe*, with a strengthened role for the European Parliament and national parliaments, more opportunities for citizens to have their voices heard and a clearer sense of who does what at European and national level.

- A strengthened role for the European Parliament: the European Parliament, directly elected by EU citizens, will see important new powers emerge over the EU legislation, the EU budget and international agreements. In particular, the increase of co-decision procedure in policy-making will ensure the European Parliament is placed on an equal footing with the Council, representing Member States, for the vast bulk of EU legislation.
- A greater involvement of national parliaments: national parliaments will have greater opportunities to be involved in the work of the EU, in particular thanks to a new mechanism to monitor that the Union only acts where results can be better attained at EU level (subsidiarity). Together with the strengthened role for the European Parliament, it will enhance democracy and increase legitimacy in the functioning of the Union.
- A stronger voice for citizens: thanks to the Citizens' Initiative, one million citizens from a number of Member States will have the possibility to call on the Commission to bring forward new policy proposals.

7 Entry into force: Maastricht, 1993; Amsterdam, 1999; Nice, 2003. The target date set by member governments for ratification of the Lisbon Treaty (Treaty on the Functioning of the European Union) is 1 January 2009.

- Who does what: the relationship between the Member States and the European Union will become clearer with the categorisation of competences.
- Withdrawal from the Union: the Treaty of Lisbon explicitly recognises for the first time the possibility for a Member State to withdraw from the Union.

2. *A more efficient Europe*, with simplified working methods and voting regulations, streamlined and modern institutions for an EU of twenty-seven members and an improved ability to act in areas of major priority for today's Union.

- Effective and efficient decision-making: qualified majority voting in the Council will be extended to new policy areas to make decision-making faster and more efficient. From 2014 on, the calculation of qualified majority will be based on the double majority of Member States and people, thus representing the dual legitimacy of the Union. A double majority will be achieved when a decision is taken by 55 per cent of the Member States representing at least 65 per cent of the Union's population.
- A more stable and streamlined institutional framework: the Treaty of Lisbon creates the function of President of the European Council elected for two and a half years, introduces a direct link between the election of the Commission President and the results of the European elections, provides for new arrangements for the future composition of the European Parliament and for a smaller Commission, and includes clearer regulations on enhanced cooperation and financial provisions.
- Improving the life of Europeans: the Treaty of Lisbon improves the EU's ability to act in several policy areas of major priority for today's Union and its citizens. This is the case in particular for the policy areas of freedom, security and justice, such as combating terrorism or tackling crime. It also concerns to some extent other areas including energy policy, public health, civil protection, climate change, services of general interest, research, space, territorial cohesion, commercial policy, humanitarian aid, sport, tourism and administrative cooperation.

3. *A Europe of rights and values, freedom, solidarity and security,* promoting the Union's values, introducing the Charter of Fundamental Rights into European primary law, providing for new solidarity mechanisms and ensuring better protection of European citizens.

- Democratic values: the Treaty of Lisbon details and reinforces the values and objectives on which the Union is built. These values aim to serve as a reference point for European citizens and to demonstrate what Europe has to offer its partners worldwide.

- Citizens' rights and Charter of Fundamental Rights: the Treaty of Lisbon preserves existing rights while introducing new ones. In particular, it guarantees the freedoms and principles set out in the Charter of Fundamental Rights and gives its provisions a binding legal force. It concerns civil, political, economic and social rights.
- Freedom of European citizens: the Treaty of Lisbon preserves and reinforces the 'four freedoms' and the political, economic and social freedom of European citizens.
- Solidarity between Member States: the Treaty of Lisbon provides that the Union and its Member States act jointly in a spirit of solidarity if a Member State is the subject of a terrorist attack or the victim of a natural or man-made disaster. Solidarity in the area of energy is also emphasised.
- Increased security for all: the Union will get an extended capacity to act on freedom, security and justice, which will bring direct benefits in terms of the Union's ability to fight crime and terrorism. New provisions on civil protection, humanitarian aid and public health also aim at boosting the Union's ability to respond to threats to the security of European citizens.

4. *Europe as an actor on the global stage* will be achieved by bringing together Europe's external policy tools, both when developing and deciding new policies. The Treaty of Lisbon will give Europe a clear voice in relations with its partners worldwide. It will harness Europe's economic, humanitarian, political and diplomatic strengths to promote European interests and values worldwide, while respecting the particular interests of the Member States in foreign affairs.

- A new High Representative for the Union in foreign affairs and security policy, also Vice-President of the Commission, will increase the impact, the coherence and the visibility of the EU's external action.
- A new European External Action Service will provide back up and support to the High Representative.
- A single legal personality for the Union will strengthen the Union's negotiating power, making it more effective on the world stage and a more visible partner for third countries and international organisations.
- Progress in European security and defence policy will preserve special decision-making arrangements but also pave the way towards reinforced cooperation amongst a smaller group of Member States.

Source: EUROPA (2007b).

Community regulations on the free movement of workers also apply to Member States of the European Economic Area (Iceland, Liechtenstein and Norway). The Amsterdam Treaty, which came into force in 1999, further strengthened the rights linked to European Union citizenship by integrating the Schengen Convention into the Treaty, and the European Court of Justice recognised the direct applicability of Article 18 of the Treaty Establishing the European Community (henceforth 'TEC', see OJ, 2002, for consolidated text), thus giving each EU citizen the right to ask for respect of that article, subject to limitations.[8] The Treaty of Nice, which entered into force on 15 February 2003, facilitated the legislative process by introducing qualified majority voting in the EU decision-making process in the field of free movement and residence.

Nonetheless, fewer than 2 per cent of EU citizens live and work in a Member State other than their state of origin – a proportion which has scarcely changed for thirty years, according to figures from Eurostat. Every year on average 7.2 per cent of EU citizens change their place of residence, of which 15 per cent cite a change of job as the main reason for the move. This compares with 16.2 per cent of United States citizens changing state of residence each year, 17 per cent for occupational reasons (European Law Monitor, 2008). Mobility between the EU10 (the EU countries that joined the Union in 2004 and 2007) and the EU15 (the 'old' EU countries) is very limited and not enough to influence the EU labour market in general. The percentage of nationals from the EU10 in the resident population of each Member State of the EU15 was relatively stable before and after enlargement. Nationals of the new Member States represent less than 1 per cent of the population of working age in all countries except Austria (1.4 per cent in 2005) and Ireland (3.8 per cent in 2005).

At this point, it may be opportune to mention that EU legislation is created by the European Parliament acting jointly with the Council; the Council and the Commission make regulations and issue directives, take decisions, make recommendations or deliver opinions. A regulation has general application, binding in its entirety and directly applicable in all Member States. A directive is binding as to the result to be achieved upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods. A decision is binding in its entirety upon those to whom it is addressed. Recommendations and opinions have no binding force.[9]

Further, it is important to recall that basic human rights instruments valid within the EU will be at the basis of Union citizens' rights, such as the European Convention on Human Rights and its optional protocols (especially, but not only, articles on family life

8 Martínez Sala Case C-85/96, rec.I-2691; Bickel and Franz Case C-274/96, rec.I-7637.

9 Article 249 of the Treaty establishing the European Community (Nice consolidated version) in Part Five: Institutions of the Community, Title I: Provisions governing the institutions, Chap. 2: Provisions common to several institutions. Previously Article 189, the wording remains unaltered (OJ C 325/35, 2002).

(Article 8), freedom of association (Article 11), and non-discrimination (Article 14 and Optional Protocol 11)), the Charter of Fundamental Rights and the European Social Charter, which all grant basic protection to people within the jurisdiction of the states parties to these instruments.

The content of rights of EU citizens depends on 'category': (a) workers, (b) self-employed, (c) students, (d) pensioners, (e) non-actives. It is however important to keep in mind that Directive 2004/38/EC and case law from the European Court of Justice operates with much less distinction than in the past and EU citizenship now confers many rights and obligations, regardless of worker or non-worker status. This is further examined in the following.

Treaty establishing the European Community (TEC)

At one level the Treaty establishing the European Community (OJ, 2002) secures the free movement of workers simply as an adjunct to the other freedoms (of goods and services). But the free movement of persons has implications beyond common market integration – it concerns human beings. It identifies people as the beneficiaries of the Treaty in a more direct sense than any other area of Community law (Weatherill, 2007, p. 423).

Since the TEC entered into force in 1993, establishing the European Union, the concept of European citizenship has been enshrined in treaty law (Articles 17–22 and 255). It has evolved as European integration has moved on, as creating an ever-closer Union among the peoples of Europe became the first aim to be mentioned in EU treaties[10] with the objective of strengthening the protection of the rights and interests of the nationals of its Member States.

European citizenship notably confers on every citizen a fundamental and personal right to move and reside freely without reference to an economic activity. The TEC also brought additional active and passive voting rights in European and local elections. It enhanced diplomatic and consular protection by giving the right to EU citizens to ask for the help of any Member State represented in a third country if their own Member State is not represented there. The Treaty of Amsterdam, which entered into force on 1 May 1999, extended citizens' rights and obligations by introducing a clause allowing EU institutions to take measures against discrimination on the grounds of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Amsterdam also reinforced the free movement of people by integrating the Schengen Convention into the treaty. Further, it

10 The Treaty of Maastricht divided EU policies into three main areas called 'pillars'. The free movement of persons comes within the first 'pillar' of treaty law, on the European Community (EC) economic, social and environmental policies. This is the basis of the most institutionally sophisticated species of law created within the European Union (the second and third pillars concern Common Foreign and Security Policy (CFSP), and Police and Judicial Co-operation in Criminal Matters (PJCC), respectively). However the non-EC pillars also influence free movement – e.g. the Schengen *acquis*. The third pillar adopts decisions by unanimity rule whereas the first pillar uses the more efficient qualified majority voting procedures.

affirmed the commitment of each Member State to raise the quality and free access to education at national level to the highest level of knowledge possible with, in particular, the view to tackling unemployment. The Treaty of Nice, signed in 2001 and entered into force in 2003, facilitated legislation relating to free movement and residence by introducing qualified majority decision-making in Council (EUROPA, 2006a).

The legislative basis for the free movement of workers is found in Article 39 of the TEC and the general right to move and reside freely within the EU is embodied in Article 18:

> 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.
>
> 2. *...the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.*

> Article 43 (ex 52) of the TEC establishes that
>
> … 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, … under the conditions laid down for its own nationals by the law of the country where such establishment is effected …

Underpinning Articles 39 and 43 (and 49 on the right to provide services, not considered here) is the principle of non-discrimination on the grounds of nationality (TEC, Article 7). The migrant has to enjoy the same treatment as nationals in comparative situations.

On the basis of Articles 18, 39, 43 and 49, Directive 2004/38/EC amends Regulation (EEC) No. 1612/68 and repeals Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, Council Directive 90/364/EEC of 28 June 1990 on the right of residence, Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students (Directive 2004/38/EC, Preamble, para. 4).

The Preamble of the 2004 directive states:

(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.

(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens (Directive 2004/38/EC, Preamble, paras 1–3).

The directive applies 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 (Directive 2004/38/EC, Article 3). Special measures are put in place to facilitate the movement of workers or self-employed. The scope of the fundamental freedom of movement of workers was extended by treaty amendments in 1992 to free movement of citizens of the EU. Free movement rights may also carry rights to remain (worker's right to remain) and of residence right, provided that EU citizens do not become a burden on the finances of the host Member State.

Member States are entitled under the TEC to impose public policy limitations on free movement of workers, for example on specified grounds of public security and public health. However, procedural requirements (Directive 64/221) must be observed when such limitations are imposed (Eurofound, 2008).

Directive 2004/38/EC thus makes Union citizenship the fundamental basis of nationals of the Member States when they exercise their right of free movement and residence on the territory of the Union. It is however already made clear in the Preamble that citizens of other Member States should not become a burden on the host state, and thus permanent residence is subject to certain restrictions, as shown below. Previously, as shown in the introduction, there were several Community instruments dealing separately with workers, self-employed persons, students and other inactive persons. The 2004 directive seeks to establish regulations to ensure that the formalities connected with the free movement of Union citizens within the territory of Member States are clearly defined, without prejudice to the provisions applicable to national border controls (Directive 2004/38/EC, Preamble, para. 7). It also incorporates the rights of family members of workers in this new approach.

The 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; (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 (Directive 2004/38/EC, Article 1).

Union citizenship

As shown above, Union citizenship is a relatively new concept compared with the right to free movement of persons within the region. The legal definition of European citizenship can be found in Article 17 of the TEC:

> Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.

In practice, this means that any person who holds the nationality of an EU Member State is automatically a European citizen. The question of whether an individual possesses the nationality of a Member State is settled solely by reference to the national law of the Member State concerned. Thus, it is for each Member State to lay down the conditions for the acquisition and loss of nationality (EUROPA, 2006a).

The TEC however does little more than introduce this concept, providing very little substance on how it will impact on EU law, despite its obvious relation to, and implications for, the law regarding free movement of persons (Hailbronner, 2007, p. 313).

A specific set of rights is attached to European citizenship: the right to move and reside freely within the EU (TEC, Article 18) – subject to certain limitations introduced by Community law; the right to vote for and stand as a candidate at municipal and European Parliament elections in whichever Member State an EU citizen resides (Article 19); access to the diplomatic and consular protection of another Member State outside the EU (Article 20) if a citizen's Member State is not represented there; the right to petition the European Parliament and to complain to the European Ombudsman (Article 21) (EUROPA, 2006a).

The European Court of Justice has declared that 'Union citizenship is destined to be the fundamental status of nationals of the Member States',[11] implying that, in its opinion, the principle of equal treatment extends to all citizens of the European Union, subject only to such exceptions that are expressly provided for (Hailbronner, 2007, p. 314. In Sala, a Portuguese national who neither qualified as a worker nor as a person entitled to free movement under the then relevant directive due to lack of sufficient resources (a request examined below), was nevertheless declared to be entitled to social benefits, such as child

11 *Martínez Sala vs Freistaat Beyern* Case C-85/96 [1998] ECR I-2691; and *Grzelczyk* vs *Centre Public d'Aide Social* Case C-184-99 [2002] ECR I-6153.

benefit.[12] The Court, deviating from previous case law and explicit provisions in secondary Community law, stated that all Union citizens could rely on the non-discrimination clause in TEC Article 12 (ex Article 6), which entitles them to social benefits, including benefits reserved to workers. Before Sala the Court had always carefully examined whether the conditions required for the application of secondary Community law (e.g. social benefits) had been fulfilled.[13]

The Court declared in *Baumbast*[14] that Article 18 (on establishment) of the TEC is directly effective and grants a conditional right of residence of all Union citizens.[15] Such developments in the Court's interpretation of secondary Community law must be kept in mind when considering the regulations examined below. Regulation 38/2004, the basis for this research, to some extent takes this development into consideration.

Schengen

During the 1980s, EC Member States began to debate whether border checks between countries could be eliminated entirely, or whether free movement should only apply to EC nationals, leaving those visiting from outside the Community subject to passport and visa checks at each national border. Given the slow movement on the issue, a handful of Member States opted to push ahead and, independently of the European Community, create an area without internal border controls. On 14 June 1985, representatives from Belgium, France, Germany, Luxembourg and the Netherlands met near the little town of Schengen in Luxembourg to sign the Schengen agreement, which called for the elimination of all passport and other checks between participating countries and established a single external border. However, the provisions of the agreement were not put in place until a later date. At that time, the Schengen area was viewed as a sort of laboratory, testing the creation of a common passport area before expanding Schengen to the entire EU.

While the original intent of eliminating border controls was to facilitate the movement of citizens from participating countries, it was not possible to eliminate border checks for these travellers while still maintaining checks for travellers from outside countries. Therefore, the concept of free movement was expanded to allow free travel of outside visitors within the Schengen area. Eliminating border controls for these outside visitors created the need for careful coordination on who would be admitted through external borders to travel freely within the Schengen area. In 1990, five countries (Belgium, France, Germany, Luxembourg, the Netherlands) signed the Schengen Convention, intending to put the common area into practice (see also EUROPA, 2008). The convention included several provisions on visa and border policies. Regarding short-term visas (less than

12 Ibid., see also Hailbronner (2007, p. 315).

13 Ibid., see also Jacqueson (2002).

14 Case C-413-99 [2002] ECR I-7091.

15 In *Trojani* vs *CPAS* Case C-456-02 [2004] ECR I-7575, the Court stated the right via the status of Union citizenship.

ninety days), it outlined the need for a common policy on the movement of persons and arrangements for the granting of visas, as well as provisions for uniform visas to allow travel throughout the Schengen area. Longer-term visas (exceeding ninety days) were to remain under national competence. While there would be no internal border controls, external borders were to be subject to uniform principles, but remain within the scope of national powers and legislation.

Other countries soon signed up to Schengen, beginning with Italy in 1990, Portugal in 1991, Spain in 1992, Austria in 1995, and Finland, Sweden and Denmark in 1996. Norway and Iceland had long been part of a Nordic passport union with Denmark, Finland and Sweden, so although neither Norway nor Iceland is a member of the EU, both joined the Schengen area in 1996 to preserve this union. Denmark also maintains a unique position in regard to Schengen in that, unlike other Schengen countries, it can choose whether or not to apply any new decisions made under the Schengen agreement. Schengen necessitated some level of mutual trust on immigration and asylum policy, as new residents of one country would then have visa- and passport-free access to all other Schengen members. However, harmonisation of immigration policy was in principle a responsibility of the EU institutions, and not of Schengen itself. Under Schengen, countries may re-establish their national border checks for a short period if necessary for national security. This flexibility has allowed Schengen to remain intact even in times where signatory states experience significant concerns as a result of exceptional events (Gelatt, 2005).

The Treaty of Amsterdam formally incorporated Schengen into the framework of the European Union as the Schengen *acquis* when it came into force in 1999. The Schengen *acquis* include the Schengen Agreement of 1985 and the Schengen Convention of 1990, as well as various decisions and agreements adopted in the implementation. With Amsterdam, decision-making power for Schengen came under the Council of Ministers of the EU. Although Schengen had officially become part of the EU, the agreement did not apply to all Member States. The United Kingdom initially opted out, preferring to maintain its own national borders. Ireland followed suit in order to maintain its Common Travel Area with the United Kingdom. However, the United Kingdom and Ireland do participate in some aspects of Schengen, including the Schengen Information System. Iceland and Norway also signed an agreement with the EU in 1999 to continue their participation in the Schengen area. While the ten new Member States that joined the EU in May 2004 are expected to eventually implement the full Schengen *acquis*, they have not yet, in the eyes of the existing Schengen states, met the requirements involved in the *acquis*. Before the new EU members can join Schengen fully, and before they can eliminate internal border controls, they must implement the data exchange and information systems necessary to participate in Schengen, and they must prove that they can effectively police their borders (Gelatt, 2005).

In anticipation of the accession of these new Schengen members, it became necessary to develop a new information system. The European Council issued guidelines in 2001 for the development of a second-generation information system (SIS II) (EUROPA, 2008).

The initial intention was to implement SIS II in 2007, in parallel with the extension of the Schengen area to the EU's ten new Member States (those joining in 2004). When, as far back as 2001, the Council entrusted the Commission with the development of SIS II, its mandate ran to 31 December 2006; five years was thought to be generous, but following various delays the Commission in July 2006 proposed that its mandate should be extended to 31 December 2007, and this was agreed. Two months later the Commission proposed an extension of its mandate by a further year, to 31 December 2008.[16]

SIS II will contain more data categories, including fingerprints and photographs, and allow more officials to view the data, including Europol, security services, police, customs and border officials. Several of the Schengen countries – Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria – signed an agreement in May 2005 known as the Prüm Convention, or Schengen III.[17] The agreement would create closer cooperation between countries in preventing and fighting terrorism and crime. Schengen III calls for the creation of shared national databanks to store DNA information (Articles 2–7), fingerprints (Articles 8–11), and vehicle identification for known or suspected criminals (Article 12). It would allow for armed 'security escorts' on planes and include measures to fight irregular migration. The agreement would establish immigration liaison officers to advise countries on any new information in the field of irregular immigration and offer advice on recognising fraudulent documents. It would also require joint action on the repatriation of irregular migrants, including joint expulsion flights (Chapter 4). While these measures are already included in the EU, the new agreement establishes national points of contact to coordinate these activities, which could facilitate their greater use. This agreement is not part of Schengen, as such, nor of the Schengen acquis.[18] However, like the original Schengen Agreement, the cooperation developed between countries under Schengen III is intended to eventually be expanded to the entire EU (Gelatt, 2005).

16 OJ 2006 L 411/1 and L 411/78; United Kingdom Government (2007).

17 Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and irregular migration. Also known as the Prüm Convention (Council of the European Union, 2005).

18 However, it follows a model of cooperation which is very similar to the 'Schengen Cooperation' before its integration into the first and third pillars of the EU under the Amsterdam Treaty of 1999. A group of powerful EU states agree stronger cooperation outside the formal structures of the EU, with the declared intention of transferring the regulations they have elaborated on a bilateral level to the level of the EU. The consequence of this will be that the European Parliament will have absolutely no say during the phase of bilateral cooperation, and it will only have limited influence when the seven Member States in this group try to implement their regulations inside the Union. This integration is planned to take place, at the latest, three years after the entry into force of the treaty – a period which will start after national parliaments ratify it. During this period, however, the contracting parties will elaborate the implementing agreements, which will contain specific technical details – institutionalisation of contact points, linkage of national databases, transfer of additional information and intelligence, etc. The treaty should be seen against the background of EU plans to introduce the so-called 'principle of availability' allowing for the exchange of information between law enforcement agencies in EU Member States – plans that started after the Madrid bomb attacks on 11 March 2004. See Statewatch (2005).

According to the Schengen acquis,19 Article 2, internal borders may be crossed at any point without any checks being carried out on persons. Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport have the right to leave the territory of a Member State to travel to another Member State. No exit visa or equivalent formality may be imposed on such persons. Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality. The passport shall be valid at least for all Member States and for countries through which the holder must pass when travelling between Member States. Where the law of a Member State does not provide for identity cards to be issued, the period of validity of any passport on being issued or renewed shall be not less than five years (Directive 2004/38/EC, Article 4).

Administrative measures regarding exit and entry

Member States shall allow Union citizens to enter their territory with a valid identity card or passport, and no entry visa or equivalent formality may be imposed on them. Family members who are not nationals of a Member State can also enter with a valid passport – they are only required to have an entry visa in accordance with Regulation (EC) No. 539/2001, listing third-country nationals who must be in possession of a visa[20] or, where appropriate, comply with national law. Possession of a valid residence card in a Member State exempts such family members from the visa requirement. Member States must grant such persons every facility to obtain the necessary visas. Such visas are issued free of charge by an accelerated procedure. The host Member State must not place an entry or exit stamp in the passport of family members who are not nationals of a Member State provided that they present a residence card.

Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, before

19 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Official Journal L 239 , 22/09/2000 P. 0019–0062.

20 In Annex 1 to the regulations. Under Article 62, point (2)(b) of the Treaty, the Council is to adopt regulations relating to visas for intended stays of no more than three months, and in that context it is required to determine the list of those third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement. Article 61 cites those lists among the flanking measures which are directly linked to the free movement of persons in an area of freedom, security and justice. The regulation follows on from the Schengen *acquis* in accordance with the Protocol integrating it into the framework of the European Union, hereinafter referred to as the 'Schengen Protocol'. It does not affect Member States' obligations deriving from the *acquis* as defined in Annex A to Decision 1999/435/EC of 20 May 1999 concerning the definition of the Schengen *acquis* for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the *acquis*.

turning such persons back the Member State concerned must give them every reasonable opportunity to obtain the necessary documents within a reasonable period of time, or prove by other means that they are covered by the right of free movement and residence. The Member State may require the person concerned to report their presence within its territory within a reasonable and non-discriminatory period of time.[21] Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions (Directive 2004/38/EC, Article 5).

Administrative measures regarding residence

When it is possible to apply for permanent residence, the host state must without delay issue the Union citizen with a document certifying duration of residence. Further, Member States shall issue family members who are not nationals of a Member State but are entitled to permanent residence with a permanent residence card within six months of submission of the application.

The permanent residence card is renewable automatically every ten years. The application for a permanent residence card for family members who are not Union citizens shall be submitted before the residence card expires. Failure to comply with the requirement to apply for a permanent residence card may render the person concerned liable to proportionate and non-discriminatory sanctions. Interruption in residence not exceeding two consecutive years shall not affect the validity of the permanent residence card for either Union citizens or non-Union family members (Directive 2004/38/EC, Article 20).

The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document. The residence card shall be valid for five years from the date of issue or for the envisaged period of residence of the Union citizen, if this period is less than five years. The validity of the residence card shall not be affected by temporary absences not exceeding six months a year, or by absences of a longer duration for compulsory military service or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country (Directive 2004/38/EC, Article11).

21 The rules regarding the entry of EU and EEA citizens are generally uncontroversial and all Member States permit the entry of EU or EEA nationals on the basis of a travel document or national identity card. The problematic issues relate to the other documentation that might be permissible to prove identity and nationality in the absence of these documents, or in the absence of the required visa in the case of third-country national family members, and the continuing difficulties surrounding the admission of family members and particularly third-country national family members of EU citizens in some Member States (see Groenendijk et al., 2006).

Documents needed to obtain residence

For periods of residence longer than three months, the host state may require Union citizens to register with the relevant authorities. The deadline for registration may not be less than three months from the date of arrival. A registration certificate shall be issued immediately, stating the name and address of the person registering and the date of registration. Failure to comply with this requirement may render the person concerned liable to proportionate and non-discriminatory sanctions. For the registration certificate to be issued, Member States may only require that (a) Union citizens who are workers or self-employed present a valid identity card or passport, a confirmation of engagement from the employer or a certificate of employment, or proof that they are self-employed; (b) Union citizens have sufficient resources; (c) Union citizens provide proof of enrolment at an accredited establishment and of comprehensive sickness insurance cover. Member States may not require this declaration to refer to any specific amount of resources (Directive 2004/38/EC, Article 8.1-3).

In general, Member States may not lay down a fixed amount which they regard as 'sufficient resources', but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host state become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host state (Directive 2004/38/EC, Article 8.4).

For the registration certificate to be issued to family members of Union citizens, who are themselves Union citizens, Member States may require the following documents to be presented: (a) a valid identity card or passport; (b) a document attesting to the existence of a family relationship or of a registered partnership;.(c) where appropriate, the registration certificate of the Union citizen whom they are accompanying or joining; (d) in cases of dependants, a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen.

Special rules apply to family members who are not Union citizens but who are dependent on such a citizen and/or who require the care of the latter. Family members who are not nationals of a Member State must be issued with a residence card, where the planned period of residence is for more than three months. The deadline for submitting the residence card application may not be less than three months from the date of arrival (Directive 2004/38/EC, Article 9).

1.a.a Free movement of workers

Speaking of free movement of 'workers' in the EU after Directive 2004/38/EC may be rather misleading, as according to this directive the right to free movement is not a right of workers but of 'EU citizens' in general. However the directive still distinguishes between economically active and non-active EU citizens, this distinction not having been fully abandoned in favour of the status of 'Union citizen' (Hailbronner, 2007, p. 320). It remains the case that the law has not evolved into a general charter of citizen rights, but retains features of the emphasis on rights and benefits for particular categories of person (Weatherill, 2007, p. 428). This may create some confusion as it implies that Union citizenship ought to be the foundation for these rights and obligations. When examining the directive it is obvious that there are no separate provisions for workers but that workers or the self-employed are treated within each provision, especially on the rules of residence. Further, workers and the self-employed are also concerned by other relevant regulations, such as those on professional recognition.

Directive 2004/38/EC applies 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 (Article 3). Union citizens have the right of residence in the host state for a period not exceeding three months without being subject to any conditions or formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to job-seekers as recognised by the case law of the Court of Justice (Preamble, para. 9).[22]

But the terminology may be maintained because special regulations facilitating work are put in place by the directive. Further certain advantages specific to Union citizens who are workers or self-employed persons and their family members, which may allow these persons to acquire a right of permanent residence before they have resided five years in the host state, are maintained, as these constitute acquired rights, conferred by Commission Regulation (EEC) No. 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that state, and Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity (Directive 2004/38/EC, Preamble, para. 19).

In order to be considered a 'worker' with the rights derived from the right to free movement of *workers* a person has to have the nationality of one of the EU Member States (or that of Norway, Iceland or Lichtenstein). What constitutes a worker, and self-employed,[23] follows the interpretation given by the European Court of Justice, which has given a

22 See also Case C53/81 [1982] ECR I-1035 *Levin* vs *Staatssecretaris van Justitie*, para. 23; and Case C-138/02 [2004] *Brian Francis Collins* vs *Secretary of State for Work and Pensions*, para. 36.

23 C-151/04 (2005) *Nadin and Nadin-Lux* para. 31: as the essential characteristic of an employment relationship within the meaning of Article 39 EC is the fact that for a certain period of time a person performs services for and under the direction of another person in return for which they receive remuneration, any activity which a person performs outside a relationship of subordination must be

rather wide definition based on effectively three criteria: the worker must be carrying out effective and genuine work, under the direction of another person, and be remunerated,[24] this includes for example part-time work,[25] trainees,[26] remuneration in kind.

As the definition of 'worker' defines the scope of the fundamental principle of freedom of movement, it must not be interpreted in a restrictive way.[27]

The Court has also extended the definition to include those seeking work for a period of at least three months.[28] Article 14(4)(b) of Directive 2004/38/EC follows this line, making it clear that Union citizen job-seekers cannot be expelled as long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged. No time limit is specified (Barnard, 2007, p. 289).

Treaty establishing the European Community (TEC)

The basis for the free movement of workers is to be found in Article 39 of the TEC (OJ, 2002):

> 1. Freedom of movement for workers shall be secured within the Community.
>
> 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;

classified as an activity pursued in a self-employed capacity for the purposes of Article 43 EC and Case C-268/99 *Jany and Others* [2001] ECR I-8615, para. 34.

24 The essential feature of an employment relationship is, according to case law, 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 (see, in particular, Case 66/85 *Lawrie-Blum* vs *Land Baden-Württemberg* [1986] ECR 2121, paras 16, 17; and Case C-85/96 *Martínez Sala* vs *Freistaat Bayern* [1998] ECR I-2691, para. 32).

25 Case 171/88 *Rinner-Kuhn* [1989] ECR 2743.

26 Case C-27/91 *Le Manoir* [1991] ECR I-5531.

27 Case 53/81 *Levin* [1982] ECR 01035.

28 Case C-85/96 *Martínez Sala* vs *Freistaat Bayern* [1998] ECR I-2691.

(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 service.[29]

Obviously, para. 3 of Article 39 sets out the basic provisions for what is entailed in the right to move freely as a worker, these are the basic rights of any EU citizens moving within the Union for work.

The Council shall issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, in particular by ensuring close cooperation between national employment services, by abolishing those administrative procedures and practices and qualifying periods in respect of eligibility for available employment, which would form an obstacle to liberalisation of the movement of workers, by abolishing all qualifying periods and other restrictions provided for either under national legislation or under agreements previously concluded between Member States, and by setting up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries (TEC, Article 40 (ex Article 49)).

The European Court of Justice has recognised directly on the basis of the TEC that workers have the right to leave their state of origin, to enter the territory of another Member State and to reside and pursue an economic activity there (Barnard, 2007, p. 290).[30]

Regulation 1612/68

As mentioned above, regulations on the free movement of workers were already in place five years after the founding of the EEC. According to Council Regulation 1612/68 of 15 October 1968 (EUROPA, 2007a), 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 (Article 1). This entitlement is enjoyed without discrimination by permanent, seasonal and frontier workers or by those who pursue their activities for the purpose of providing services. Workers who are nationals of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of nationality in respect of any conditions of employment and work, in particular as regards remuneration,

29 The Treaty of Amsterdam merely deleted the words 'by the end of the transitional period at the latest' from the first paragraph, and altered to Article 39 the number of this article (ex Article 48). The Nice Treaty left Article 39 untouched.

30 Case C-363/89 [1991] ECR I-273.

dismissal, and in the case of the unemployed, reinstatement or re-employment. Workers from Member States must enjoy the same social and tax advantages as national workers and, by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres. Any agreements concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal laying down or authorising discriminatory conditions in respect of workers who are nationals of the other Member States are not permitted (Article 7).

A worker on the territory of another Member State 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 host Member State's employment offices to their own nationals seeking employment (Article 5). Recruitment may not be dependent on medical, occupational or other criteria which discriminate on the grounds of nationality (Article 6). A national of a Member State working in 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. They may be precluded from involvement in the management of public law bodies and from holding an office governed by public law. They also have the right of eligibility for workers' representative bodies within the undertaking (Article 8). Further, a worker in another Member State 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.

Directive 2004/38/EC

Directive 2004/38/EC (EUROPA, 2004) changes this approach as it makes Union citizenship the fundamental basis of nationals of Member States when they exercise their right of free movement and residence on the territory of the Union. It also incorporates the rights of family members of workers in this new approach.

The rights of workers can essentially be divided into (a) the right of access to work; (b) the right to reside; (c) the right to have your family with you; and (d) the right to equal treatment, as provided for in the legal basis for these rights in Article 39 of the TEC. This basically means the right to seek employment in another Member State; the right to work in another Member State; the right to live there for this purpose; the right to equal treatment as regards access to work, working conditions and any other benefits which may ease the integration of the worker into the host state. Alongside freedom of movement for workers, there is a range of legislation designed to coordinate social security systems and ensure mutual recognition of qualifications.

The special status given to workers on the basis of Directive 2004/38/EC can be seen in the following analysis when special provisions are applicable to workers or the self-employed, for example regarding residence.

Recognition of professional qualifications

Access to work means that citizens of the EU have access under the same conditions as national workers to the national labour market, and that diplomas from other Member States must be recognised. Directive 2005/36/EC, on the recognition of professional qualifications (EUROPA, 2005b), however permits the requirement that a worker speaks and understands the national language (Article 53).

This applies to all nationals of a Member State wishing to pursue a regulated profession in a Member State, including those belonging to the liberal professions, other than that in which they obtained their professional qualifications, on either a self-employed or employed basis. Each Member State may permit Member State nationals in possession of evidence (Article 3.1.c)[31] of professional qualifications (Article 3.1.b)[32] not obtained in a Member State to pursue a regulated (Article 3.1.a)[33] profession (Article 2).

The recognition of professional qualifications by the host state allows the beneficiary to gain access in that Member State to the same profession as that for which they are qualified in the home state and to pursue it in the host state under the same conditions as its nationals.[34]

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31 (c) 'evidence of formal qualifications': diplomas, certificates and other evidence issued by an authority in a Member State designated pursuant to legislative, regulatory or administrative provisions of that Member State and certifying successful completion of professional training obtained mainly in the Community. Where the first sentence of this definition does not apply, evidence of formal qualifications referred to in paragraph 3 shall be treated as evidence of formal qualifications.

32 (b) 'professional qualifications': qualifications attested by evidence of formal qualifications, an attestation of competence and/or professional experience.

33 (a) 'regulated profession': a professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications; in particular, the use of a professional title limited by legislative, regulatory or administrative provisions to holders of a given professional qualification shall constitute a mode of pursuit. Where this definition does not apply, a profession in accordance with Article 3.2.a-b which states that a profession practised by the members of an association or organisation listed in Annex I shall be treated as a regulated profession. The purpose of the associations or organisations referred to in the first subparagraph is, in particular, to promote and maintain a high standard in the professional field concerned. To that end they are recognised in a special form by a Member State and award evidence of formal qualifications to their members, ensure that their members respect the regulations of professional conduct which they prescribe, and confer on them the right to use a title or designatory letters or to benefit from a status corresponding to those formal qualifications. On each occasion that a Member State grants recognition to an association or organisation referred to in the first subparagraph, it shall inform the Commission, which shall publish an appropriate notification in the *Official Journal of the European Union*.

34 The French report for the European Report on the Free Movement of Workers in Europe in 2005 (Groenendijk et al., 2006), shows most changes on this issue in 2005. After years of not implementing the relevant directives (2001/19, 89/48 and 92/51), France was condemned in several court cases for not fulfilling its obligations (Cases C-198/04 and C-164/05). This has led to a series of legislation to bring French law into line with the relevant directives. In accordance with the main rule, a person having a professional diploma from another Member State (EEA or Switzerland) should have the right to exercise his profession in Sweden. A Swedish dissertation on recognition of professional qualifications in the

If access to or pursuit of a regulated profession in a host state is contingent upon possession of specific professional qualifications, the competent authority of that Member State shall permit access to and pursuit of that profession, under the same conditions as apply to its nationals, to applicants possessing the attestation of competence or evidence of formal qualifications required. Specific requirements to documentation exist. In some cases recognition may depend on professional experience.[35]

EU was published in 2005 (Staffan Ingmanson, *Erkännande av yrkeskvalifikationer inom EU*, Juridska insititutionen vid Umea universitet no 11/ 2005). In Denmark an Executive Order was issued on the recognition of foreign qualifications for service on merchant ships implementing Directives 2003/103 and 2001/25. The Latvian Government adopted in 2005 a number of new regulations regarding the recognition of qualifications of pharmacists, dentists, (maternity) nurses, doctors and veterinaries. Latvia also adopted a regulation on additional requirements for recognition aiming at setting up standard procedures for recognition. There was also legislation adopted in case of recognition of qualifications of third-country nationals. In 2005, 186 diplomas of non-regulated professions obtained in another EU Member State were recognised and 20 diplomas of regulated professions. In Lithuania the texts in force are largely in line with the EU general and sectoral directives on recognition. A few new acts were adopted in this field in 2005 regulating the recognition of professional qualification of doctors, nurses and midwives, dentists, veterinary surgeons, pharmacists, architects, barristers and guides. The recognition of diplomas in Italy is subject to an aptitude test for a number of professions among which lawyers, accountants, industrial property agents and professions of ski-monitor and mountain guides. Discussion of case law in the Italian report reveals that there still seems to be a number of inconsistencies in this respect between specific pieces of Italian legislation and EC law. In Malta there is a special Mutual Recognition of Qualifications Act. At the heart of the Maltese system of mutual recognition is the Malta Qualifications Recognition Information Centre, established in 2005, which deals with requests for recognition. The recognition of diplomas of foreign universities was modified in Greece in 2005. A new institution, the Hellenic National Academic Recognition and Information Centre, has been established. Pursuant to the declarations of the government this law will facilitate the procedure of recognition of foreign degrees. This new organisation does not recognise the diplomas granted by foreign universities collaborating with private institutes operating in Greece. The recognition of diplomas issued by public and private universities in other EU Member States has also become a controversial issue before German courts and in the debates before German ministries for science, research and education. There is increasing cooperation in the university sector between public universities and private university-like institutions. Frequently, there is a substantial commercial activity with issuing 'recognised bachelor or master degrees' on the basis of a distant learning programme. The new Minister of Education in Luxembourg decided to facilitate the recognition of non-EU diplomas of secondary schools, which ended up in a new grand-ducal regulation in 2005. Also in Slovenia, a new act came into force regulating the recognition of diplomas, which *inter alia* provides procedures of (i) recognition with a view to access to education in the Republic of Slovenia and (ii) recognition with a view to access to employment in the Republic of Slovenia. The system of mutual recognition of qualifications within EU Member States applies to the nationals of EU Member States and, in Slovenia, also to the nationals of third countries who have obtained their qualifications in the territory of the EU and who wish to pursue in Slovenia a certain regulated profession or professional activity either in the status of employee or self-employed person. (see Groenendijk et al., 2006).

35 The groups of professions are to be found in Annex IV of the directive and cover more than 400 activities, e.g. manufacture of textiles, manufacturing and processing of textile materials on woollen machinery, manufacturing and processing of textile materials on cotton machinery, manufacturing and processing of textile materials on silk machinery, manufacturing and processing of textile materials on flax and hemp machinery, other textile fibre industries (jute, hard fibres, etc.), cordage, construction, construction (non-specialised), demolition, construction of buildings (dwellings or other), civil engineering, building of roads, bridges, railways, etc. installation work, decorating and finishing.

The competent authorities of the host Member State and of the home state shall work in close collaboration and provide mutual assistance in order to facilitate application of the provisions on recognition of titles, ensuring the confidentiality of the information they exchange (Directive 2005/36/EC, Article 56). Further, a national contact point had to be established (by October 2007) which should provide the citizens and the respective counter contact points in other Member States with information concerning the recognition of professional qualifications, such as information on national legislation governing the professions and the pursuit of those professions, including social legislation, and, where appropriate, the rules of ethics. These focal points also exist to assist citizens in realising their rights regarding recognition of titles, in cooperation, where appropriate, with the other contact points and the competent authorities in the host Member State (Article 57).

This field of law is regulated in detail, regarding which documents must be presented, how many years of experience are needed, specific regulations existing for specific professions. The very detailed legislation may appear complex but it serves to ensure that a person with a certain level of qualifications will have these respected and acknowledged in every Member State.

Workers in the public sector

Article 39, para. 4, of the TEC considers employment in the public sector. There has been a very restrictive interpretation of this exception by the European Court of Justice. The criterion set up has been that *exercise of public authority and the responsibility for safeguarding the general interest of the state*. The right to exercise this type of work will be evaluated on a case-by-case basis. What may be concluded is that posts in the army, police forces, judges and diplomats will in practice normally be reserved for nationals, or at least they will be given priority. For a long time problems in relation to the free movement of workers in the public sector exclusively concerned conditions of access and nationality. In a number of early judgments the Court developed its interpretation of Article 39(4): the Member States are only allowed to restrict public service posts to their nationals if they are directly related to the specific activities of the public service, namely those involving the exercise of public authority and the responsibility for safeguarding the general interest of the state including those of public bodies such as local authorities. These criteria have to be evaluated in a case-by-case approach in view of the nature of the tasks and responsibilities covered by the post.[36]

36 Case 152/73 Sotgiu [1974] ECR 153; Case 149/79 *Commission* vs *Belgium* I [1980] ECR 3881; Case 149/79 *Commission* vs *Belgium* II [1982] ECR 1845; Case 307/84 *Commission* vs *France* [1986] ECR 1725; Case 66/85 *Lawrie-Blum* [1986] ECR 2121; Case 225/85 *Commission* vs *Italy* [1987] ECR 2625; Case C-33/88 *Allué* [1989] ECR 1591; Case C-4/91 *Bleis* [1991] ECR I-5627; Case C-473/93 *Commission* vs *Luxembourg* [1996] ECR I-3207; Case C-173/94 *Commission* vs *Belgium* [1996] ECR I-3265; Case C-290/94 *Commission* vs *Greece* [1996] ECR I-3285.

In these judgments the Court ruled that jobs such as postal or railway workers, plumbers, gardeners or electricians, teachers, nurses and civil researchers may not be restricted to nationals of the home state. In order to monitor the application of this jurisprudence, in 1988 the Commission launched an action[37] that focused on access to employment in four sectors (bodies responsible for administering commercial services, public health care services, teaching sector, research for non-military purposes). The sector approach was an important starting point for the control of the correct application of EC law, which was followed by numerous infringement procedures initiated by the Commission. The effect of the 1988 action and the infringement procedure was that Member States undertook extensive reforms, opening up their public sectors. Only three infringement procedures finally had to be referred to the Court, which in 1996 fully confirmed its previous jurisprudence.[38] Although these developments have led to a fairly wide opening up of the public sectors to EU nationals in Member States, the benefit of the principles derived from the Court's jurisprudence is not yet always guaranteed to migrant workers (European Commission. 2002a).

1.a.b Right to reside and establishment

Establishment

Article 43 of the TEC provides that restrictions on the free establishment of nationals in the territory of another Member State shall be prohibited. In practice, this means that the self-employed also have the right to establish themselves in another Member State. The self-employed work outside a relationship of subordination, they bear the risk for success or failure, and they are paid directly and in full (Barnard, 2007, p. 308).[39] The European Court of Justice has focused on the prohibition of discrimination, also in relation to the right to establishment and on the acknowledgment of professional qualifications of self-employed professionals who have obtained their qualifications in another Member State, in an attempt to remove obstacles to access the host state's market and to exercise of the freedom (Barnard, 2007, pp. 310–30, 353).

The rights and obligations for Union citizens found in Directive 2004/38/EC are also applicable to the self-employed.

37 'Freedom of movement of workers and access to employment in the public service of Member States – Commission action in respect of the application of Article 48(4) of the EEC-Treaty' OJ C 72/2, 18.03.1988.

38 Case C-473/93 *Commission* vs *Luxembourg* [1996] ECR I-3207; Case C-173/94 *Commission* vs *Belgium* [1996] ECR I-3265; Case C-290/94 *Commission* vs *Greece* [1996] ECR I-3285.

39 Case C-268/99 [2001] ECR I-8615, paras 34, 70–71.

Residence

The system regarding the right to reside was reformed in 2006, on the legal basis of Directive 2004/38/EC. Citizens of Member States and their family members can now reside three months without formalities (Directive 2004/38/EC, Article 6) and even six months for job-seekers (see Figure 1). Residence for more than three months is subject to some very light procedures. Registration of residence is optional and any type of residence card or permit has been abolished. Member States may only require that an entry document and proof that a person has sufficient means (confirmation of engagement from employer or certificate of employment) are presented. There is also, on the same basis and with the same absence of formal procedures, a right of permanent residence.

Thus Union citizens have the right of residence on the territory of another Member State for a period of longer than three months if they are workers or self-employed persons in the host state; or have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host state during their period of residence and have comprehensive sickness insurance cover in the host state; or are enrolled at a private or public establishment, accredited or financed by the host state on the basis of its legislation or administrative practice, for the principal purpose of following a course of study.[40]

Special regulations guarantee that the status of worker is maintained in certain cases even when the citizen is no longer actively employed (Article 7.3).

The right of permanent residence in the host state shall be enjoyed before completion of a continuous period of five years of residence by workers or self-employed persons who comply with certain minimum requirements of period of stay (two to three years) (Article 17.3).

In these provisions, the focus that remains on workers or the self-employed becomes clear.

Union citizens and their family members shall have the right of residence, as long as they do not become an unreasonable burden on the social assistance system of the host state. An expulsion measure shall not be the automatic consequence of a Union citizen's or a family member's recourse to the social assistance system of the host state and an expulsion measure may not be adopted against Union citizens or their family (Article 15). Union citizens who have resided legally for a continuous period of five years in the host state shall have the right of permanent residence there; this also applies to family members who are not nationals of a Member State and have legally resided with the Union citizen in the

40 This case study includes vocational training. The person must prove that they have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or they must be family members accompanying or joining a Union citizen who satisfies the above conditions (Directive 2004/38/EC, Article 7.1).

host state for a continuous period of five years (Articles 15.1, 3, 4). Detailed regulations govern the loss of residence in case of prolonged absence, but once acquired only two years of consecutive absence can result in loss of residence (Articles 15.1, 3, 4).

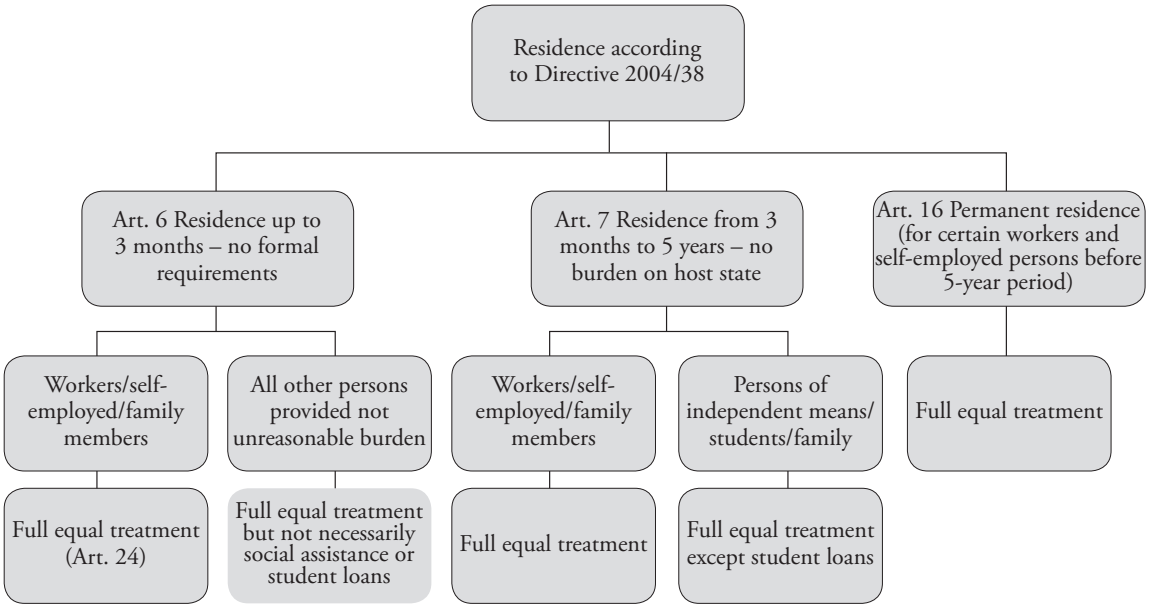
The right of permanent residence in the host state can be enjoyed before completion of a continuous period of five years of residence by workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old-age pension or workers who cease paid employment to take early retirement, provided that they have been working in that Member State for at least the preceding twelve months and have resided there continuously for more than three years. Likewise, the right of permanent residence can be enjoyed before the five-year period for workers or self-employed persons who have resided continuously in the host state for more than two years and stop working there as a result of permanent incapacity to work (Article 17.1). Irrespective of nationality, the family members of a Union citizen who have the right of residence or the right of permanent residence in a Member State shall be entitled to take up employment or self-employment there (Article 23).

Member States may carry out checks on compliance with any requirement deriving from their national legislation for non-nationals always to carry their registration certificate or residence card, provided that the same requirement applies to their own nationals as regards their identity card. In the event of failure to comply with this requirement, Member States may impose the same sanctions as those imposed on their own nationals for failure to carry an identity card (Directive 2004/38/EC, Article 26).

Four major judgments were given by the EU Court of Justice on the interpretation of Directives 93/96, 90/364 and 90/365, those subsequently replaced by Directive 2004/38/EC (Cases C-456/02; C-200/02; C-209/03 and C-157/03). On these occasions, the Court recalled that the right to reside in the territory of a EU Member State is conferred directly on every citizen of the Union by Article 18(1) EC and that citizenship of the Union is destined to be a fundamental status of nationals of EU Member States, enabling those who find themselves in the same situation to receive the same treatment in law, irrespective of their nationality. The Court also underlined the need to interpret the right of free movement in the light of fundamental rights with particular regard for the right to protection of family life and the principle of proportionality.

The death of a Union citizen, departure from the host state, divorce, annulment of marriage or termination of partnership does not affect the right of family members who are not nationals of a Member State to continue residing in the Member State in question, subject to certain conditions (Directive 2004/38/EC, Article 3).

Figure 1. Residence according to Directive 2004/38/EC



Source: Barnard (2007, p. 424).

1.a.c Equal treatment

EU citizens must be treated equally in respect of terms and conditions of employment and in respect of social and tax advantages (Barnard, 2007, pp. 293–302). In fact the case law from the European Court of Justice on such rights on equal treatment and non-discrimination lies at the foundation of what has become Union citizenship in Directive 2004/38/EC (Barnard, 2007, p. 307).

Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing in the territory of the host state shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.[41]

41 Most of the national reports for the European Report on the Free Movement of Workers in Europe in 2005 (Groenendijk et al., 2006), give a short overview of the general provisions in their country prohibiting discrimination in the field of employment between EU citizens and own citizens. The direct applicability of Regulations 1612/ 68 and 1408/71 still ensures in Lithuania the equal treatment of EU nationals with regard to concluding labour contracts and conditions of work. The Belgium report notices that a debate on the workers who cross the border every day from France to Belgium (and profit from the different tax and social security systems) could, in future, raise a more general debate on the cross-border regions in Europe. Until the end of the transitional period, there is no equality of treatment of all Union nationals in the area of access to work in Poland on the basis of reciprocity. Only Irish, British

The host state shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Directive 2004/38/EC Article 14(4)(b),[42] nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families (Article 24).

Non-discrimination

There is a general prohibition on discrimination under Article 12 of the TEC, on which the European Court of Justice has placed great emphasis.[43] Once an individual has been admitted to a territory of a Member State they cannot be discriminated against. This is central to the Treaty provisions on free movement of persons (Barnard, 2007, p. 255).

An EU national working in another Member State must be treated in exactly the same way as colleagues who are nationals of that state as concerns working conditions, covering for example pay, training, dismissal and reinstatement. This right to non-discrimination on grounds of nationality also applies to regulations which, unless objectively justified and proportionate to their aim, are intrinsically liable to affect migrant workers more than national workers and consequently risk placing migrant workers at a particular disadvantage (usually referred to as 'indirect discrimination').[44] As the Court recalled

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and Swedish nationals, as well as the nationals of the EU10 Member States, have the same access to work as Polish citizens. Among the nationals of the other EU15 Member States, there are differences in restrictiveness of provisions. The same applies to Hungary. Hungary applies reciprocity in terms of the Accession Treaty, but attaches importance to the correct application of the equivalency rule. The Danish integration assistance, which does not apply to EU citizens and members of their families, also does not apply to third-country nationals who are granted a residence permit as family members of EU citizens according to the principles of the *Singh* judgment. The Netherlands report indicates that although there is a statutory right to equal access to employment, there are four other mechanisms that in practice may work as a barrier to employment of an EU migrant accessing employment in the Netherlands: (1) the recruitment procedures, (2) the security checks for jobs with private employers designated as security functions, (3) language requirements, and (4) the recognition of foreign diplomas. There are long security checks for foreigners and these procedures dissuade employers from hiring them for jobs designated as security jobs. The German authorities may not restrict the exercise of a medical doctor practising on the basis of his admission in Belgium if the exercise of medical profession is only of a temporary nature, according to the German Federal Civil Court. (pp. 15–16 of the report).

42 This refers to Union citizens entering the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled as long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

43 *Cowan* vs *Le Trésor Public* Case C186/87 (on criminal injury compensation) and *Thieffry* vs *Conseil de l'Ordre des Avocats à la Cour de Paris* Case C71-76 (on the right to establish as a lawyer after the necessary diploma and qualifications had been recognised).

44 Case C-111/91 *Commission* vs *Luxembourg* [1993] ECR I-817, para. 17; Case C-337/97 *Meeusen* [1999] ECR I-3289, para. 27; and Case C-294/97 *Eurowings Luftverkehr* [1999] ECR I-7447, para. 33.

in the *Gottardo* case[45] this fundamental right to equal treatment requires that when a Member State concludes a bilateral convention on social security with a third country (which provides for account to be taken of periods of insurance in the third country for the acquisition of entitlement to benefits), it must grant nationals of other Member States the same advantages as those enjoyed by its own nationals (European Commission, 2002a). There is thus a prohibition of both direct and indirect discrimination. It also follows that working conditions (remuneration, training, promotion, membership of trade unions) must be the same for nationals and non-nationals.[46] Further, there should be no discrimination with regard to social and tax advantages (Regulation 1612/68, Article 7, para. 2). The *Cristini* case (C-32/75) confirms that there is an obligation on states to eliminate 'obstacles to free movement', this includes access to work and to determine professional advantages (salary, seniority). In this context the previous periods of comparable employment completed in public service abroad must be taken into account, and Member States (employers) have the obligation to compare the professional experience and apply non-discriminatory criteria.

Direct discrimination means different and usually less favourable treatment on the grounds of nationality. Such discrimination can only be lawful of in the interest of public policy, security and health and only if proportionate[47] and compatible with fundamental human rights[48] (see also Barnard, 2007, p. 256).

Indirect discrimination is also prohibited, as seen above. This involves the elimination of requirements which, while apparently nationality-neutral, have a greater impact on nationals of other Member States (Barnard, 2007, p. 256).[49] The European Court of Justice has found national regulations imposing requirements concerning residence[50] and language to be indirectly discriminatory: while nationals almost always satisfy the condition, migrants do not (Barnard, 2007, p. 256).

Unless objectively justified and proportionate to its aim, the provision of national law must be regarded as indirectly discriminatory and contrary to Community law if it is intrinsically liable to affect migrants more than nationals and if there is a risk that it will place migrants at a particular disadvantage (Barnard, 2007, p. 257).[51] The Court has taken a line where, unless the Member State can justify its conduct, a national rule which

45 Case C-55/00, judgment of 15.01.2002.

46 This would follow also from general International and Regional Human Rights Instruments and obligations (The International Covenant on Civil and Political Rights, The International Covenant of Economic, Social and Cultural Rights, The European Convention on Human Rights and the European Social Charter all include as a fundamental right and principle the prohibition against discrimination also on the basis of nationality.)

47 Case C-100/01 *Ministre de l'Intèrieur* vs *Olazabal* [2002] ECR I-10981, para. 43; Case C-108/96 *MacQuen* vs *Grandvision Belgium* [2001] ECR I-837, para. 31.

48 Case C-260/89 ERT vs DEP [1991] ECR I-2925.

49 See also Case C-175/88 *Biehl vs Administration des Contributions* [1990] ECR I-1779

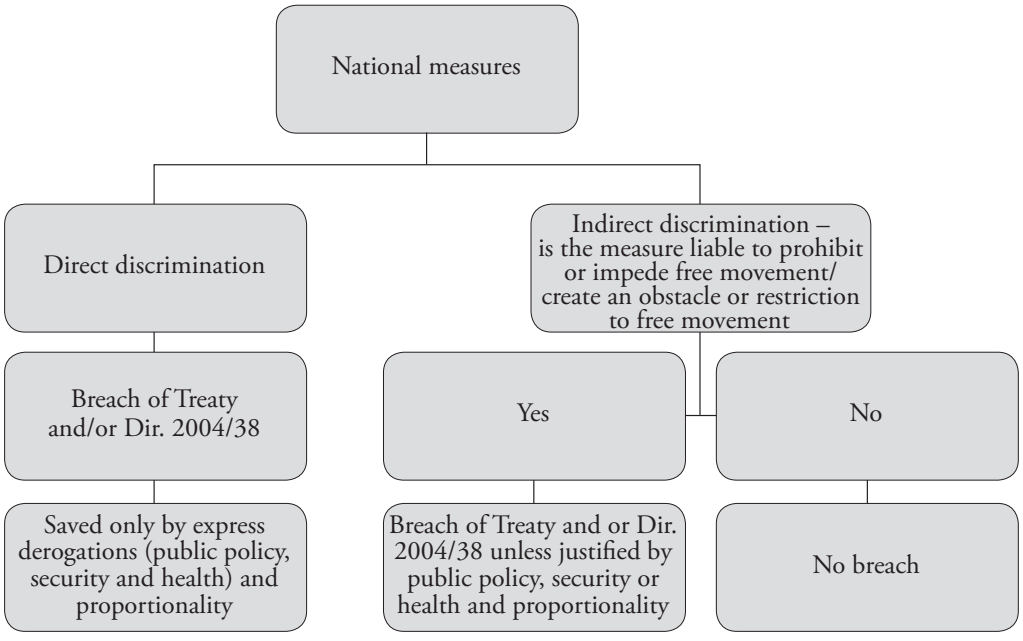
50 Case C-360/96 [1998] ECR I-2521 against Austria, Case C-388/01 ECR I-721 against Italy and Case C-244/00 ECR I-29265 against Italy.

51 See also Case C-281/98 [2000] ECR I-4139, para. 41.

is liable to prohibit or otherwise impede free movement will breach Community law, even if does not discriminate against nationals (Barnard, 2007, p. 273).

The principle of non-discrimination requires perfect equality of treatment in Member States of persons in a situation governed by Community law and nationals of the Member State in question.[52] The consequence of the principle is that a migrant will enjoy equal treatment with nationals of the host state. This means that if someone moves from state A to state B, which has lower social standards, the migrant will enjoy these lower standards (Barnard, 2007, p 255).

Figure 2. Principle of non-discrimination



Source: Barnard (2007, p. 275).

Articles 39, 43 and 18 of the TEC are directly effective and have both vertical (between public authority and individual) and horizontal (between individuals) effect.[53] The Court noted that as working conditions are governed not only by laws but also by agreements and on acts adopted by private persons, there would be inequality in the application of Article 39 if it applied only to acts of a public authority. The Court then ruled that the prohibition of discrimination in Article 39 applies both to agreements intended to regulate paid labour collectively and contracts between individuals, and thus the article has horizontal effect and applies to private persons (Barnard, 2007, p. 285).

52 *Data-elect* Case C-43/95 [1996] ECR I-4661.

53 Case C-350/96 [1998] ECR I-2521 and Case C281/98 [2000] ECR I-4139.

Various national reports submitted to the creation of the European Report on the Free Movement of Workers in Europe in 2005 (Groenendijk et al., 2006, p. 37) mention anti-discrimination. The Luxembourg report refers to the two judgments of the Court of Justice against Luxembourg for failing to transpose these two directives, and also notes a national administrative court decision finding that the provision in the statute on civil servants stating that a person can only become a civil servant in Luxembourg if they are under 45 years of age is not contrary to Directive 2000/78/EC, because Article 6 of the directive provides for a possible exception based on age that would allow for this restriction. In Poland, the new government has abolished the post of Plenipotentiary on Equal Status of Women and Men as a separate organ, transferring its competences to the Minister of Labour and Social Policy. This development has raised concerns about the fate of the 2004 National Programme against Racial Discrimination established to implement anti-discrimination law and policy in practice. In Sweden, amendments have been introduced to the anti-discrimination law ensuring that sex discrimination is explicitly prohibited in all areas covered by Directive 2000/43/EC. In Portugal, Law 18/2004 was introduced, transposing Directive 2004/43/EC. This law applies to the public and private sectors in relation to social protection, including social security and health care, social advantages, education and access to and supply of goods and services available to the public, including housing (Groenendijk et al., 2006, p. 37).

1.a.d Family

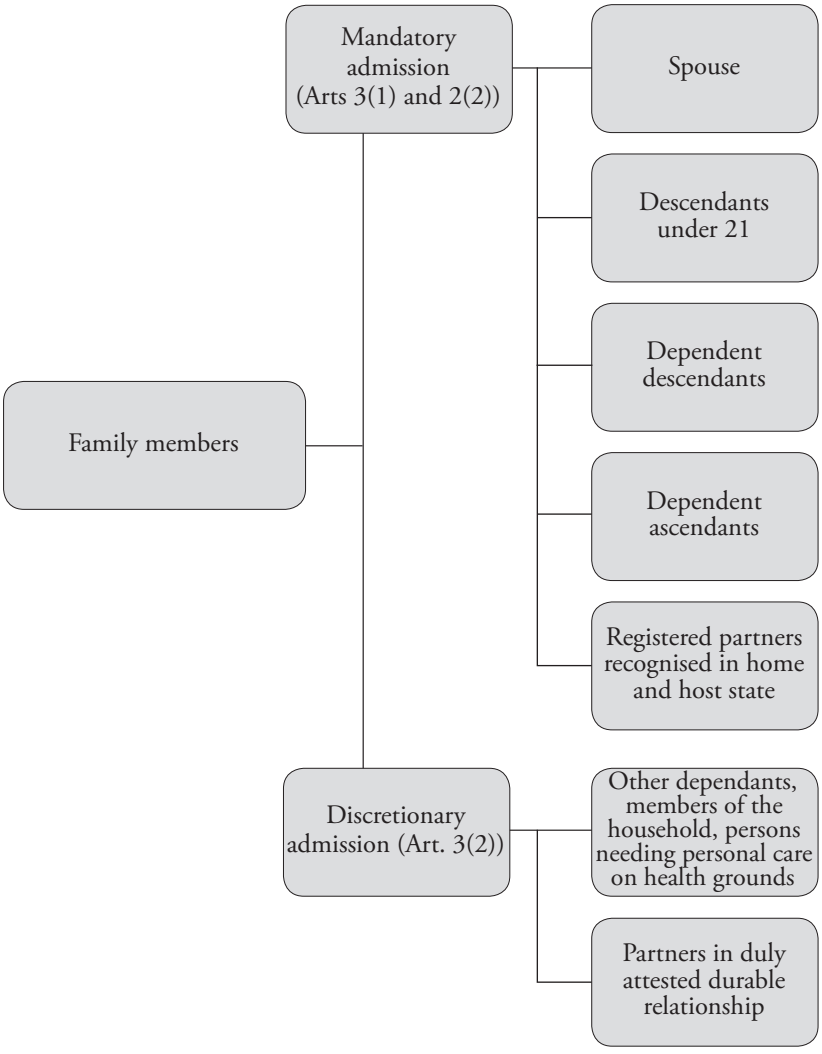
With regard to the provisions on family unification, Regulation 1612/68 has been amended by Directive 2004/38/EC in various ways. First, it extends the definition of 'family member', which had previously been restricted to the spouse, direct descendants who are under 21 or who are dependants and direct dependent relatives in the ascending line (Regulation 1612/68, Article 10.1), to include also registered partners, if the legislation of the host Member State treats registered partnerships as equivalent to marriage, also extending the definition of family to dependants of the spouse or partner (Directive 2004/38/EC, Article 2).

According to Directive 2004/38/EC, family members from a Member State (and from non-Member States if in possession of a valid passport) may, as discussed under 'Residence', exercise their fundamental right to reside freely on the territory of another Member State for a period of up to three months (Article 6). For periods of longer than three months they derive their right of residence from the fact of being a member of the family of a worker who is a Union citizen (Article 7.1.d) (again note the special rights still conferred on workers). They do not need a residence card but must nevertheless register with the relevant authorities.

Family members from a non-member country enjoy the same rights as the Union citizen whom they accompany but may be required to have a short-stay visa or equivalent (Articles 7.2, 9). For periods of longer than three months they must apply for a 'residence card of a family member of a Union citizen', which is valid for at least five years and

which in principle may not be withdrawn (Article 11). For the residence card to be issued, Member States shall require presentation of (a) a valid passport; (b) a document attesting to the existence of a family relationship or of a registered partnership; (c) the registration certificate or, in the absence of a registration system, any other proof of residence in the host state; or proof of the existence of a durable relationship with the Union citizen (Article 10).

Figure 3. Admission of family members



All family members, irrespective of nationality, are entitled to permanent residence after a continuous period of five years (Directive 2004/38/EC, Article 16.2). This right is lost in the event of absence from the host state for more than two years (Article 16.4). Even when the EU citizen with whom the family has moved dies or the partners are divorced,

the 'accompanying' family member can obtain permanent residence after a period of regular residence of five years (Article 18).

They are also entitled to social security benefits and have the right to take paid or unpaid employment.[54]

54 The restrictive rules on family reunification in Denmark, found in Article 9 of the Aliens Act, continue to create problems. The main criticisms are aimed at the '24-year' rule and the '28-year' rule. The latter was introduced in connection with the so-called 'attachment requirement' with Denmark. The demand means that a couple who want to marry need to be more 'attached' to Denmark than to any other country. Thus the combined attachment of the spouses/partners to Denmark must be greater than their attachment to any other country. It quickly became clear, after the concept was introduced in 2002, that it would concern many Danish citizens who had lived for a longer period abroad and who had married there. In order to avoid including such marriages the 28-year rule was added, which adds that Danish citizenship for more than 28 years 'neutralises' the demand for a superior 'attachment' to Denmark (both concepts are found in Article 9, para. 7, cited below). The rules have been heavily criticised for discriminating immigrants – also of second or third generation who are not Danish citizens. The 24-year rule is found in Article 9 of the Aliens Act and establishes that it is possible to grant residence permit upon request to a foreigner above 24 years of age, as partner who lives in shared dwelling or in steady partnership of a longer duration with a person who is resident in Denmark and above 24 years of age who (a) is a Danish National, (b) is a citizen of any of the other Nordic countries, (c) has a residence permit according to Article 7 (Convention Refugees) or Article 8 (UNHCR refugees), (d) has had an unlimited residence permit in Denmark for a minimum of three years. Further, in order to be granted spousal reunification, the person residing in Denmark must reside permanently in the country. There are further specific requirements which have to be met, including that there may be no definite reasons for assuming that the decisive purpose of contracting the marriage is to obtain a residence permit (Aliens Act, Article 9.9).When the Danish Immigration Service assesses whether the 'attachment requirement' is fulfilled, attention to the following circumstances are considered, among other things: How long each of the spouses/partners has lived in Denmark. Whether one or both have ties to other individuals in Denmark; for example, family members. Whether one or both have custody of or visiting rights to minors in Denmark. Whether one or both have completed an education, or have a permanent connection to the labour market in Denmark. The Danish language proficiency of both parties. The extent of both parties' ties to another country, including whether either or both of them have made extended visits to that country. Whether the applicant has children or other family members in another country. According to international obligations some exceptions may be made with regard to the 24-year requirement, attachment requirement, support requirement, housing requirement, collateral requirement, as well as the requirement stating that applicants may not have received certain types of public financial support within the past twelve months. Exemptions can be made if the person living in Denmark is an asylum-seeker or has protected status and risks persecution in their home country. An exemption can also be given if the person living in Denmark has a child from a previous relationship also living in Denmark, and if the parent has custody of the child, or if the parent has visitation rights and is together with the child on a regular basis. Finally, an exemption can be granted if serious illness, debilitating handicap, or advanced age of the person living in Denmark make it indefensible on humanitarian grounds to force the individual to establish residence in the spouse's country if adequate health treatment cannot be provided there. Special consideration is made if it is in Denmark's interest to ensure that a qualified worker remains living in Denmark. While these regulations do not apply to EU citizens exercising their free movement rights, they continue to be relevant for Community law on free movement because many persons who are unable to comply with the strict requirements of the Aliens Act are invoking Community law to circumvent them. A number of minor amendments were introduced in 2005 to the Danish family reunification rules. The first concerns the integration declaration discussed above. The second amendment is a positive feature introduced in response to criticism of the regulations by the Council of Europe's Commissioner for Human Rights and requires particular weight to be given to family unity considerations in a number of specific cases concerning the possible issue of a residence

1.a.e Expulsion and restrictions

Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into a Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality[55] to take account of the degree of integration of the persons concerned, the length of their residence in the host state, their age, state of health, family and economic situation and the links with their country of origin (Directive 2004/38/EC, Preamble, para. 23).

Before taking an expulsion decision on grounds of public policy or public security, the host state shall take account of considerations such as how long the individual concerned has resided on its territory, age, state of health, family and economic situation, social and cultural integration into the host state and extent of links with the country of origin. The host state may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they (a) have resided in the host state for the previous ten years; or (b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989 (Directive 2004/38/EC, Article 28).

Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Personal conduct has to be socially harmful[56] and there must be a genuine and sufficiently serious threat affecting one of the fundamental interests of

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permit to a family member. In Greece, the new law on the status of aliens (Law 3386/2005) established a framework for the facilitation of family reunification, although no further details are provided in the report. In Sweden, the official government report issued in March 2005 on the new Aliens Act and Ordinance (presented in February 2006) refers to the transposition of the Family Reunification Directive and observes that the optional stable resources and health insurance conditions for family reunification will be applied, although the official report also notes that in practice health insurance is already provided to migrants who are long-term residents because Swedish social security law is based on residence. In Ireland, the Department of Justice issued guidelines in February 2006 on the visa application process for the spouse and dependant unmarried children of non-EEA nationals who are in possession of valid work permits/visas, although the guidelines did not specify whether this concerned the implementation of the Family Reunification Directive (see Groenendijk et al., 2006).

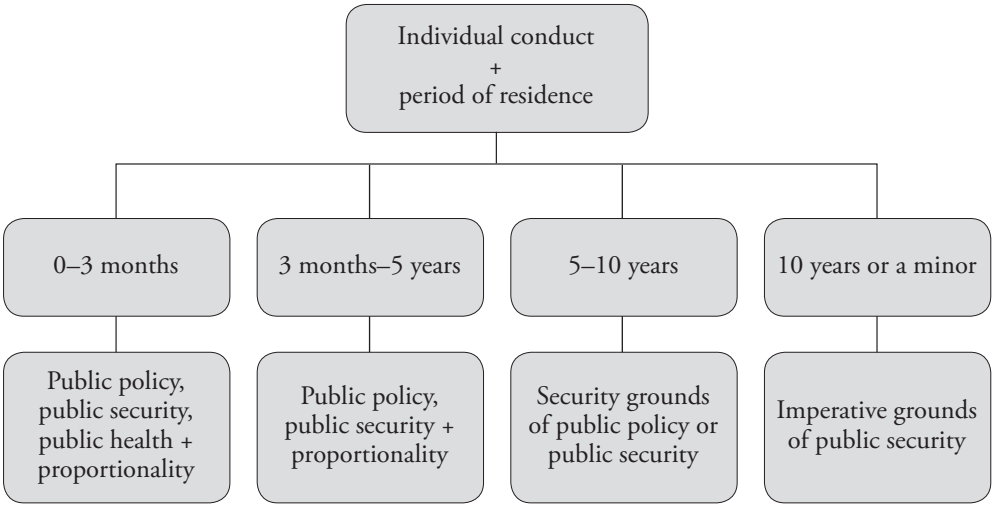
55 Measures taken by the state must not only serve the purpose for which they are intended but must also be proportionate to the risk presented. It is a test of suitability and a test of necessity. It is a balancing exercise between the objectives pursued and the adverse effects on individual freedom (much as from human rights cases where there is a balancing act between the interests at stake and the rights limited). See Case C-215/03 [2005] ECR I-1215, paras 38 and 40; and Case C 118/75 [1976] ECR 1185, para. 21.

56 Case 41/74 [1974] ECR 1337.

society.[57] 'Measures' were defined in R vs Bouchereau (case 30/77) as any action affecting the right of persons coming within the field of application of TEC Article 39 to enter and reside freely in a Member State on the same conditions as nationals of the host state.

Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted (Directive 2004/38/EC, Article 27.2). For example, with regard to criminal offenders, the Court's long-established jurisprudence lays down that previous convictions alone are insufficient for refusal of entry or expulsion; what matters is the personal conduct of the individual concerned and whether they possess a present and sufficiently serious threat affecting one of the fundamental interests of society[58] (Figure 4).

Figure 4. Limitations on the right to enter and reside in a Member State based on personal conduct



Source: Barnard (2007 p 264-65).

As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host state they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host state should examine whether these are temporary difficulties and take into account the duration of residence, the personal circumstances

57 Case *R* vs *Bouchereau* [1977] ECR 1999, para. 35.

58 Case 30/77 *R* vs *Bouchereau* [1977] ECR 1999, para. 28;.Rutili vs Minister of Interior [1975] ECR 1219, para. 22.

and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers save on grounds of public policy or public security (Directive 2004/38/EC, Preamble, para. 16).

The greater the degree of integration of Union citizens and their family members in the host state, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host state, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child, of 20 November 1989 (Preamble, para. 24).

The persons concerned shall be notified in writing of any decision taken regarding restrictions on their free movement, in such a way that they are able to comprehend its content and the implications for them. They must be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of state security, and live up to standards of fair trial in general, including access to redress and appeal (Article 30).

Expulsion orders may not be issued by the host state as a penalty or legal consequence of a custodial penalty. If an expulsion order is enforced more than two years after it was issued, the Member State shall check that the individual concerned is currently and genuinely a threat to public policy or public security and assess whether there has been any material change in the circumstances since the expulsion order was issued (Article 33).

1.a.f Students

Union citizen students have a right to move and reside freely within any Member State, following Article 1 of the directive extending the rights and obligations to all Union citizens, as long as they fulfil the residence criteria, mainly of not becoming a burden on the host state.

1.a.g Persons no longer active in the labour market

The right to reside in a Member State once no longer active in the labour market is regulated by Directive 2004/38/EC, especially Article 17, 'Exemptions for persons no longer working in the host Member State and their family members', in the chapter on permanent residence, according to which the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years

of residence by workers who have reached retirement age, or who have worked in the Member State for two years and then become incapacitated, or who have worked in another state but have maintained to return to the host state at least once a week.

Further, the general provision in Article 14 on the retention of right to residence clearly states that as long as a Union citizen does not become a burden on the host state the right is retained.

1.b Regulations influencing the free movement of persons

1.b.a Social security schemes

Removing obstacles to labour market mobility, whether between jobs or geographically, within or between Member States, is therefore essential in order to ensure that the right to free movement is a real option for European workers, and that the potential gains in productivity, growth and jobs offered by a better functioning labour market can be realised. In addition to increasing the career and development possibilities of individual workers, eliminating barriers to mobility is therefore integral to the Lisbon Strategy[59] to

59 During the meeting of the European Council in Lisbon (March 2000), the Heads of State or Government launched a 'Lisbon Strategy' aimed at making the European Union the most competitive economy in the world and achieving full employment by 2010. This strategy, developed at subsequent meetings of the European Council, rests on three pillars: (a) an economic pillar preparing the ground for the transition to a competitive, dynamic, knowledge-based economy. Emphasis is placed on the need to adapt constantly to changes in the information society and to boost research and development.; (b) a social pillar designed to modernise the European social model by investing in human resources and combating social exclusion. The Member States are expected to invest in education and training, and to conduct an active policy for employment, making it easier to move to a knowledge economy; (c) an environmental pillar, which was added at the Göteborg European Council meeting in June 2001, draws attention to the fact that economic growth must be decoupled from the use of natural resources. A list of targets has been drawn up with a view to attaining the goals set in 2000. Given that the policies in question fall almost exclusively within the sphere of competence of the Member States, an open method of coordination (OMC) entailing the development of national action plans has been introduced. Besides the broad economic policy guidelines, the Lisbon Strategy provides for the adaptation and strengthening of existing coordination mechanisms: the Luxembourg process for employment, the Cardiff process for the functioning of markets (goods, services and capital) and the Cologne process on macroeconomic dialogue. The mid-term review held in 2005, for which a report was prepared under the guidance of Wim Kok, former Prime Minister of the Netherlands, showed that the indicators used in the OMC had caused the objectives to become muddled and that the results achieved had been unconvincing. For this reason, the Council has approved a new partnership aimed at focusing efforts on the achievement of stronger, lasting growth and the creation of more and better jobs. As far as implementation is concerned, the coordination process has been simplified. The integrated guidelines for growth and employment will henceforth be presented jointly with the guidelines for macroeconomic and microeconomic policies, over a three-year period. They serve as a basis both for the Community Lisbon Programme and for the National Reform Programmes. This

raise employment, improve social cohesion and strengthen competitiveness (European Commission, 2005b, p. 10). Social protection systems are highly developed in the states of the European Union. They protect people against the risks of inadequate income associated with unemployment, ill-health and invalidity, parental responsibilities, old age or following the loss of a spouse or parent. The ability of workers to sustain these risks and provide this support depends to a great extent on their employment context, and whether, and to what extent, individual capacity or collective solidarity at work can provide social protection. The organisation and financing of social protection systems are the responsibility of individual EU Member States. Nevertheless, the European Union has a particular role in ensuring, through EU legislation coordinating national social security systems, that people who move across borders and hence come within the remit of different social protection systems are adequately protected. Such legislation mainly concerns statutory social security schemes.[60] The Treaty of Rome of 1957 did not

simplification in programming makes it possible to monitor implementation more closely by using one single progress report. See EUROPA (2008).

60 For the European Report on the Free Movement of Workers in Europe in 2005 (Groenendijk et al., 2006), countries reported that a French ministerial note issued in 2005 recalls explicitly that income support is awarded to Community nationals and those in similar categories, as well as to members of their families regardless of their nationality under the same conditions as applicable to French nationals. In Finland in 2005 two significant reforms took place in the area of tax legislation affecting persons working or living in another EU Member State. The Greek report mentions a discriminatory rule regarding a special pension including free medical care for Greek citizens older than 68 years, not having sufficient resources. This pension is not available to EU citizens residing in Greece. According to Directive 2003/109, the communal apartments have to be made accessible to aliens who are already in the Member State for more than five years. At the end of 2005 the capital of Austria, Vienna, decided to grant this access to its 220,000 apartments. The automatic salary increase, which was limited in Austria to employment in the public service only after 7 November 1968 (date of entry into force of Regulation 1612/68) was removed in 2005 following the European Court of Justice judgment *Österreicher Gewerkschaftsbund* of 30 November 2000 (C-195/98). The introduction of the habitual residence test for access to several social benefits in Ireland has led to questions on the application of the equality principle. In Latvia the right to social services and social assistance is linked to the possession of a personal number. EU/EEA citizens acquire such a personal number if they are permanent residents. Latvian citizens can qualify for these services and assistance even when they have not resided in Latvia for five years, because they keep the personal number. The Italian 2004 Community Law, which entered into force in 2005, tries to avoid reverse discrimination of Italian citizens, while implementing principles deriving from EC law such as the principle of equal treatment, the right of establishment and the freedom to provide services. The Italian constitutional court declared a law of the Lombardy region unconstitutional because it limited the entitlement to free benefits of public services to invalid Italian citizens. Every person (whether Maltese or any other EU citizen) not fulfilling the five-year continuous residence requirement is to be considered as a non-resident for the purpose of the acquisition of immovable property in Malta. The fact that such Maltese or other EU citizens are in possession of a valid residence permit is irrelevant. The Slovenian Personal Income Tax Act treats an EU worker, if resident according to tax legislation, the same as a Slovenian worker. Special treatment is stipulated for non-residents. This special treatment applies to tax exemptions and tax relief. Non-residents are not obliged to pay income tax out of capital profits and savings profits with their source in Slovenia. In Baden-Württemberg (Germany) workers without a high-school diploma have access to university study in their professional field, if they fulfil certain requirements, such as having their main residence for at least a year in Germany. As these requirements may be difficult to fulfil by Union citizens, questions may arise as to the compatibility of these provisions with the principle of non-discrimination according to nationality. The permanent residence requirements for access to social benefits and services

mention social protection as a concern of the European Community, though Article 118 EC referred to the Commission having the task of promoting close cooperation between Member States in matters relating to social security. It was not until the Maastricht Treaty's Protocol on Social Policy, in the Agreement on Social Policy,[61] that one of the objectives of the Community was stated to be 'proper social protection' (Article 136,

(e.g. nursing homes) in the Czech Republic were not applied in practice to EU workers. In the United Kingdom, the authorities established a scheme to assist those designated as key workers in the public sector to have preferential access to credit in order to purchase their own homes in areas of particular price pressure. The scheme was opened in 2005 to nationals of any country (including EU citizens). Also access to banking facilities has begun to raise issues for nationals of other Member States. In order to respond to the United Kingdom's implementation of the money laundering regulations, UK banks have begun to require more detailed information confirming an individual's previous address before a bank account can be opened, leading to complaints from EU citizens unable to open an account. The main issue in Belgium is now the conditions of residence to benefit from social rights such as unemployment benefits. According to a 2005 amended decree in the Netherlands on double taxation, implementing the ECJ judgment in *De Groot* (Case C-385/00) personal tax advantages are fully taken into account when a taxpayer who also pays taxes in another state was taxed in that state without personal and family circumstances being taken into account. According to a revised act on stimulation of private ownership of housing, EU and EEA nationals and Turkish nationals whose right of residence directly flows from the Association Agreement are entitled to a financial contribution to acquire their own house on an equal footing to nationals and holders of a permanent residence card (see Groenendijk et al., 2006).

61 The Agreement on Social Policy was annexed to the Protocol on Social Policy of the Treaty on European Union. This agreement of 31 October 1991 proposed a radical change in the Community legislative process in the sphere of social policy. The social partners' agreement proposed a constitutionally recognised role for the social partners in the Community legislative process, which formerly had engaged only the EU institutions. At the same time, a major extension of EC competences in the field of employment and industrial relations was proposed, allowing for qualified majority voting with respect to some of the new competences. At the Maastricht summit in December 1991, the then twelve Member States of the European Community were unable to agree on the future direction of social policy in the new European Union. Only eleven of them were willing to incorporate into the EC Treaty an agreement of 31 October 1991 concluded between the European Social Partners, organisations of employers (UNICE and CEEP) and trade unions, and the European Trade Union Confederation (ETUC). The United Kingdom rejected this proposal and refused to be bound by the Agreement. The Social Policy Protocol to the Treaty of Maastricht (TEC) embodied a compromise in the form of a UK 'opt-out' , thus creating a 'twin-track' EU social policy. On one track, all twelve Member States would continue to observe and to be bound by the previous provisions of the 'Social Chapter' of the EC Treaty. On a second track, all twelve Member States agreed that eleven Member States could adopt policies on employment and industrial relations, in accordance with the new procedure laid down in the Agreement on Social Policy annexed to the Protocol. It was agreed that the UK would not participate in these procedures, nor would it be bound by their outcome. Between 1992 and 1997, therefore, a 'two-speed' Europe operated in the sphere of employment and industrial relations. In accordance with the new social policy procedures of the Protocol and Agreement on Social Policy, only eleven Member States signed the Directives on European Works Councils (1994), parental leave (1996) and part-time work (1997). It was not until May 1997 that the newly elected UK Government decided to terminate the opt-out. By the Treaty of Amsterdam of June 1997, the Social Policy Protocol was deleted and the Agreement on Social Policy was incorporated into a revised Social Chapter of the EC Treaty. The new Social Chapter of the EC Treaty, as amended by the Treaties of Amsterdam and Nice (Articles 136ff. EC), incorporates the Agreement on Social Policy. Specifically, it extends EU competences in the field of employment and industrial relations, obliges the Commission to consult management and labour in the formulation of Community law in the field of social policy, formally establishes a role for management and labour in the legislative process of the EU (including the making of binding agreements at EU level), and allows for qualified majority voting

TEC). The Treaty of Amsterdam declared that one of the Community's tasks is promoting 'a high level … of social protection' (Article 2, TEC). Social protection has become a central concern of the European Employment Strategy,[62] due in large part to anticipated demographic changes up to 2010, leading to a dramatic increase in the number of retired people and a reduction in the number of working people. Social protection in the form of social security is addressed by Council Directive 79/7/EEC of 19 December 1978 (Article 2: sickness, invalidity, old age, accidents at work and occupational diseases, unemployment). As shown below, the regulations on social security were elaborated in regulations from 1971 and, more recently, in regulations from 2004.

The 1978 directive seeks the progressive implementation of the principle of equal treatment for women and men in matters of social security 'to the working population … whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment – and to retired or invalided workers and self-employed persons'. Despite this potentially broad scope, the principal interventions of the EU in social security have concerned free movement of workers and equal treatment of women and men. There remains a lack of clarity as to the extent to which the EU is able to intervene in social protection and the Member States are willing to allow EU intervention. On the one hand, Article 137(1)(c) of the TEC allows for the adoption of directives on 'social security and social protection of workers'. On the other hand, the Treaty of Nice amended the Social Chapter of the EC Treaty by adding 'the modernisation of social protection systems' to the list of areas where the Council may adopt measures designed to encourage cooperation between Member States. More recently, the European Union has started to promote closer cooperation among the Member States on the modernisation of social

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on legislative proposals before the Council of Ministers, in broad areas of employment and industrial relations.

62 The Delors White Paper of 1993 on 'Growth, competitiveness, employment: the challenges and ways forward into the 21st century' declared that employment was 'one of the most important areas of concern of the EC', and proposed '… a thorough-going reform of the labour market'. The Lisbon Presidency Conclusions called on the social partners to play a major role in the implementation of the European Employment Strategy (EES). This was reinforced at the Feira Council in 2000, which invited the social partners 'to play a more prominent role in implementing and monitoring the guidelines. Guidelines could emerge from an EU-level social dialogue between EU social partners with mandates from affiliated social partners drawing on experience of national employment pacts, or following on from proposals by the Commission. Affiliated social partners at Member State level could produce National Action Plans to implement the Guidelines embodied in EU framework agreements. Following Wim Kok's sombre review of the Lisbon strategy in 2005, the Commission was further forced to reconfirm its support for the EES and announce the need to implement measures to improve the synergy effect between EU and the national action plans. The relaunch of the Lisbon strategy saw the European Council approve changes to EU guidelines that would affect the EES. In particular, this concerned the integration of macro-economic, micro-economic and employment policies for growth and jobs – producing one set of guidelines to cover all three areas. A further step undertaken to reinvigorate the EES involved the unveiling of the 2007–2013 cohesion policy in 2006. The main feature of this new policy involves the importance placed on encouraging Member States to submit National Strategic Reference Frameworks that promote growth and better jobs. These new developments address previous concerns that the EES was being undermined *inter alia* by its uncertain relation to macroeconomic policy and the scarcity of financial support for innovative developments (see Eurofound, 2008).

protection systems which face similar challenges across the EU. This cooperation takes place mainly within the Social Protection Committee (SPC), where the open method of coordination was developed and applied to the areas of social inclusion and pensions. Cooperation was also launched in the areas of health and long-term care and 'making work pay', i.e. ensuring that social protection systems provide income security without discouraging employment. In March 2006, after the relaunch of the Lisbon Strategy, the European Council adopted a new framework for the open coordination of social protection and inclusion policies in the European Union, providing a set of common objectives – three overarching objectives and other specific objectives for each of the three policy areas:

- Eradicating poverty and social exclusion;
- Adequate and sustainable pensions;
- Accessible, high-quality and sustainable health and long-term care.

According to Article 42 (ex Article 51) of the TEC the Council shall adopt measures in the field of social security as are necessary to provide freedom of movement for workers. Particularly, it shall make arrangements to secure migrant workers and their dependants: aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries and payment of benefits to persons resident in the territories of Member States.

In general, social security benefits must be paid in whichever Member State the beneficiary resides. There is the exception of a certain category called 'special non-contributory benefits', which falls between the traditional categories of social assistance and social security. These benefits are aimed at particular problems such as care for people with disabilities or the prevention of poverty, and are payable only in the country that provides them, and beneficiaries cannot export them to another Member State. However, the Commission has identified several problems that are unduly restricting the portability of social security rights. Quoting the respective European Court of Justice case law, it stated, for example, that it would be discriminatory not to allow equivalent tax deductions for a migrant worker's contributions for an occupational pension and private sickness and invalidity insurance (Eurofound, 2008).

It is up to the host state to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of job-seekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons (Directive 2004/38/EC, Preamble, para. 21). Generally, when arriving in the host country, a person should register with the local social security insurance in order to access sickness and other social security benefits, and entitlement to all benefits in kind provided under the law of the host country. These benefits comprise medical and dental care, medicines and hospitalisation, as well as direct payments intended to reimburse the

costs of these. As a general rule, they are provided according to the legislation of the host country as if a person were insured in that country.

The work of the European Court of Justice has somewhat developed during past decades since the concept of Union citizenship has come into play. One of the most important implications of the dynamic approach of the Court has seen the development of 'Social Citizenship'. Together with TEC Article 12, which prohibits any discrimination on grounds of nationality, the Court has used the law on free movement to develop this concept, characterized by the right of all Union citizens, regardless of their economic activity to, to take advantage of the social system in the Member State in which they reside (Hailbronner, 2007, p. 317). Such rights are subject to the limitations of Community law, such as having sufficient means of subsistence and health insurance, but these have been interpreted in a restrictive manner by the Court (Hailbronner, 2007, p. 317).[63]

The reasoning of the Court always progresses along the same lines. Union citizenship is declared to be the fundamental status of the nationals of Member States, enabling those who migrate to another EU country to enjoy the same treatment as the nationals of that country (Hailbronner, 2007, p. 318).

Regulation (EEC) 1408/71

Regulation 1408/71 applies to workers (employed and self-employed), nationals of a Member State or third country, or stateless persons/refugees residing in the territory of a Member State to whom the legislation of one or several Member States applies, and to the members of their families and their survivors. It also applies to survivors of these workers irrespective of the nationality of the latter, provided the survivors are Community nationals, and to civil servants and persons treated as such in accordance with the legislation applicable. The regulation also applies to persons studying or undergoing vocational training and to members of their families. Persons residing in the territory of a Member State to whom the regulation applies are subject to the same obligations and enjoy the same benefits under the legislation of a Member State as the nationals of that state (Article 2).

Regulation 1408/71 also applies to all legislation relating to the social security branches concerning sickness and maternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, unemployment benefits, family benefits and death grants. It applies to general and special contributory and non-contributory social security schemes and to schemes concerning the liability of an employer. It does not apply to medical or social assistance or to benefit schemes for war victims (Article 4).

63 See also *Bidar* vs *London Borough of Ealing* Case C-209/03 [2005] ECR I-2119, where the court awarded assistance for students, in the form of a minimum income under Belgian law and a subsidised loan under British law, to cover maintenance costs.

Invalidity, old age or survivors' cash benefits, pensions for accidents at work or occupational diseases and death grants under the legislation of one or more Member States may not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of another Member State (Article 12).

In order to avail themselves of the right of free movement, it is essential for the persons involved to know in which Member State they will be insured, and where contributions will have to be paid. Regulation 1408/71 contains detailed rules on the determination of the Member State whose social security legislation is applicable, based on two basic principles: (a) a person is subject to the legislation of only one Member State at a time; (b) a person is normally covered by the legislation of the Member State where they pursue a professional activity (*lex loci laboris*) (Articles 13–14).

In a Communication from the Commission of 11 December 2002, Free movement of workers: achieving the full benefits and potential (COM(2002) 694 final – not published in the *Official Journal*; see European Commission, 2002a), the Commission identified various obstacles to free movement, linked to aspects of social security. To facilitate the exercise of the right to free movement, migrant Community nationals must not suffer disadvantages in their social security rights. Regulation 1408/71 establishes a system for coordinating social security systems. It lays down common rules aimed at ensuring that the various national social security systems are not applied in such a way that they discriminate against persons who are exercising their right to free movement. Community law has never sought to harmonise the field of social security, and the Member States have therefore retained their competences with regard to the organisation of their respective social security systems. The complex nature of Regulation 1408/71 does, however, make it difficult to apply. For this reason, a revision has been necessary, resulting in Regulation 883/2004.

Regulation (EC) 883/2004

Obviously, the adoption of Community legislation simplifying the field of social security is an essential prerequisite for effective exercise of the right to free movement of persons enshrined in the TEC. Rather than adopting measures designed to harmonise Member States' legislation, Community law provides for coordination of the national systems. In effect, the social security systems are the outcome of long-standing national traditions and reflect the culture of each state. In the framework of coordination, Member States retain the right to determine the types of benefits and the conditions for granting them. However, Community law imposes certain regulations and principles so as to ensure that application of the different national systems does not harm persons who exercise their right to free movement (EUROPA, 2008).

Regulation 883/2004 aims to rationalise the concepts, rules and procedures concerning the coordination of Member States' social security systems. Particular changes in comparison with Regulation 1408/71 are:

- Enhancement of the insured's rights by extending the personal and material scope;
- Extension of the scope to all Member State nationals covered by the social security legislation of a Member State and not just the active population;
- Increase in the number of social security branches subject to the coordination regime so as to include pre-retirement legislation;
- Amendment of certain provisions on unemployment: maintenance for a certain time (three months, up to a maximum of six months) of the right to unemployment benefits for unemployed persons who go to another Member State to seek work;
- Reinforcement of the general principle of equal treatment, which is of particular importance for frontier workers, notably by inserting a provision stipulating the assimilation of facts;
- Reinforcement of the right to export social security benefits;
- Introduction of the principle of good administration (EUROPA, 2008).

Regulation 883/2004 stipulates that all persons residing in the territory of a Member State are subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that state. The general principle of equal treatment is widened in the framework of the new regulation, which applies to all Member State nationals who are or who have been covered by the social security legislation of one of the Member States, as well as to members of their family and their survivors. This means that not only employees, self-employed persons, civil servants, students and pensioners, but also non-active persons, will be protected (Article 2.2). The provisions of the regulation apply to all the traditional branches of social security – sickness, maternity, accidents at work, occupational diseases, invalidity benefits, unemployment benefits, family benefits, retirement and pre-retirement[64] benefits, and death grants (Article 3). The new regulation extends the principle of exportation of benefits acquired to all cash benefits other than the specified exceptions.[65]

Regulation 883/2004 also recognises the principle of the aggregation of periods, pursuant to which periods of insurance, employment or residence in the legislation of a Member State are taken into account in all the other Member States (Article 6). This means that a Member State must take into account, for the purposes of the acquisition of the right to benefits, periods of insurance, employment, self-employment or residence in another Member State.

An insured person who stays in a Member State other than the one in which they are affiliated or in which they reside is entitled to benefits in kind required on medical grounds during the stay, taking account of the nature of the benefits and the expected

64 'pre-retirement benefit' means all cash benefits, other than an unemployment benefit or an early old-age benefit, provided from a specified age to workers who have reduced, ceased or suspended their remunerative activities until the age at which they qualify for an old-age pension or an early retirement pension, the receipt of which is not conditional upon the person concerned being available to the employment services of the competent state (Article 1(x)).

65 Articles 21 and 29, Article 34 on overlapping long-term care, Article 64 on unemployment and Article 70 on non-contributory benefits.

duration of the stay. The new regulation no longer restricts medical benefits to emergency treatment. These benefits are provided by the Member State in which the person is staying (Article 19).

Detailed regulations govern cases of work-related accidents (Title III, Chap. II). As before, the insured person is subject to the legislation of a single Member State only (Article 11.1). The Member State concerned is the one in which they pursue a gainful activity (lex loci laboris) (Article 11.3).

All Member States in which a person has been insured must pay an old-age pension when the insured person reaches the age of retirement (Title III, Chap. I, sect. II).

As regards unemployment benefits, the competent institution of a Member State must take into account the periods of insurance, employment or self-employment completed under the legislation of any other Member State as though they were completed under the legislation it applies. The new regulation mainly introduces two questions linked to unemployment benefits: (a) the exportation of unemployment benefits to another Member State when a person goes there in order to seek work; (b) the right to unemployment benefits for workers who, during their last job, resided in a Member State other than the competent state (Article 65). An unemployed person may move to another Member State in order to seek work while retaining entitlement to benefits for three months. The unemployed person must register as a person seeking work with the employment services of the Member State to which they have gone, be subject to the control procedure organised there and adhere to the conditions laid down under the legislation of that Member State (Article 64).

The regulation introduces the principle of good administration. The institutions must respond to all queries within a reasonable period of time and must in this connection provide the persons concerned with any information required for exercising the rights conferred on them by this regulation. Moreover, in the event of difficulties in interpretation or application, the institutions involved must contact one another in order to find a solution for the person concerned (Title IV).

Regulation (EC) 883/2004 is not applicable until the date of entry into force of the new implementing regulations (Council of the European Union, 2007). The very ample coverage of these regulations thus allow all EU citizens, regardless of whether they are employees, self-employed workers, civil servants, students and pensioners or non-active persons, to keep their social benefit entitlements when they move within the EU. But although the regulations have been simplified they still leave many people perplexed, affecting both their implementation and the respect they are accorded (see below).

1.b.b Cooperation between Member States in clearing vacancies and providing guidance to workers of other Member States

EEC Regulation 1612/68 states that Member States shall designate specialist services that work together with each other and with the Commission with a view to jointly clearing vacancies and applications for employment. In addition, each specialist service in a Member State shall communicate all useful information on working and living conditions, and on the labour market, to the specialist services in other Member States, which in turn shall disseminate this information in order to provide guidance to workers on the possibilities of working in another Member State. The specialist services exchange vacancies and applications for employment between themselves, as well as information on suitable applications, giving the latter the same priority as national applications. The European Coordination Office establishes a uniform system on the exchange of vacancies and applications for employment. The specialist services can delegate the clearance of vacancies and applications for employment to regional services. If the latter are territorially responsible for the border regions of two or more Member States, they exchange data relating to vacancies and applications for employment directly with each other and can up set up cooperation and service structures. Specialist placement services for certain professions also exchange data relating to vacancies and applications for employment directly with each other.

Every two years, the Commission draws up a report on the results achieved by these mechanisms for the clearance of vacancies and applications for employment, and on developments in the Community's labour market. The European Coordination Office contributes to such objectives by implementing, in cooperation with the Technical Committee, joint methods of action. It can become involved in the clearance of vacancies itself, and can organise training for specialist staff in the Member States.

The EURES (European Employment Services) Charter (not repealed by Directive 2004/38/EC, see OJ, 2003) established the European Job and Mobility Network, stating that EURES members and partners shall actively contribute to increased mobility in the European labour market by exchanging information between themselves on vacancies and applications for employment. Vacancy information shall be valid, accurate and sufficient to allow job-seekers to make an informed decision about applying. Special attention shall be given to job vacancies where the employer is specifically interested in recruiting workers from other European countries. Vacancy notices shall be exchanged according to the uniform system (EURES Charter, Part 1.1). EURES members and partners shall provide information services, counselling and advice to job-seekers and employers, including persons with special information needs such as workers in the cross-border areas, the young, the elderly, the disabled and women, as well as to family members of EU migrant workers. These services shall include job vacancies and applications. EURES members and partners shall help and advise job-seekers interested in working abroad about suitable vacancies and assist with drawing up applications and CVs, in conformity with the recommended European CV format. Job-seekers shall be given the opportunity

to register their CVs in the EURES CV database. EURES members and partners shall provide information and recruitment services to employers who wish to recruit from other countries, including advice and help to specify the profile of the potential candidates. They shall promote the EURES CV database as a tool to give employers access to a pool of those interested in working abroad, providing up-to-date, accurate and comprehensive information and advice on living and working conditions in the EURES countries, current trends in the European labour market, availability of workers, labour shortages and surpluses. EURES services are usually free of charge. When EURES members and partners charge any fees, there shall be no differentiation between the charges levied for access to EURES services and those applicable to comparable national services (Part 1.1).

EURES members shall support the development of cross-border cooperation together with local social partners, local authorities and other relevant local and regional organisations located in cross-border areas in order to improve the local labour market and facilitate the mobility of workers in these areas, with a view to contributing to the economic and social development of the area. They shall endeavour to integrate the cross-border cooperation with their other activities in order to exploit all possible synergies (EURES Charter, Part 1.2).

With a view to establishing coordinated monitoring of obstacles to mobility and contributing to the removal of such obstacles, EURES members shall, in cooperation with the relevant EURES partners or other relevant sources, regularly provide the EURES Coordination Office with information on current migration flows, the existence of specific surpluses and shortages of skilled workers as well as any specific obstacles to mobility that they identify, including differences in legislation and administrative procedures (EURES Charter, Part 1.3).

The EURES web-portal is an interactive tool for employers and employees alike, with 1,343,415 job vacancies, 314,813 CVs and 15,087 employers registered.[66]

1.b.c Pension

On 28 June 1998 the Council adopted Directive 98/49/EC on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community. This directive is the only existing legal instrument at European level on the free movement of persons in relation to supplementary pensions. It is intended to ensure the right to the equality of treatment as regards the preservation of supplementary pension rights when moving within the Community, but it does not concern the conditions of acquisition of supplementary pension rights or their transferability. The directive obliges Member States to take the necessary measures to ensure the preservation of vested pension rights for members of a supplementary pension scheme in respect of whom contributions are no longer being made to that scheme as a consequence of

66 Active as at May 2008 (http://europa.eu.int/eures/home.jsp?lang=en).

their moving from one Member State to another, to the same extent as for members in respect of whom contributions are no longer being made but who remain within the same Member State. Moreover, Member States have to ensure that supplementary pension schemes make payments in other Member States of all benefits due to workers, net of any taxes and transaction charges that may be applicable. With regard to posted workers, Directive 98/49/EC provides that contributions can continue to be made to a supplementary pension scheme in the worker's Member State of origin and exempts at the same time the employer from the obligation to make contributions to supplementary pension schemes in the host state (Article 4). Finally, it requires that workers who move to another Member State receive at least the same information as national job changers on their pension rights and the choices available to them under the scheme (Article 6).

Directive 2003/41/EC of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (IORP) aims at creating at European level a common legal framework for the activities of institutions for occupational retirement provision, so as to allow them to fully benefit from the advantages of the internal market (Preamble). It regulates the setting up of a full prudential framework which is necessary so as to provide affordability of pensions and a high level of protection for the rights of future pensioners. The proposal seeks to ensure that institutions enjoy sufficient freedom to develop an effective investment policy and can benefit from the greater depth and liquidity of the capital markets resulting from the introduction of the Euro. The directive establishes the right for institutions for retirement provision to manage pension schemes across borders. It will therefore allow pan-European groups of companies to set up pan-European pension funds, which may facilitate labour mobility within these groups (Article 20).

Following the 2001 Stockholm European Council, in an Action Plan on Skills and Mobility (13 February 2002, see European Commission, 2002*b*) was drawn up with the aim to expand occupational mobility and skills development as well as facilitate geographical mobility both through Member State and Community efforts. The mid-term review on the implementation of the Skills and Mobility Action Plan from February 2004 (European Commission, 2004) has concluded that despite improvement in a number of areas, occupational and geographical mobility still remains low in the EU. The portability of supplementary pension rights has been identified as an area, where further action is needed to promote mobility (European Commission, 2005b, p. 11).

Regulation 1408/71 has been very successful in protecting people's rights under statutory schemes, its effectiveness is diminished by the trend to increasing reliance on supplementary provisions which are not covered by the coordination regulations. This development has been well documented throughout the 1990s in the different editions of the 'Social Protection in Europe' reports (European Commission, 2005b, p. 7). More recently, it has been confirmed by the findings of the work carried out jointly by Member States and the Commission in the framework of the 'open method of coordination' (OMC): the national

strategy reports on pension reform presented by the Member States in September 2002[67] show that reforms already adopted or envisaged in response to the common challenge of an ageing population tend to foresee a greater role for supplementary pension provision, thus adding to the importance of improving the portability of supplementary pension rights so as to improve the social protection of mobile workers and their families. Public policy tends to compensate for the decreasing ability of statutory pension schemes to preserve the living standards achieved before retirement, by promoting supplementary pensions which therefore become an increasingly important element of social protection (European Commission, 2005b, p. 7). Directive 98/49/EC is the only instrument aimed at safeguarding supplementary pension rights of mobile workers and self-employed, but does not provide a sufficient guarantee against the loss of supplementary pension rights (European Commission, 2005b, p. 16).

On the basis of the current situation in the Member States, four main areas can be identified which can affect negatively the social protection of mobile workers and thus constitute obstacles to the exercise of the right to free movement (identified in a Green Paper, European Commission, 1997).

- tax treatment of cross-border contributions and transfers;
- conditions for the acquisition of supplementary pension rights;
- regulations on preservation of dormant pension rights;
- the way the transfer of acquired rights is organised.

All these areas are interlinked and determine whether mobile workers can expect to receive an adequate pension at the end of their career or whether they will be penalised because of their mobility. In addition to these areas, it has to be recognised that the information provided to scheme members and in particular to (potential) early leavers plays an essential role in enabling mobility on a well-informed basis (European Commission, 2005*b*, p. 15).

An early leaver who has acquired rights can in principle leave these rights in the scheme of origin. In this case it is important to know whether and how these acquired rights are preserved. Such reservation may be limited to a nominal value. This implies that the real value of preserved pension entitlements would fall as a result of inflation. Moreover, pay rises are not reflected in pension entitlements, as is the case for workers who remain in the same job if benefits are expressed as a percentage of earnings or adjusted average earnings. Frequent job changers who leave their entitlements in different pension schemes will therefore receive significantly reduced supplementary pensions at the end of their careers compared with people who remain within the same pension scheme (European Commission, 2005b, p. 16).

67 The fifteen national strategy reports, as well as the Joint Report by the Commission and the Council on adequate and sustainable pensions, are available on EUROPA website (www.europa.eu.int/comm/employment_social/socprot/pensions/index_en.htm).

A number of significant obstacles to the portability of supplementary pension rights indeed exist: The application of sometimes long and strict *acquisition conditions* can result in a deterioration of the social protection of the mobile worker and will create disincentives to move between jobs. Where the worker moves to another job and leaves his acquired rights behind in the scheme of the former employment, the *dormant rights will in many cases not be protected sufficiently* to avoid that the early leaver is significantly worse off than a worker with a similar profile who remains within the same employment. The worker who moves to another employment often does not have the choice between *transferring* the acquired rights and the preservation of these rights in the former scheme. Where a transfer is possible and the worker decides to make use of it, it depends largely on the conditions of this transfer and the assumptions used in calculations for the determination of the transfer value whether the worker will not lose out too much by transferring the rights. Finally, the (potential) mobile worker in the EU does not have the guarantee that she/he will be *informed* on all the consequences on the supplementary pension rights upon leaving the employment or on the options available with regard to the preservation or transfer of the acquired rights (European Commission, 2005*b*, p. 18).

A way of remedying the problems relating to pensions would be to make use of a legislative instrument, such as a regulation or a directive. A strong point of legally binding action would be that it would allow for addressing all problems identified and hereby ensure to tackle the problem in an effective way (voluntary action, on the other hand, could run the risk that only some of the problems are solved, but not all). An extension of Regulation 1408/71 to supplementary pension schemes would at first sight be a logical step but applying the same regulations to supplementary pension provision as to statutory social security schemes is not possible for three main reasons: it would require a system of mutual recognition between supplementary pension schemes (difficult to achieve because of the important diversity of supplementary pension schemes), this would result in very high costs for the schemes/employers (who would have to take into account the period during which the employee worked and was insured with a former employer). An up-dated and simplified version of Regulation 1408/71 was agreed in 2003 after years of negotiation – it would prove very difficult to open discussions again. Such a coordination system in the form of a regulation would moreover not allow the flexibility needed to take into account the important diversity of supplementary pension provision in the Member States and its voluntary nature. On the other hand, a directive would not have these shortcomings. In particular a directive establishing minimum requirements, thus respecting the contractual nature and the diversity of supplementary pension provision, could reconcile the need to improve the situation of mobile workers and thus the exercise of their right to free movement and the functioning of the internal market on a firm legal basis and to allow for the necessary flexibility taking into account the specific features of existing schemes and their diversity. A directive would thus allow Member States, social partners or other relevant stakeholders to determine the best way to implement the minimum requirements established at EU level adapted to their specific national situation (European Commission, 2005*b*, p. 21).

Following this reasoning under the proposal for a 'portability of pensions' directive (European Commission, 2005*a*), proposed by the European Commission in October 2005, workers switching jobs or countries will no longer need to worry for the future. Designed to avoid major losses and in many cases allowing benefits to transfer with the worker across sectors and countries in the EU, the proposal is expected to boost the Commission's 'Growth and Jobs' strategy by making it easier for workers to move jobs and countries. If approved by Council and Parliament, the directive will make more flexible the conditions of acquisition of pension rights (such as different qualifying periods before which workers acquires rights), the conditions of preservation of dormant pension rights (such as pension rights losing value over time) and the transferability of acquired rights. The proposal also seeks to improve the information given to workers on how mobility may affect supplementary pension rights (European Commission, 2008).

The Commission adopted on 9 October 2007 an amended proposal to reduce obstacles to workers' mobility through improved access and better preservation of supplementary pension rights. The proposal states that recourse should also be made to Article 94 of the Treaty, given that the disparities between the national legislation governing supplementary pension schemes are likely to hamper both the exercise of the right of workers to freedom of movement and the operation of the internal market. Thus, in order to improve the rights of workers moving within the Community and within the same Member State, provision should be made for certain of minimum requirements for the establishment of pension rights and preservation of the vested pension rights of outgoing workers in a supplementary pension scheme linked to an employment relationship (European Commission, 2008).

It thus focuses on the setting of minimum requirements for better access to pension rights, clearer rights of preservation so mobile workers' pensions are treated fairly and improved access to useful and timely information.[68] Its aim is to ensure that workers are not penalised because of mobility.

1.b.d Taxation

Upon settling in another Member State, EU citizens must pay taxes in the host state.

Migrant workers have the right to the same tax and social advantages as nationals of the host state. The Court has held that this means all the advantages which, whether or not linked to a contract, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and whose extension to workers who are nationals of other Member States

68 Article 6, 2005/0214 (COD). Amended proposal for a Directive of the European Parliament and of the Council on minimum requirements for enhancing worker mobility by improving the acquisition and preservation of supplementary pension rights.

therefore seems likely to facilitate the mobility of such workers within the Community.[69] This has been held to cover, for example, public transport fare reductions for large families, child-raising allowances,[70] funeral payments (European Commission, 2002*a*) and minimum subsistence payments.

The Commission Communication of 19 April 2001, on the elimination of tax obstacles to the cross-border provision of occupational pensions, proposed a comprehensive strategy to address the tax obstacles that acted as a major disincentive to cross-border membership. It is recognised that taxation regulations applied to supplementary pension schemes can constitute a major obstacle to the freedom of movement of workers across borders. Two main obstacles were identified: the tax treatment of cross-border payments of pension contributions; and the tax obstacles to the cross-border transfer of pension capital. Individuals wishing to contribute to pension schemes outside their home state and pension institutions that wish to provide pensions across borders may be hindered in doing so because of the design of the tax system. In particular, a Member State may apply tax incentives only to contributions made within that state. In such cases, there is no tax deductibility for pension contributions paid to a pension fund in another Member State. This not only limits the attractiveness of paying cross-border contributions, but also seals off the national market from competition from other Member States, making it difficult to create pan-European funds. The Commission is undertaking legal action against those Member States that restrict the freedom to provide services and the free movement of workers by refusing tax deductibility for pension contributions paid to pension funds in other Member States (European Commission, 2005*b*, p. 58).

On the basis of these procedures and rulings by the European Court of Justice (*Danner* case C-136/00 and *Skandia* case C-422/01), it can be concluded that initially at least ten Member States (France, Finland, Sweden, Belgium, Portugal, Spain, Ireland, Italy, Denmark and the United Kingdom) had tax legislation that discriminated against foreign pension funds. While the infringement procedures are continuing, Belgium, France, Finland, Ireland, Portugal, Spain and the United Kingdom have already announced they will change their tax legislation in order to give contributions paid to pension funds located in another Member State the same tax treatment as contributions paid to domestic funds. Germany, Austria and the Netherlands already allowed tax relief for contributions paid to foreign funds. The second obstacle relates to the cross-border transfer of pension capital. There may be cross-border situations where national tax regulations are contrary to the Treaty provisions on the freedom of movement for workers and/or the free movement of capital. An example of such a situation could be an EET[71] or ETT[72] state taxing the value of the pension capital upon cross-border transfer, where it would not tax a transfer within

69 Case C-85/96 *Martínez Sala*.

70 Case 32/75 *Cristini* vs *SNCF* [1975] ECR 1085.

71 Exempt contributions, Exempt investment income and capital gains of the pension institution, Taxed benefits.

72 Exempt contributions, Taxed investment income and capital gains of the pension institution, Taxed benefits.

its territory, and where it applies the principle of residence taxation of pension benefits in its double tax treaties (European Commission, 2005*b*, p. 59).

Regarding tax obstacles to cross-border transfers, the Commission has already started an infringement procedure against Belgium. In the Belgian case, the Commission pointed out that it is unacceptable that in Belgium the transfer of pension capital to a foreign pension fund gives rise to special taxation, whereas the transfer of pension capital within Belgium is tax free. Belgium has announced that it will abolish the restriction on cross-border transfers. It seems that the tax legislation in several other Member States also hinders the transfer of acquired pension rights to schemes situated in another Member State (This seems to be in any event the case for Denmark, Germany and Italy). In other Member States, the taxation of the cross-border transfer depends on the bilateral tax treaties applicable: France, Ireland and the Netherlands). In its Pension Taxation Communication of April 2001 the Commission had already announced that it would examine national tax regulations impeding the cross-border transferability of pension capital and take the necessary steps to ensure effective compliance with Treaty regulations. Moreover, on 27 April 2005 the European Federation for Retirement Provision announced that it would launch a formal complaint with the Commission against the Member States which in its view had created unjustified obstacles to the cross-border transfer of pension capital (European Commission, 2005*b*, pp. 59–60).

Different Member States have different regulations in terms of whether they tax or exempt pension contributions, investment income and capital gains of the pension institution, and pension benefits. These differences can create problems where employees spend their working careers in one Member State but retire to another. Pensions are sometimes taxed, for example, even though the contributions are not tax deductible or the pension is not taxed even though the contributions are deductible. Concerning problems of double taxation and non-taxation arising from the mismatch of tax systems, the Commission has recommended wider application of the 'EET system' (Exempt contributions, Exempt investment income and capital gains of the pension institution, Taxed benefits) already applied in eleven Member States, entailing the deductibility of pension contributions and investment income coupled with the taxation of benefits, together with better coordination of Member States' taxation regulations. Completely uniform regulations for occupational pensions will not be easy to achieve while the reliance on social security and occupational pension schemes varies so significantly from one Member State to another. Solutions could include unilateral tax relief, bilateral agreements or a multilateral convention or coordinating measures at European Union level (EUROPA, 2005*c*).

1.b.e Health care

Regulation 1408/71 also lays down the conditions for access to health care for people moving within the European Union. Depending on personal status and/or type of stay, EU citizens are entitled to immediately necessary care, to care which becomes necessary, or to all sickness benefits in kind in a Member State other than the one in which they are

insured against sickness as if they were insured there, but at the expense of the institution of insurance. For persons wishing to go to another Member State specifically to obtain treatment, the costs of such treatment will, under the coordination system set up by Regulation 1408/71, only be covered by the Member State in which they are insured if they received prior authorisation. Simply put, anyone temporarily staying, or residing, in a Member State other than the one where they are insured against sickness, is entitled to receive sickness benefits in kind according to the legislation of this Member State as if they were insured there, but at the expense of the institution of insurance. Depending on the status of the person and/or the type of stay, there is a right to immediately necessary care (tourists), to care which becomes necessary (students and expats), or to all sickness benefits in kind (workers, self-employed or pensioners residing in a Member State other than the competent one) (European Commission, 2002*a*, p. 12).

For anyone wishing to go to another Member State specifically to obtain treatment, the costs will, under the coordination system set up by Regulation 1408/71, only be covered by the Member State where they are insured if they received prior authorisation. This Member State has broad discretion to grant or refuse the authorisation, but it may not be refused if two conditions are simultaneously met: (a) where the treatment in question is among the treatments provided for by the health scheme of the Member State of insurance and (b) the person cannot be treated within the time normally necessary for obtaining this treatment, taking into account their current state of health and the probable course of the disease. If authorisation is granted, care is provided according to the legislation, including tariffs, of the Member State where the care is provided, but at the expense of the institution of the Member State in which the person is insured. However, the Court has held that, in the light of other fundamental freedoms, such as the free movement of goods and the freedom to provide services, such prior authorisation, if not justified, could be regarded as an infringement of these fundamental freedoms. It follows that, under certain conditions, patients may apply for reimbursement of medical costs incurred in connection with health care received in another Member State, even in the absence of prior authorisation. In the *Vanbraekel*[73] case the Court examined the question of which reimbursement rate a person who went to another Member State for planned medical treatment could benefit from, where the reimbursed costs, according to this Member State's legislation, were lower than the person would have been entitled to in the Member State of insurance. Although the Court confirmed that under Regulation 1408/71 reimbursement could only be made according to the tariffs of the Member State where the treatment was provided, it held that, under the principle of freedom to provide services, the insured person was entitled to additional reimbursement from the Member State of insurance if the latter's legislation would have provided for a higher level of reimbursement had the hospital treatment been received there.

The right to move across EU borders with the prime objective of receiving health care falls within regulations on free movement of services, but it can be briefly mentioned that for patients seeking medical treatment in another Member State the Court, in the

73 Case C-368/98 [2001] ECR I-5363.

Kohll[74] and *Decker*[75] cases, made reference to further fundamental freedoms of the Treaty, i.e. the free movement of goods and freedom to provide services. In these two cases and a further case[76] which – unlike the first two – concerned medical treatment in a hospital, the Court confirmed Member States' ability to freely organise their own health-care systems but recalled that they have to respect basic Community regulations such as the freedom to provide and receive services in doing so. The Court explicitly stated that medical and hospital care were services within the meaning of the Treaties. However the Court also concluded that, although the national system of prior authorisation concerned constituted a barrier to the freedom to provide services, overriding reasons like the maintenance of the social security system's financial stability and of a balanced medical and hospital service open to all could justify such a barrier. Nevertheless, for a prior administrative authorisation scheme to be justifiable it must be based on objective, non-discriminatory criteria which are known in advance. These criteria must circumscribe the exercise of the national authorities' discretion so that it is not used arbitrarily. An easily accessible procedural system must ensure that a request for authorisation will be dealt with objectively and impartially and within a reasonable time, and refusals to grant authorisation must be open to challenge in judicial or quasi-judicial proceedings.

This jurisprudence does not mean that insured persons have a general right under Community law, after receiving medical treatment abroad, to be reimbursed for the costs incurred. It is only in respect of treatment which the social insurance system of the Member State where they are insured would normally pay for that patients may ask that the costs of medical treatment abroad be taken in charge or reimbursed (European Commission, 2002*a*, p. 14).

The European Health Insurance Card was introduced progressively from 1 June 2004 until 31 December 2005. Since 1 January 2006, it has been issued and is recognised in all the countries listed below.[77]

If residing in another Member State for less than three months, it is possible to rely on the European Health Insurance card. The card or its equivalent document, the provisional replacement certificate, makes it easier to obtain access to medical treatment while staying temporarily in another Member State. Such treatment is provided in accordance with the regulations of the host state, and the costs incurred are reimbursed in line with the tariff scales applied in that Member State. For example, if medical care is provided free of charge in a Member State, an EU citizen will be entitled to free medical care by presenting their card or an equivalent document. Presentation of the European Health Insurance Card guarantees reimbursement of medical costs on the spot, or soon after return to the home

74 Case C-158/96 [1998] ECR I-1931.

75 Case C-120/95 [1998] ECR I-1831.

76 Case C-157/99 *Geraets-Smits/Peerbooms* [2001] ECR I-5473.

77 Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom; Iceland, Liechtenstein, Norway and Switzerland are part of the collaboration.

state (European Commission, 2003*a*, para. 2.4). Anyone who is insured by or covered by a statutory social security system in any Member States is entitled to a European Health Insurance Card. As this covers the cardholder only, each member of the insured person's family needs to have their own card (European Commission, 2003*a*, para. 2.4.1).

Regulation 2004/883 provides that an insured person who is authorised by the competent institution to go to another Member State with the purpose of receiving the treatment appropriate to his condition shall receive the benefits in kind provided, on behalf of the competent institution, by the institution of the place of stay, in accordance with the provisions of the legislation it applies, as though he were insured under the said legislation. The authorisation shall be accorded where the treatment in question is among the benefits provided for by the legislation in the Member State where the person concerned resides and where he cannot be given such treatment within a time-limit which is medically justifiable, taking into account his current state of health and the probable course of his illness (Regulation 883/2004, Article 20.2). The regulations provide that a citizen residing in another Member State than the one ensuring him shall receive benefits in kind (treatment), as though ensured under the legislation of the Member State where they reside (Article 17).

1.b.f Participatory rights

Article 19 of the TEC provides that every citizen of the Union residing in a Member State of which they are not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which they reside, under the same conditions as nationals of that state.

This has been elaborated in Directive 94/80/EC, which lays down that persons who may vote and stand as candidates in municipal elections in their Member State of residence of which they are not nationals are those who: (a) are European Union citizens, i.e. persons with the nationality of a Member State of the European Union; (b) are resident in the Member State where they would like to vote or stand as a candidate; (c) comply with the conditions imposed by the national legislation of the Member State of residence on its nationals concerning the right to vote and stand in municipal elections. The principle of equality and non-discrimination between national and Community voters and candidates must be observed (European citizens to satisfy the same conditions as nationals of the Member State of residence) (Directive 94/80/EC, Article 3). In order to take part in elections, citizens must apply to be entered on the electoral roll of the Member State of residence as an expression of their interest in voting. The Member States must make the necessary arrangements to enable them to be entered on the electoral roll in due time before polling day. Community nationals must provide the same supporting documents as national voters (Article 9). In Member States where voting is compulsory, Community voters entered on the electoral roll are also covered by this obligation (Article 8). There is nothing in the directive to prevent persons voting or standing as a candidate both in their state of residence and in their home state. However, Member States may provide

that the holding of elected municipal office in the state of residence is incompatible with the holding of offices in other Member States which are equivalent to those which give rise to incompatibility in the state of residence (Article 6). Member States may refuse Community citizens the right to stand as a candidate if they have lost the right to stand as a candidate under the law of their state of origin as a result of an individual decision under civil or criminal law; if they cannot produce a declaration on nationality and residence declaration, declaration of non-deprivation of the right to stand as a candidate and, in certain cases, an attestation from the competent administrative authorities, or an identity document. Member States may also reserve the office of elected head, deputy or member of the governing college of the executive for its own nationals if these persons are elected to hold office for the duration of their mandate, while ensuring that any measures adopted in this area are appropriate, necessary and proportionate. Member States may also provide that citizens of the Union who are elected members of a representative council may not take part in designating delegates who can vote in a parliamentary assembly or in electing the members of that assembly (Article 5).

The directive provides for derogations for: (a) any Member State where the proportion of Union citizens of voting age who reside there, but are not its own nationals, exceeds 20 per cent of the total electorate; (b) Union citizens who already have the right to vote in elections to the national parliament of their Member State of residence (Directive 94/80/EC, Article 12).

Further, EU citizens have the right to vote for the European Parliament. Council Directive 93/109/EC of 6 December 1993 lays down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals.

The 1993 directive lays down detailed arrangements under which EU citizens residing in a Member State of which they are not nationals may exercise the right to vote and to stand as a candidate in that country. It does not affect the rights of a Member State's own nationals at elections to the European Parliament, whether or not those nationals reside inside the country (Directive 93/109/EC, Article 1). A national of another Member State who wishes to vote or to stand as a candidate in their state of residence must: (a) be a citizen of the Union; (b) be resident in the Member State in which they propose to vote or to stand as a candidate; (c) satisfy the same conditions as a national of that Member State who wishes to vote or to stand as a candidate (the principle of equality between domestic and other Community voters (Article 3). Community voters shall exercise their right to vote either in their state of residence or in their home state. No one may vote more than once or stand as a candidate in more than one Member State (Article 4).

Free choice of where to vote: a Community voter is to be entered on the electoral roll of their state of residence only if it is requested in advance. A voter who opts for the right to vote in their state of residence undertakes not to exercise a right to vote in their state of origin (Directive 93/109/EC, Article 9). A candidate must not have been deprived of voting rights in their state of residence or their state of origin. When submitting an

application to stand as a candidate, a Community national must provide proof supplied by their state of origin that they is entitled to stand as a candidate there. The state of residence may, if it so wishes, refuse to enter voters who are disqualified from voting in their state of origin (Article 9).

A system of exchange of information between Member States is provided for in order to prevent citizens from voting more than once or standing as candidates in more than one Member State (Directive 93/109/EC, Article 14).

1.c Overview of current state of implementation

In 2003, the European Commission published the Report to the Council and Parliament on the implementation of Directives 90/364, 90/365 and 93/96 (right of residence) – COM/2003/0101 final, this was the second report on the implementation of the three directives on the right of residence of Union citizens and their family members, of whatever nationality, who are not economically active in the host state, covering the period 1999–2002. The first report described in detail the slowness and difficulties of transposing the three directives into the domestic law of the Member States, completed when Italy enacted Legislative Decree 358 on 2 August 1999, a few months before the Court of Justice gave judgment in Case C-424/98 *Commission* vs *Italy* on 25 May 2000. Despite transposal, there were still individual cases of incorrect application, discovered following complaints addressed to the Commission or petitions addressed to Parliament's Petitions Committee. During the report period the Commission intensified its efforts to initiate and complete infringement proceedings against Member States whose legislation, regulations, circulars, instructions or administrative practices were in breach of their obligations under the directives; there were also major developments in the case law of the Court of Justice which, proceeding from the concept of Union citizenship, interprets the conditions laid down by the directives for recognising the right of residence more flexibly. There was also a major legislative initiative to facilitate and simplify the exercise of the right of Union citizens to move and reside freely in the territory of the Member States by means of a single instrument replacing the plethora of existing instruments. Lastly, the signing and proclamation of the Charter of Fundamental Rights of the European Union by the Presidents of the Parliament, the Council and the Commission at Nice on 7 December 2000 was vitally important for the free movement of persons, not so much because its chapter on citizenship, and in particular Article 45, sanctions the right of any Union citizen to move and reside freely in the territory of the Member States subject to the conditions and limits provided for by Community law, which makes no real change to Community law on the free movement of persons, but because the Charter codifies and presents in a visible and clear form fundamental rights, binding the three Union institutions, particularly the Commission, and giving them guidance for interpreting the current law and providing a basis for current or future legislative initiatives (European Commission, 2003b, Introduction).

The Commission concluded in 2003 that, twelve years after the adoption of the three directives on the right of residence of those who are not economically active and a few years after their transposition into national law, their application was basically satisfactory, as the declining number of complaints received by the Commission shows. But there were still individual cases of incorrect application. These were due mainly to misinterpretation and to administrative practices based on such misinterpretations by national administrative authorities, in particular the immigration police, who are often short of personnel with training in Community law to implement the relevant provisions with the flexibility that the spirit of the directives requires. The Commission is available to provide both national authorities and Union citizens with the assistance and information they need. Any Union citizen can, by simple letter, ask the Commission to intervene if they have problems connected with application of the directives. Intervention by the Commission has the advantage of being free for the citizen and effective because of the importance attached to it by the national authorities. But, in the absence of direct contact with the national authorities involved in an individual case and the constraints imposed by infringement proceedings, intervention by the Commission takes time, whereas the situation might need a rapid solution (European Commission, 2003*b*, Conclusion).

In 2006 the Commission published its Third Report from the Commission to the Council and the European Parliament on the application of Directives 93/96, 90/364, 90/365 on the right of residence for students, economically inactive and retired Union COM(2006) 156 final. This is the last report on these directives which have all been replaced by Directive 2004/38/EC. The Commission concluded in this report that at the end of the reference period, fifteen years after the adoption of the directives on the right of residence of inactive Union citizens, their application was basically satisfactory as the declining number of infringements showed. However, the national implementation measures of six Member States[78] were still subject to infringement procedures for non-conformity or incorrect application, due, mainly, to restrictive interpretation of the directives. During this period, the Commission also received complaints which could be solved in many instances before initiating infringement procedures. Directive 2004/38/EC improves the current legislation and provides a solution to many of the specific problems encountered with regard to the application of the three directives in a number of ways: it provides a single, simple legal instrument on the fundamental right of free movement and residence which is the most visible right attached to Union citizenship; it facilitates the right of residence through a reduction of administrative formalities and related expenses and the introduction of a right of permanent residence after five years of residence in the host state, which will not only be unconditional but will also ensure full equal treatment of economically inactive Union citizens with nationals. It limits the scope for expulsion of Union citizens and their family members. Finally, the judgments of the Court and the incorporation into the directive of the clarifications therein will help prevent future infringements (European Commission, 2006*b*, Conclusion).

78 Belgium, France, Italy, Luxembourg, the Netherlands and Spain.

It can be seen from the European Report on the Free Movement of Workers in Europe in 2005[79] that states are working towards implementation, as well as that in some fields – especially those influencing but not directly governing free movement – full compliance is still not in place. These are also perhaps the regulations that create most difficulties for people who wish to exercise their right to free movement, as considered below.[80]

1.d Enlargement and transitional measures

Although the free movement of persons is a fundamental precondition of the common market and an essential element of European citizenship, transition to full mobility of workers remains one of the most controversial issues regarding the accession of new Member States. Therefore, a clause was inserted into the Accession Treaty in 2003 in order to alleviate widespread fears that enlargement would lead to a flood of cheap labour from Eastern Europe, i.e. social dumping (Eurofound, 2008). In order to avoid a 'mass influx' from the ten new Member States the EU, or rather the 'old' EU, adapted transitional arrangements which control immigration from the ten new states over a period of seven years. The transitional arrangements do not apply to Cyprus or Malta (Malta can, however, invoke the safeguard clause). Moreover, they only apply to workers and access to work: citizens of the new Member States have full rights to freedom of movement from the moment of accession, provided they are not seeking paid work (for example in the case of students and retired people).

The Member States of the EU15 may allow *complete or partial* freedom of movement of workers from the new Member States. They have the right to limit this freedom during the transitional period, which started on 1 May 2004, for a maximum of seven years (+2, +3, +2 arrangement).

The formula '2+3+2'(1 May 2004–30 April 2011) may be divided into:

- 2004–2006 – national measures;[81]
- 2006–2009 – application of restrictions can be prolonged;[82]

79 Supra note 32 on professional qualifications, 41 on access to work, 54 on family reunification and 61 on social policy.

80 At the time of writing, a report is being drafted on the implementation regarding Directive 38/2004, which will cover the period up to 30 April 2008 and will probably be made accessible to the public in autumn 2008.

81 2004–2006: During this period current Member States apply national measures or measures resulting from bilateral agreements, thus regulating access to their labour markets. According to para. 12 of the Annexes, Member States may introduce under *national law* greater freedom of movement, (which may be equal to that guaranteed by the EC law provisions), but in any case national measures *may not be* more stringent than those that were in force on the day of signing of the Accession Treaty (para. 14). See Traser et al. (2005).

82 2006–2009: Before the end of the first two-year period (i.e. by 30 April 2006), the Commission will produce a report, on the basis of which the Council will review the functioning of the transitional provisions. Nevertheless, the result of this review will not be binding on Member States. Those who wish

- 2009–2011 – restrictions only if 'serious disturbances of the labour market'.[83]

(Romania, Bulgaria having other dates: 2007–08, 2009–11, 2012–13) Ireland, the United Kingdom and Sweden chose not to apply the restrictive measures and opened their borders to workers from the new Member States on 1 May 2004. For an initial period of two years, the Member States of the EU15 must apply either their national law or any bilateral agreements reached with the new Member States, or Community law. This means that, in most cases, workers from the new Member States still need a *work permit* to enter the labour market. The new Member States are free to impose reciprocal restrictions on workers from any of the EU15 Member States which have decided to take such measures (European Law Monitor, 2008). In 2009 the Member States of the EU15 will only be able to extend restrictive measures for another two years if they can argue that there exists or that there is a risk of serious disruption to their labour market. At the end of the seven-year transition period, Community citizens will enjoy the free movement of workers in full throughout the enlarged European Union (European Law Monitor, 2008).

The core of the transitional measures consists of the maintenance of the national regulations (or bilateral agreements) governing the granting of work permits. Once the national regulations cease to apply (end of the transitional period), the Member State is not allowed to request a work permit as a condition of access to the labour market, but may continue to issue them for monitoring and statistical purposes (Traser et al., 2005, p. 7).

A 'safeguard clause' allows a Member State which has chosen to drop the restrictive measures and allow free movement of workers to ask the Commission to authorise it to impose fresh restrictions if its labour market is threatened or experiencing serious difficulties. Safeguard clauses are included in accession treaties but have never yet been used. The EU15 Member States cannot make access to their labour market more restrictive for workers from the new Member States than it was at the date they signed the Accession Treaty on 16 April 2003 (European Law Monitor, 2008).

They must also observe a preference rule by which, if a job is offered to a foreigner, citizens of Member States that joined the EU in 2004 have priority over citizens of non-EU states.

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to continue applying national measures will still be allowed to do so after having notified the Commission (para. 3). Only in the absence of such notification, EU provisions governing free movement of workers will apply automatically to that particular Member State. During this three year period any Member State applying national restrictions may also at any time willingly 'switch' to full application of EU free movement provisions and should inform the Commission. See Traser et al. (2005).

83 2009–2011: As a general principle all national measures relating to labour market access should cease to apply by 2009. Nevertheless, a Member State is again given discretion to continue applying national measures (subject to the notification procedure as above) in case of serious disturbances of its labour market or a threat thereof. Moreover, during the whole seven-year period Member States applying EU provisions on access to their labour market in full may resort to a *safeguard clause* included in para. 7. This allows for partial or total suspension of application of the EU provisions referring to the free movement of workers, in case of disturbances to the labour market or threat thereof, even though the Commission's permission will be required for this clause to be applied. See Traser et al. (2005).

The application of transitional measures (from the enlargement of 2004) was carried out as follows: the first two years Ireland, Sweden and the United Kingdom (the latter, however, adopted a mandatory Worker Registration Scheme. Under this scheme workers from EU8 Member States must register with the UK Home Office within thirty days of starting their employment in the country) applied no restrictions whereas reciprocal measures were applied by Hungary, Poland and Slovenia. In February 2006 the Commission presented a report on the functioning of the transitional arrangements. Member States then decided whether they would continue restrictions during the second phase. In this second phase, Finland, Greece, Italy, Portugal and Spain (27 July 2006), the Netherlands (1 May 2007), and Luxembourg (1 November 2007) did not apply any restrictions and Belgium, Denmark, France and Germany (1 November 2007) simplified procedures or reduced restrictions in some sectors/professions, whereas Hungary continued to apply reciprocal measures. For example, Denmark issued work permits to EU8 workers, on condition that their work was full-time and governed by a collective labour agreement or complied with normal standards for the sector/profession. Work permits were issued without a prior examination of the labour market situation, but the applicants needed to be in possession of a residence permit before starting their employment. The Netherlands adopted a two-fold procedure. A traditional full work-permit system, including a labour market test, applied for most sectors, but a number of sectors and occupations were temporarily exempted from this labour market test. When the exemption applied, a work permit could be granted within two weeks without the need for a labour market test. The list of exemptions was reviewed by the government on a three-monthly basis. France decided to maintain a traditional work permit system with some exceptions, for example work in the research sector. Belgium, Finland, Greece, Luxembourg and Spain also maintained a work permit requirement. A work permit system with some modification applied in Germany and Austria as well. These two countries applied restrictions also on the posting of workers in certain sensitive sectors. Italy combined a work permit system with a special entry quota for workers from EU8 Member States. Legislation in Portugal also provided for a quota system. Three EU8 states (Hungary, Poland and Slovenia) applied reciprocity to EU15 Member States applying restrictions. None of the EU8 states applied for permission to restrict access by workers from other EU8 states. Malta made use of the provisions in the Accession Act that allowed for the issuing of work permits automatically and for monitoring purposes (European Commission, 2007).

With regard to the enlargement of 2007 application of transitional measures (enlargement 2007) there were no restrictions in eight of the EU10 (with the exception of Hungary and Malta), Finland and Sweden for the two years. By the end of 2008, the Commission will again present a report on the functioning of the transitional arrangements and Member States will again decide whether they would continue restrictions during the second phase.

Currently, ten of the EU15 Member States have opened their labour markets completely: the United Kingdom, Ireland and Sweden had already done so during the first phase. They were followed by Finland, Greece, Portugal and Spain as of 1 May 2006 and, as of 27 July 2006, by Italy. The Netherlands lifted all restrictions from 1 May 2007 and Luxembourg from 1 November 2007. The United Kingdom continues its mandatory

Worker Registration Scheme, and in Finland employment must subsequently be registered for monitoring purposes. Most of the EU15 Member States that have maintained restrictions have simplified their procedures or have reduced restrictions in some sectors/professions (Belgium, Denmark, France and – as of 1 November 2007 – Germany). The Royal Decree adopted in Belgium for the second phase of the transitional arrangements specifically provides that the restrictions could be lifted before the formal end of the second phase if certain conditions (notably in the form of enforcement measures) are met. Germany and Austria also maintain national measures in relation to the cross-border provision of services. Finally, Hungary still applies reciprocal measures. Slovenia ceased to apply reciprocity on 25 May 2006 and Poland on 17 January 2007. None of the EU8 Member States have thus far resorted to the safeguard procedure, which would mean that EC law on free movement of workers continues to apply among the EU8 (European Commission, 2007).

In a report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty (period 1 May 2004 to 30 April 2006) COM(2006) 48 final, the Commission reported that some EU15 states applying restrictions claim that these allow them to manage migration from neighbouring EU8 states. Two Member States continued to view the measures as necessary in the near future, taking into account national absorption capacity, the need to integrate all migrants, including those from non-EU countries, and to accompany internal structural reforms. Nevertheless, it was acknowledged that the restrictions may have encouraged EU8 nationals to look for other ways to perform economic activity in EU15 Member States, reflected in an exceptionally high influx of posted workers or workers claiming to be self-employed. As for EU8 Member States, virtually all called for lifting the restrictions. They stressed the fundamental nature of their citizens' right to freedom of movement as workers in the EU25 and pointed to statistical evidence showing that their citizens had not, in fact, flooded EU15 labour markets nor had they caused any surge in welfare expenditure by EU15 Member States. They also underlined the role of their citizens in alleviating problems caused by the EU15's ageing workforce (European Commission, 2006*a*, paras 9, 10).

The social partners called upon their national authorities to consult them regarding their positions for the second period. Many stressed that restrictions might have had the effect of postponing indispensable structural reforms both in the EU15 and in the EU8 labour markets. Recognising that migration flows from EU8 to EU15 Member States had been modest, social partners strongly emphasised that erosion of labour standards and 'social dumping' should be avoided. They also pointed out that restrictions on legal work in fact lead to a proliferation of undocumented work, bogus 'self-employed' work, and fictitious service provision and subcontracting. Lacunae in enforcement of existing Community legislation and in particular of the posted workers directive were also reported. The overriding majority of the social partners, with the exception of those representing small and medium-sized enterprises and/or trade unions in a few countries, stated that they were in favour of lifting the restrictions, in order to create a level playing field (European Commission, 2006*a*, para. 11).

A resolution adopted on 5 April 2006, based on an own-initiative report by EPP-ED[84] MEP Csaba Öry of Hungary, stresses that the free movement of workers is one of the four fundamental freedoms guaranteed by the TEC as well as being an expression of solidarity between old and new Member States. Parliament calls on Member States which opt to extend the transitional measures to 'do so on the basis of an in-depth analysis of the threat to their labour market from each individual new Member State'. It also calls on Member States 'who wish to continue transitional arrangements to create during the next stage the conditions to ensure that the transitional arrangements are not continued beyond 2009'. In addition Parliament calls on the Commission and Council 'to produce, by January 2009 at the latest, standardised statistics on intra-EU migration' and 'to set up a system for the systematic monitoring of migration of workers within the EU' (European Parliament, 2006, para. 12).

1.e Free movement flows

Differences remain in the availability, access, detail and quality of the data on admission and presence in Member States of nationals of other Member States, notwithstanding the efforts of Eurostat and the proposal of the Commission to create a clear basis in Community law for the systematic collection of data on migration. In some Member States EU nationals are not obliged to report to the authorities, or only EU10 nationals are under an obligation to register. In those Member States data of nationals of other Member States are not available from population registration, but only from other sources. It is remarkable that the national reporters of some EU10 Member States (e.g. Hungary, Slovakia and Slovenia) were able to produce relevant, detailed and up to date statistical information on EU migrants, whereas the report on some EU15 Member States (e.g. Belgium and France) due to the lack of publicly available official data, could only provide unofficial, outdated or incomplete statistical information (Groenendijk et al., 2006, p. 46).

In 1999, around 2.7 million EU nationals (1.8 per cent of the employed population) were living and working in another Member State. There are considerable variations depending on the country of origin and destination: the highest share of workers abroad comes from Ireland (13 per cent of all employed Irish nationals), Portugal (8 per cent) and Luxembourg (7 per cent), whereas the biggest recipients of labour from other Member States are Luxembourg (37 per cent of the resident labour force), Belgium (6 per cent) and Ireland (2.5 per cent). The larger Member States typically host considerably more other EU workers than they are sending out. Anecdotal evidence suggests that the number of EU citizens commuting to work in another Member State has grown but there is little statistical information. Commuting is concentrated in certain regions, depending on population density, physical proximity and infrastructural connection of urban and industrial centres. One of the most highly integrated border regions is Luxembourg:

84 European People's Party (Christian Democrats) and European Democrats in the European Parliament.

commuting from France, Belgium and Germany into Luxembourg corresponds to around 30 per cent of total employment there. However, this is exceptional in the EU; in border regions such as that between France and Belgium, or Austria and Germany/Italy, commuting is estimated at a small percentage of the labour force (European Commission, 2001, p. 29).

The absolute number of EU migrants and their share in the foreign population vary considerably between Member States (Tables 2 and 3). In a small group of states, EU nationals account for two-thirds or more of the foreign population (Belgium, Ireland and Luxembourg). On the other hand there are states where EU migrants make up only a tiny minority of the non-national residents: for example in the three Baltic States, Greece (1.5 per cent), Slovenia (5 per cent) and Italy (8 per cent) of the foreign population. In a third group, nationals of other Member States make up approximately one-third of foreign residents: for example Germany (31 per cent), Malta (35 per cent), Netherlands (33 per cent) and Portugal (28 per cent). In Spain, their share is clearly smaller: only 17 per cent of non-nationals are EU nationals. The largest absolute numbers of EU migrants are resident in Germany (almost 2 million), France, the United Kingdom (1.1 million born in other EU Member States), Spain (570,000) and Belgium. In Slovenia a total of 3,300 nationals of other Member States are registered, less than 5,000 in Latvia and in Cyprus 5,300, nationals of Greece, Poland, Slovakia and the United Kingdom making up more than 90 per cent of EU migrants in Cyprus. The large majority of EU migrants originates from the neighbouring countries or from a Member State with a common cultural tradition (e.g. Greece and Cyprus, Finland and Estonia, Latvia and Sweden, Ireland and the United Kingdom, Austria and Germany, Czech Republic and Slovakia, Spain and Portugal). Polish and British nationals are however working or resident in large numbers in other Member States that are not geographically or culturally close to their home country. These two nationalities might overall be the largest groups of Union citizens living or working in other EU Member States (Groenendijk et al., 2006, p. 46).

Table 2. EU10 and EU15 nationals as percentage of destination country's working-age population aged 15–64 (2004)

Country of Destination	Type of Data	% of WAP Nationality	
		EU10	EU15
Belgium	Residence permits	0.2	2.7
Czech Republic	Foreign workers stock	1.0	0.1
Denmark	Residence permits	0.1	0.2
Germany	Foreign workers stock	0.2	1.0
	Work permit	0.9	:
Estonia	Residence permit	0.0	0.1
Greece	Residence permit	0.1	:
Spain	Residence permit	0.0	0.1
France	Work permit	0.0	:
Ireland	Personal Public Service numbers	1.9	:

Country of Destination	Type of Data	% of WAP	
		Nationality	
		EU10	EU15
Italy	Application for work authorisation	0.1	:
Latvia	Residence permit	0.0	0.0
Lithuania	Residence permit	0.0	0.0
Hungary	Residence permit	0.0	0.0
Malta	Residence permit	0.1	0.8
Netherlands	Work permit	0.2	:
Austria	Average annual stock	0.7	:
	Work permit	1.2	:
Poland	Residence permit	0.0	0.0
Portugal	Residence permit	0.0	0.0
Slovenia	Registration of workers	0.0	0.0
Slovakia	Residence permit	0.0	0.0
Finland	Residence permit	0.0	0.0
Sweden	Residence permit	0.1	0.0
United Kingdom	Applicants to WRS	0.4	:

Notes:

%WAP – as percentage of destination country's working age population 15-64 ":" not applicable/not available.

All figures refer to the number of applicants/applications/registrations/permits issued (flows), except in the case of the Czech Republic, where the figure refers to the stock of workers, and for Germany, where the first line refers to the stock of workers and for Austria, where the first line refers to the average annual stock of employees. Figures on residence permits refer to permits issued for employment reasons only, except for Belgium.

1. Figures for France, Italy, Austria and the number of work permits for Germany relates to EU8:
2. The figure for Belgium refers to residence permits issued for all reasons.
3. The figure for Ireland refers to PPS Numbers, it is not only for employment reasons but also for other administrative purposes, including welfare, health and public services.
4. Reference date 2004 May-December.

Data for Cyprus and Luxembourg not received by the Commission.

Source: Administrative data from Member States

The percentage figures after the 2005 enlargement are given in Table 3.

Table 3. Resident working-age population by nationality (2005), row percentages

Country of Destination	Nationality			
	National	EU15	EU10	Non-EU
Belgium	91.3	5.8	0.2	2.8
Denmark	96.4	1.1	:	2.4
Germany	89.5	2.8	0.7	7.0
Greece	94.0	0.3	0.4	5.3
Spain	90.5	1.2	0.2	8.1
France	94.4	1.9	0.1	3.6

Country of Destination	Nationality			
	National	EU15	EU10	Non-EU
Ireland	92.3	3.0	2.0	2.8
Luxembourg	57.9	37.6	0.3	4.2
Netherlands	95.7	1.4	0.1	2.8
Austria	89.2	1.9	1.4	7.5
Portugal	97.0	0.4	:	2.6
Finland	98.3	0.4	0.3	1.0
Sweden	94.8	2.3	0.2	2.7
United Kingdom	93.8	1.7	0.4	4.1
EU15	92.4	2.1	0.4	5.1
EU10	98.4	0.2	0.2	1.2
EU25	93.7	1.7	0.3	4.3

Eurostat LFS, 2005 Q1, Ireland 2005Q2

Notes: "." Data not available or not reliable due to small sample size

Source: European Commission (2006*a*).

Workers from EU10 Member States helped to relieve labour market shortages and contributed to better economic performance in Europe. Countries that have not applied restrictions after May 2004 (Ireland, Sweden and the United Kingdom) have experienced high economic growth, a drop of unemployment and a rise of employment. As to the twelve EU countries using transitional arrangements, where workers managed to obtain access legally, this has contributed to a smooth integration into the labour market. However, evidence suggests that some of these countries may also have faced undesirable side effects, such as higher levels of undeclared work and bogus self-employed work. For the EU as a whole, flows of workers have been rather limited (Finfacts Ireland, 2006).

From certain reports, it appears that there are clear differences in job patterns between workers from the EU15 and the EU10. In Hungary, nationals from EU10 countries, mainly Slovak citizens, are employed predominantly in transport, construction and unskilled jobs, while nationals of the EU15 are highly skilled or self-employed. Only 2 per cent of EU15 nationals worked in unskilled jobs, as opposed to 18 per cent of EU10 workers. A similar discrepancy is reported in the United Kingdom, where EU10 workers are overrepresented in manufacturing, construction, distribution, restaurants, and workers from the EU5 are employed mostly in banking, finance, insurance, public administration, health and education. In Denmark most EU10 workers are employed in jobs covered by collective labour agreements, such as farming, services, construction and hotels. In Malta, nationals of other Member States work predominantly in service, construction and hotel jobs. In Latvia and Poland, EU migrants work mainly in processing, IT, education, trade or in managerial jobs. In Slovenia half of the 3,500 EU migrants employed have a university degree and another 27 per cent have completed secondary education. They are working predominantly as managers, technicians or in the sciences (Groenendijk et al., 2006. p. 48).

Table 4. Resident working-age population by nationality (2005) – cell percentages

Country of Destination	Nationality					
	EU15			EU10		
	2003	2004	2005	2003	2004	2005
Belgium	5.4	5.8	5.8	0.2	0.2	0.2
Denmark	1.0	1.1	1.1	:	:	:
Germany	2.7	2.6	2.8	:	:	0.7
Greece	0.2	0.4	0.3	0.3	0.4	0.4
Spain	1.1	1.2	1.2	0.2	0.2	0.2
France	1.9	2.1	1.9	0.1	0.1	0.1
Ireland	3.4	3.3	3.0	:	:	2.0
Luxembourg	37.2	37.6	37.6	0.3	0.3	0.3
Netherlands	1.5	1.5	1.4	0.1	0.1	0.1
Austria	1.7	1.8	1.9	0.7	0.8	1.4
Portugal	0.3	0.4	0.4	:	:	:
Finland	0.3	0.3	0.4	0.3	0.3	0.3
Sweden	2.2	2.2	2.3	0.2	0.2	0.2
United Kingdom	1.8	1.8	1.7	0.2	0.3	0.3
EU15	2.0	2.1	2.1	0.2	0.2	0.4
EU10	:	0.2	0.2	:	0.1	0.2
EU25	1.9	1.7	1.7	0.1	0.1	0.3

Eurostat LFS, 2003-2005 Q1, Ireland 2005Q2

Notes: "." Data not available or not reliable due to small sample size

Source: European Commission (2006*a*).

In the first quarter of 2005, the proportion of the working age population from EU10 Member States within the EU15 was rather small, ranging from 0.1 per cent in France and the Netherlands to 1.4 per cent in Austria and 2 per cent in Ireland (Table 4). Further, these figures have been stable in relation to the two years before enlargement, i.e. 2003 and 2004, with only a moderate increase of 0.1 percentage points each year in the United Kingdom and a marked increase in Austria, where figures doubled to 1.4 per cent. It is also interesting to note that in EU15 Member States the percentage of non-EU nationals is significantly higher than that for EU10 nationals. This can also be explained for historical reasons and because immigration from EU10 is fairly recent. This implies that immigration from non-EU countries is a much more important phenomenon than intra-EU mobility, both within the EU15 and the EU25 (European Commission, 2006*a*, paras 17, 18).

Concerning Transit Agreement, there is no evidence either from administrative sources or from the Labour Force Survey to show a direct link between the magnitude of mobility flows from EU10 Member States and the Transit Agreement in place. In particular, flows into the United Kingdom and Sweden, which are Member States without restrictions for EU8 workers, are comparable if not lower to those into countries with Transit Agreement. The experience of the Nordic countries, which have comparable labour markets and economic performance, confirms this. Ultimately, mobility flows are driven by factors relating to supply and demand conditions. If anything, TA will only delay labour market adjustments, with the risk of creating 'biased' destination patterns even on a more permanent basis. On a more general level, restrictions on labour market access may exacerbate resort to undeclared work. When accompanied by lacunae in enforcement of Community legislation already in place, this phenomenon leads to undesirable social consequences both for undeclared workers and the regular labour force (European Commission, 2006*a*, paras 19, 20).

Labour market outcomes for nationals from EU10 into EU15 Member States are a central issue to consider. For those EU15 Member States for which there is statistically significant information available (see Table 5), the key labour market indicator, the employment rate, shows that EU10 nationals tend to have employment rates in each country which are comparable to those of individuals who are nationals of that country and of other EU15 countries. Moreover, these are generally higher than for non-EU nationals. In Ireland, Spain and the United Kingdom, EU10 nationals have even higher employment rates than country nationals. This shows that EU10 nationals positively contribute in each Member State to overall labour market performance, to sustained economic growth and to the state of public finances (European Commission, 2006*a*, para. 23).

An interesting fact is that since enlargement the employment rate of EU10 nationals in several EU15 Member States including Austria, France, the Netherlands, Spain and the United Kingdom has increased, in certain cases quite substantially. This could be connected with two facts; Firstly, enlargement may have contributed to bringing to the surface part of the underground economy constituted by previously undeclared workers from the EU10, with well-known beneficial effects, such as greater compliance with legally sanctioned labour standards, improved social cohesion thanks to a reduced risk of marginalisation of those concerned, and higher state income from tax and social security contributions. This also means that the increase in labour mobility from EU10 Member States due to enlargement may in fact be smaller than shown by the data; Secondly, a real improvement in the employment rate of EU10 nationals may have occurred after enlargement due to a change in employers' attitudes, greater opportunities to set up private businesses, better information and regulation (European Commission, 2006*a*, para. 24).

In December 2007 Eurostat concluded that new Member States contribute to reducing unemployment in Europe, estimates for 2006 show that the EU27 unemployment rate was 8.2 per cent, 0.8 percentage points less than in 2005. The contribution of the new Member States was crucial to this reduction. At regional level, unemployment is becoming

more uniform across the EU27 due to two factors: regions with high unemployment rates, located mainly in the new Member States, have reduced unemployment, whereas some regions with low unemployment rates in the EU15 have experienced the opposite trend (Eurostat, 2007).

Table 5. Resident/work permits to EU nationals: absolute numbers and percentages of destination country's working-age population aged 15–64

Country of Destination	Type of data	Reference period	Nationality			
			EU15		EU10	
			Number	%WAP	Number	%WAP
Belgium	Residence permit	2003	184695	2.7	9351	0.1
	Residence permit	2004	183019	2.7	12918	0.2
	Residence permit	2005	178155	2.6	15408	0.2
Czech Republic	Foreign workers stock	2003	4903	0.1	64198	0.9
	Foreign workers stock	2004	3751	0.1	69024	1.0
Denmark	Residence permit	2004	6825	0.2	4911	0.1
Germany	Foreign workers stock	2004	560230	1.0	108162	0.2
	Work permit	2004	:	:	497298	0.9
Estonia	Residence permit	2004	705	0.1	155	0.0
Greece	Residence permit	2004	:	:	3711	0.1
Spain	Residence permit	2004	21986	0.1	11255	0.0
France	Work permit	2003	:	:	10067	0.0
	Work permit	2004	:	:	9916	0.0
Ireland	Personal Public Service Num.	2004 May-Dec	:	:	53829	1.9
	Personal Public Service Num.	2005 Jan-Nov	:	:	107024	3.8
Italy	Application for work auth.	2004	:	:	26324	0.1
	Application for work auth.	2005 Jan-Sep	:	:	49454	0.1
Latvia	Residence permit	2004 May-04.05	742	0.0	497	0.0
Lithuania	Residence permit	2004	117	0.0	27	0.0
Hungary	Residence permit	2004	2727	0.0	1455	0.0
Malta	Residence permit	2004-2005 Apr	2095	0.8	215	0.1
Netherlands	Work permit	2003	:	:	12541	0.1
	Work permit	2004	:	:	24424	0.2
	Work permit	2005	:	:	14612	0.1
Austria	Average annual stock	2004	:	:	40420	0.7
	Average annual stock	2005 Jan-Jun	:	:	40861	0.7
	Work permit	2004	:	:	68449	1.2
	Work permit	2005 Jan-Jun	:	:	32265	0.6
Poland	Residence permit	2004	4311	0.0	456	0.0

Country of Destination	Type of data	Reference period	Nationality			
			EU15		EU10	
			Number	%WAP	Number	%WAP
Portugal	Residence permit	2004	1082	0.0	43	0.0
Slovenia	Work permit/registration	2004-2005 Jun	416	0.0	1471	0.1
Slovakia	Residence permit	2004	151	0.0	142	0.0
Finland	Residence permit	2004	727	0.0	1651	0.0
Sweden	Residence permit	2004	2698	0.0	3514	0.1
United Kingdom	Applicant to WRS	2004 May-Dec	:	:	134530	0.4
	Applicant to WRS	2005 Jan-Sep	:	:	156165	0.4

All figures refer to the number of applications/registrations/permits issued (flows), except in the case of the Czech Republic, where the figure refers to the stock of workers and for Germany, where the first line refers to the stick of workers, and for Austria, where the two first lines refer to the average annual stock of employees. Figures on residence permits refer to permits issued for employment reasons only, except for Belgium.

Notes:

1. The reference period is normally from January to December, otherwise it is specified.
2. Figures for France, Italy, Austria and numbers of work permits for Germany relate to EU8.
3. Figures for Belgium refer to residence permit issued for all reasons; EU15 figures include permits issued to non-EU nationals born in Belgium.
4. The figure for Ireland refers to PPS Numbers issued not only for employment reasons, but also for other administrative purposes, including welfare, health and other public services.
5. The figure for Sweden for EU10 nationals refers to 2004 May-Dec.

Data for Cyprus and Luxembourg not received by the Commission

":" not available/applicable

Source: Administrative data from Member States.

Subjective motivations of intra-EU mobility vary considerably by country of origin and destination. Overall, however, the classic pattern of labour migration tells only a limited part of the story. 'Work opportunities' (mentioned by 25.2 per cent) are less common than non-work reasons. Among the latter, 'family/love' (29.7 per cent) prevails over 'quality of life' (24 per cent) and 'study' (7 per cent), while 13.1 per cent mention other more specific motives. Half of EU movers are 'supermobile', as they have previous migration experiences (and 26.5 per cent in a third country). Over time 'family/love' and 'quality of life' tend to become more common motives to migrate. Gender differences are also noticeable, reproducing traditional roles: four women out of ten move for sentimental reasons (probably following or joining their partners abroad), while one third of men still qualify as 'work migrants'. Overall, the right to free movement is changing not only the objective conditions, but also the subjective underpinnings of intra-EU mobility from 'international' to 'internal' mobility, inasmuch as the latter is more frequently driven by personal relationships than by job shifts (PIONEUR, 2007).

Studies show that a much higher proportion of younger people would like to move than those in older age groups: this is important because a combination of ageing and the desire of business for experienced employees means that older workers will be an important part of the workforce in the future; single people are more inclined to move than those who are

married or living together; senior managers/directors are more inclined to want to move than those in other occupational groups, although these data need to be interpreted with caution because of the difficulties in establishing a consistent occupational classification across countries; those on low incomes are slightly less keen to move, perhaps reflecting the costs of mobility; and a slightly higher proportion of men would like to move than women (PricewaterhouseCoopers, 2002).

These numbers and tables basically all show, as was stated at the beginning of this study, how mobility between the Member States is in fact quite low, perhaps even surprisingly so – about 2 per cent, and the amount of regulations governing these 2 per cent is amazingly vast. On the basis of legislation and these figures we move on to a short assessment of how easy – or difficult – free movement is in the region.

1.f Evaluation of the possibility of free movement in the region

One of the strong features of the free movement of persons regime in the European Union is the legal protection afforded by EU law to EU nationals moving between Member States. Traditional state sovereignty in this area has been diluted considerably. For example, admission can only be denied to EU workers if they pose a threat to the public security, public policy or public health of the Member State concerned (TEC, Article 39), terms that have been given a uniform restrictive interpretation by the European Court of Justice (case of *R* vs *Bouchereau*). Expulsion of EU workers is also subject to equivalent regulations, which have now been consolidated in Directive 2004/38/EC applicable to EU nationals and their family members who move for both economic (salaried workers, self-employed) and non-economic (non-working family members, students, retirees, etc.) reasons (Cholewinski, 2005).

There can be no doubt that the regulations relating to free movement of persons have been significantly simplified with Directive 2004/38/EC, and the underlying principle of Union citizenship. By now, also on the basis of the extensive case law from the European Court of Justice in this field there can be no doubt that the right to move and reside freely within the EU is firmly established directly on the basis of the relevant articles of the TEC and the right is increasingly dependent solely on the fact of being a Union citizen. By now the only effective restriction on this freedom is the fact that one may not be a burden on the host state, and the very restrictively interpreted rights of the state to expel on very narrow grounds. Free movement within the European Union is thus at face value rather easy and straightforward and rather well protected. The main restraint which may be invoked is that the Union citizen may not be a burden on the host state.

Intra-EU migrants are changing in their social composition. While once they were predominantly low-skilled economic migrants – such as 'guest-workers' from South to North – more recently they tend to be better educated, highly skilled labour migrants, and they also partly come with other motivations, such as to retire and to study. There

are by now strong migration flows of retired people from North to South as well as movements of the highly skilled particularly between the different countries of Northern and Central Europe (PIONEUR, 2007).

When mobility remains low, however it seems that the reasons, as shown below, are mostly practical obstacles, but also legal obstacles especially on the social level (social security, health, taxes) exist.

The European Commission has tried to develop a three-pronged strategy to overcome some of the barriers to occupational and geographical mobility. The first element of this strategy relates to transparency and transferability of skills, qualifications and experience across EU borders. A number of programmes have been developed to facilitate this, including instruments to translate, record and electronically lodge different aspects of a person's human capital at national employment service centres where they can be accessed by employers across the EU. The second element of the strategy relates to facilitating geographical mobility across borders. Lack of portability of social security, health benefits and supplementary pensions have been identified as major deterrents to mobility. The introduction of the European Health Card in 2004 has been the main achievement to date with progress on other fronts rather slow. The third element of the strategy relates to provision of information on various aspects of mobility, including that of the labour markets of other EU regions. The national employment services have been networked to form EURES. To this has been added a portal on mobility and one on information on education and training opportunities (Shah and Long, 2007).

Box 2. Key barriers to mobility

Key barriers to mobility have been defined:

- *by employers:* there are management issues attached to a mobile workforce; greater mobility will create a key challenge for human resource management; many problems arise as a result of differences between our own internal policies; the terms upon which our international workers are employed are highly inconsistent; we need a more streamlined approach.
- *by individuals:* the shift toward two-income households means the lack of employment opportunities for spouses is probably one of the biggest barriers encountered; it is increasingly difficult to get highly skilled senior managers to accept international assignments; the balance of power is shifting.
- *by policy-makers:* immigration procedures take endless time and are very complex; pension plans are one of the biggest barriers to mobility; it is very difficult to find a transferable, standardised pension scheme.

Source: Case study interviews, PricewaterhouseCoopers (2002).

What may create obstacles to free movement are more the regulations governing aspects which influence this mobility, such as regulations on recognition of professional qualifications and pensions. As noted above, states are improving their implementation on recognition of professional qualifications, but problems remain. Furthermore, with the exception of a handful of regulated occupations – doctors, nurses, midwives, pharmacists, dentists, veterinarians and architects – recognition is not automatic and each individual has to apply to the authorities in the host country for their qualifications to be assessed as equivalent to the local ones.

Major advances have been made in economic integration in the EU over the last half-century. There are however large areas where Member States still have control, particularly in the areas of taxation, social security, health coverage and wages. These systems have been constructed over a number of years. For many states the systems are part of their cultural heritage, which they are unwilling to see dismantled. However if these different systems are not compatible and transparent then they can create both financial and administrative hurdles with a potential to deter individuals from making decisions to seek employment and relocate to another country. Health-care systems vary widely between Member States. Even though most EU countries have universal health coverage for their citizens, this may not immediately extend to non-citizens. If the coverage of health insurance cannot extend beyond state borders, this can become a major barrier to geographical mobility. Lack of portability can also mean that a person ceases accruing health benefits while they are out of the country. Other obstacles and disincentives exist for those looking for work and wanting to undergo training in another Member State. In some states individuals lose their rights to unemployment benefits and social security if the training lasts longer than three months or they leave the state for more than three months. Housing and information on housing can be barriers to mobility. They can also be barriers to mobility within countries. The housing markets in Member States can be subject to a varying range of rigidities such as property taxes and discretionary planning regulations by local authorities, all of which can mean big differences in costs of moving (Shah and Long, 2007).

Also, the complex nature of social rights across borders may contribute significantly to rendering mobility less easy. This is both a legal and a practical obstacle. Individual experiences show that the right to take unemployment social security for three months from one state to another was complicated significantly by the fact that the host state seemed unaware, or unwilling, to claim the social security from the state of origin and in at least one case threatened the beneficiary with a lawsuit unless the individual repaid the social security – which could without problem be claimed from the proper authority in the state of origin, which was waiting to transfer the money to the host state.[85]

85 A Union citizen from Denmark moved to Italy to search for work with the right to obtain Danish unemployment benefits for three months, paid by the Italian authorities which were then reimbursed by Denmark (interview with individual concerned).

The simplification of social protection rules planned with Regulations 883/2004 may help to make them more easily implemented and thus more easily known and respected by operators, who in the end have direct contact with Union citizens who have moved from one Member State to another.

Other problems occur when staff in, for example, municipal registration offices are unaware of the mobility rules and, after the entry into force of Directive 2004/38/EC, still require that Union citizens show their residence permit in order to register their residence in the municipality.

Another, perhaps in a certain sense 'opposite', problems arise in France where Union citizens are no longer required to register anywhere, which renders it effectively impossible to register at all and thus to obtain an insurance or in general to conclude a contract, an ID card, bank account and a fixed registered residence.[86]

Practical problems also occur in relation to health care, especially for those no longer economically active, who do not have insurance with their employer. These people may be forced to obtain a long-term private insurance which may be disproportionately expensive, whereas, had they remained in their state of origin, they would have been covered by public health insurance. This is due to the fact that such persons in some cases lose their right to health insurance in the state of origin and the host state has the right to require that the individual does not become a burden.[87] Tax regulations may also create problems for people no longer economically active, who depend on a pension paid by the state of origin but have to pay taxes in the host state. Mainly due to confusion and incompetence regarding these issues, specific cases show how double tax occurs and the individual has to take action against the state of origin in order to obtain the right not to be double taxed.[88]

'Horizontally' there may also be problems when private operators such as banks require not only proof of residence, which is understandable (and a problem when such proof is unattainable as mentioned above) but also a residence permit when such permits are no longer necessary and no longer given.[89]

The practical issues of residing and working abroad are underestimated. Also in the context of the enlargement the continued application of the pre-accession work permit systems for new Member State nationals by certain EU15 countries leads to confusion. Nationals of the 'A8'[90] are still encountering barriers when trying to reside in some of

86 Interview with Union citizen no longer active in the labour market who has moved from Denmark to France.

87 Ibid.

88 Ibid.

89 Union citizen in Italy.

90 This term is used do describe the workers of the new Member States (with the exception of Cyprus and Malta) to whom the Community principle of free movement of workers does not apply during the transitional period.

the EU15 countries while looking for work there (as the process of applying for a work permit must commence from their country of employment or a residence permit linked to a work permit is required from them straight on arrival). It is also not unusual that the requirement to obtain a work permit is sometimes confused with the necessity to possess an entry visa, which does not apply to any EU citizens – be they EU10 or EU15 nationals (Traser et al., 2005, p. 27).

This demonstrates how practical implementation and lack of knowledge on the part of the operators the mobile individual encounters, of secondary legislation in many cases, are more of an obstacle to mobility than lack of implementation of regulations directly related to free movement. However, delayed implementation of Directive 2004/38/EC obviously did not help mobility in some countries, but that problem should be overcome by now.

As mentioned in the section on pensions, on the basis of the current situation in Member States, four main areas can be identified that may negatively affect the social protection of mobile workers and thus constitute obstacles to the exercise of the right of free movement (European Commission, 1997, p. 283).

- tax treatment of cross-border contributions and transfers;
- conditions for the acquisition of supplementary pension rights;
- regulations on preservation of dormant pension rights;
- the way the transfer of acquired rights is organised.

The problems mentioned above regarding pension underlines the need to improve the portability of supplementary pension rights, in particular for the increasing number of schemes that contribute in an essential way to the social protection of (mobile) workers. It is also clear that in order to tackle this problem effectively, it is necessary to address the problems identified in a comprehensive way.

Even if some individual Member States and pension schemes are in the process of improving portability, the lack of commonly agreed principles and requirements in this area at the European level would not allow making real progress in the elimination of the existing and probably increasing obstacles to free movement created by the design of supplementary pension provision. The EU has to take action not only because of the negative effect of insufficient portability on the working of the internal market but because the Commission has to assume its obligations as a guardian of the Treaty ensuring the respect of the basic freedoms prescribed by this Treaty, in particular the freedom of movement of workers (European Commission, 2005*b*, p. 19).

The various actions that have been taken at European level with regard to supplementary pension provision are not yet sufficient to improve substantially the supplementary social protection of mobile workers by preventing significant losses of pension entitlements of early leavers. Important legal action by the Commission in the field of taxation is in progress. However, these initiatives have not, or only partially (in the case of taxation), addressed the main obstacles to portability of supplementary pension rights as identified above; especially the tax treatment of cross-border transfers, the conditions for acquisition

of rights, the preservation of dormant rights and transferability conditions (European Commission, 2005*b*, p. 20).

In a Communication from the Commission of 16 March 2007, EURES Activity Report 2004–2005 presented by COM(2007) 116, the EURES system (described above) was evaluated. It was concluded that an overall assessment of the first experiences with the setting up of a EURES structure in the new Member States, shows that all ten new members have made a good start with the implementation of EURES. They all have an active information programme, targeted at the different actors and stakeholders of the EURES project. The knowledge and experience of the EURES advisers is elaborated through extra training courses, studies, seminars and meetings with EURES actors in other countries. Job-seekers are approached via information days, job fairs, counselling, school and university visits and special events. Leaflets and noticeboards in universities and local employment offices complement these information activities. And several reports refer to a good use of the media to get EURES known to the public. EURES plays an important role in cross-border regions where EURES advisers give information and advice to cross-border workers and employers wishing to recruit from the other side of the border.

The highest concentration of cross-border commuting flows can be found in a relatively small part of the EEA, notably between different regions in Belgium, Luxembourg, the Netherlands, Germany, France and also Switzerland with which an official cooperation within the EURES network has been in operation since 2002. Available statistics and estimates on commuting flows show that there is a gradual increase of flows between new and old Member States but also between new Member States. EURES supports about twenty officially recognised cross-border partnerships as well as various other forms of cross-border activities that may prepare the ground for future partnerships. An essential feature of EURES is the active participation of social partners in the network, particularly as regards its cross-border activities.

Differences in culture and language add diversity and richness to European societies but they are also significant barriers to labour mobility. In spite of an increasing number of EU citizens who are multi-lingual, language is still one of the most significant barriers to mobility. Living and working in another Member State requires a person to have at least a working knowledge of the local language for successful integration into the local community. Age is a major determinant of mobility with the highest mobility among those between 20 and 40. On the one hand this age group can expect the highest economic return from migrating and the lowest costs but on the other hand it is also the age group most likely to start families and thus in need of social and economic security. Mobility decisions are often joint decisions of a couple or a family unit and involve factors such as suitable work for both partners in the new location. If children are part of the family unit then the problem of finding suitable schools and the degree of difficulty of integrating into the education system of another country can be major deterrents to moving to another country (Shah and Long, 2007).

Notwithstanding the efforts made and the progress of the realisation of Union citizenship, however, mobility remains low. This may be due to the simple fact that differences in quality of life are not great within the Union (especially between the EU15) even if differences in wages and unemployment rates should perhaps further more mobility, and that even allowing for official barriers on, for example, language, it is almost impossible to live and work in Greece without speaking a word of Greek, or in Italy without speaking a word of Italian.

The reasons for the low intra-EU mobility are non too clear, even if some possible motives have been given above, and partial explanations might be the high cost of physical relocation to another country, the loss of country-specific human capital when people move and a lack of portability of pensions, health and social security benefits across borders. A sociological explanation is that most workers do not seek employment across borders because of *nationally habitualised indifference*, which translates to avoiding uncertainty associated with working on the *other side* and wishing to *border* one's orientation and identity within the existing socio-spatial environment (Shah and Long, 2007). The study by PIONEUR shows that about 50 per cent of internal movers hold so-called 'tripartite' territorial identities that consist of two national attachments (country of origin, COO; country of residence, COR) as well as a feeling of belonging to the EU. The other 50 per cent of movers divide into three groups: first, those who identify with both the COO and the COR but have not developed a feeling of belonging to the EU (two national identities: 17.7 per cent), second, those who have experienced identity-conflict between the COO and the COR identity and feel attached to either one of those plus the EU (one national + European identity: 16.7 per cent) and third, those who hold only one identity (single identity: COO, COR or European) or no territorial identity at all (15.9 per cent altogether). On the basis of social psychological theories, the authors suggest that, for intra-EU migrants, the best condition to develop a European identity is to hold two non-conflicting national identities. If so-called 'cognitive inconsistency' arises between the COO and the COR identity, the feeling of belonging to the EU can still be achieved but is less frequent (PIONEUR, 2007).

The main obstacles can thus be identified:

- lack of integrated European-wide employment legislation;
- differences in tax systems between Member States;
- lack of language skills;
- differences in benefit systems between Member States;
- immigration issues;
- differences in pensions systems between Member States;
- lack of mutual recognition of professional qualifications;
- availability of information on international employment opportunities (PricewaterhouseCoopers, 2002).
- In conclusion it can be said that many obstacles of a legal but mainly of an administrative nature, and also of a linguistic or socio-cultural nature, continue to hamper workers' freedom of movement and to discourage them from taking advantage of the opportunities for mobility that arise. Their apprehension is also often linked to a lack

of information about existing opportunities or the related support mechanisms in the EU (EUROPA, 2005*a*). Interestingly, EU movers are overrepresented in the upper class and underrepresented in the working class, which may also point to the fact that mobility within the EU is more of a choice made by personal reasons than out of direct need (see above under migration flows).

The practical difficulties mentioned here shows that there is a need to render practical aspects of mobility easier, but that said it is also true that finding a job in another Member State or going there once retired or for study purposes would be much more difficult if these regulations were not in place. There can be no doubt that mobility for those who chose the challenge of living in another country has been significantly simplified by the European regulations and especially by Directive 2004/38/EC, and that not all challenges can be removed as Member States will continue to have different characteristics – the European Union is made up of different countries, it is not one large state.

Part 2: Economic Community of West African States[91]

2.a Regulations directly governing the free movement of persons

Background

The Economic Community of West African States (ECOWAS) was set up in 1975 with the aims: 'to promote cooperation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations among Member States and contribute to the progress and development of the African Continent' (ECOWAS, 1975, 1993, Article 3.1). Following the desire of ECOWAS to 'accelerate the economic integration process in the region' (Preamble) the Treaty was revised in 1993 – this is the version referred to throughout this report, unless otherwise stated. In order to ensure these aims, the Community was to establish a common market through 'the liberalisation of trade; the adoption of a common external tariff and a common trade policy vis-à-vis third countries; and the removal, between Member States, of obstacles to the free movement of persons, goods, service and capital, and to the right of residence and establishment' (Article 3.2.d(i)–(iii)). Further, the Community declared in its establishing Treaty that 'citizens of the Community shall have the right of entry, residence and establishment and Member States undertake to recognise these rights of Community citizens in their territories in accordance with the provisions of the Protocols relating thereto' (Article 59.1). Member States were to adopt appropriate measures in order to ensure these rights and the implementation of this article (Articles 59.2, 59.3).

Before further analysing these dispositions, it is appropriate to explain that within ECOWAS the Treaty is binding on the Member States, as is the Protocol. The Authority of Heads of State and Government of Member States (hereafter the Authority) is the supreme institution of the Community and is composed of heads of state and/or government of Member States (ECOWAS, 1975, 1993, Article 7.1). The Authority acts by decisions

91 With thanks to Jo-Lind Roberts for her considerable contribution.

(Article 9.1), which are binding on Member States and institutions of the Community (Article 9.4). It further issues resolutions that are not legally binding, but are meant to influence the Member States. The Council of Ministers of the Community (hereafter the Council) is in charge of the 'functioning and development of the Community (Article 10.3). It is composed of the minister in charge of ECOWAS affairs and any other minister of each Member State (Article 10.2). The Council of Ministers acts on regulations (Article 12.1) that are binding on Member States after their approval by the Authority (Article 12.3). The Council also issues recommendations to the Authority on actions aimed at attaining the objectives of the Community (Article 10.3a). Article 5.2 of the Treaty enounces that 'each Member State shall, in accordance with its constitutional procedures, take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the implementation of the provisions of this Treaty'.

In the area of free movement of persons, however, although there has been definite development, and the UN Economic Commission for Africa (UNECA) identified ECOWAS[92] as one of Africa's most promising subregional organisations in its 2004 report *Accessing Regional Integration in Africa*, stating that it had achieved an 'above average' integration rating of at least 6 per cent between 1994 and 1999 (Cholewinski et al., 2007, p. 349; UNECA, 2004, p. 231) the objectives set out have not yet been reached.

Measures regarding exit and entry

In 1979 ECOWAS Member States voted Protocol A/P.1/5/79 relating to Free Movement of Persons, Residence and Establishment. As mentioned in the introduction, its purpose was to set out a three-phase approach to further integration over a period of fifteen years. To summarise, Phase I provided for the elimination, over five years, of the need for visas for stays of up to ninety days within ECOWAS territories by Community citizens in possession of valid travel documents and an international health certificate. Member States reserved to themselves, in Article 4 of the Protocol, the right to refuse admission to any Community citizen who comes within the category of inadmissible immigrant under their domestic laws.

The Protocol established Phase I forthwith, dispensing with the necessity to obtain a visa for all ECOWAS citizens possessing a 'valid travel document and an international health certificate' (ECOWAS, 1979, Article 3.1) and visiting a Member State for a period of time not exceeding ninety days (Article 3.2). In order to facilitate these dispositions, private vehicles registered in a Member States could enter and remain in another Member State for a period not exceeding ninety days (Article 5.1), and commercial vehicles were allowed a fifteen-day period, as long as they did not 'engage in any commercial activities within the territory of the Member State entered' (Article 5.2). Documentation

92 Together with the Southern African Development Community (SADC) and the West African Economic and Monetary Union (UEMOA).

had of course to be presented (Articles 5.1 and 5.2: valid driving licence; Matriculation Certificate (Ownership Card) or Log Book; insurance policy recognised by Member States; international customs documents recognised within the Community).

The Protocol also set out requirements and guarantees in the case of expulsion (ECOWAS, 1979, Article 11), and confirmed that the Protocol does not operate to the detriment of more favourable provisions in other agreements concluded by Member States (Article 12).

As stated earlier, the principle of the ninety-day stay without visas is considerably restricted by the provisions of Article 4 of the Protocol, allowing Member States to refuse admissions to Community citizens who do not comply with their domestic immigration laws. By acknowledging state sovereignty in such unambiguous terms, ECOWAS 'virtually invites national provisions more restrictive than and perhaps antipathetic to the non-discrimination, regional social cohesion and promotion and protection of human and peoples' rights objectives at the heart of the ECOWAS initiative' (Adepoju et al., 2007, p. 8). Although a certain amount of domestic legislation on inadmissibility stipulations is anterior to the Protocol and even the Treaty (in the Gambia for example) this does not necessarily make them inoperative, even though these dispositions are clearly in breach of ECOWAS dispositions on non-discrimination and equal treatment of nationals, as shown below. Table 6 sets out the inadmissibility provisions of ECOWAS Member States.

Table 6. ECOWAS inadmissibility provisions

Country	Laws and provisions
Benin	Law No. 86-012 relating to Foreigners in the Republic of Benin, 31 January 1986 15. Foreigners must present a passport, medical certificate, entry visa (or other travel documents). 16. People younger than 15 must be accompanied by a guardian. Order No. 218 instituting a residence card in Benin and specifying the conditions of its issuance, 3 November 1992 16. Individuals can be refused residence permits if their presence constitutes a threat to public order.

Burkina Faso	Ordonnance No. 84-049/CNR/PRES establishing the conditions of entry, stay and exit for foreigners in Burkina Faso, 4 August 1984 3. Foreigners must have recognised and valid travel documents and visas, up to date international health certification, return ticket (or other proof of ability to leave) and have completed appropriate application procedures. 13. The minister of Public Health and Rural Development may impose special preventative conditions on travellers of all nationalities and origins.
Cape Verde	No information currently available.
Côte d'Ivoire	Decision No. 2005-05/PR relating to the identification of persons and the stay of foreigners in Côte d'Ivoire 8. ECOWAS citizens have the right to freely circulate within the country for up to 3 months with a passport. Stays of longer than 3 months require a residence card.
Gambia	Immigration Act 1965 12. It is unlawful for prohibited immigrants to enter or reside in the Gambia. 13. (1) Prohibited immigrants include: (a) persons without visible means of support (or who in the opinion of the Principal Immigration Officer are likely to become a pauper or public charge); (b) idiots and insane persons and those suffering from communicable diseases (as may be prescribed); (c) undesirable persons; (d) persons who on arrival lack a valid passport (or if underage, corresponding details in the accompanying adult's valid passport); (e) prostitutes or other persons who (in the opinion of the Principal Immigration Officer) derive their livelihood in whole or part from prostitution or other immoral occupations (whether such prostitute or person is male or female); (f) persons subject to deportation order (from the Gambia)

Ghana	Immigration Act, 202 February 2000 (Act 573) 4.1. Foreigners must have a valid passport or other valid travel document, or be exempt from needing a visa; 8.1. Individuals prohibited entry include those: facing a deportation order; destitute; refusing to have a medical exam; sentenced with an extraditable crime in a foreign country; medically unfit; not conducive to the public good; procuring or attempting to procure persons into Ghana for immoral purposes; carrying out activities that contradict the laws of Ghana; dependent on a prohibited person.
Guinea	Law L/9194/019/CTRN relating to the conditions of entry and stay of foreigners in the Republic of Guinea, 1994 3. Foreigners must have a valid passport. 6.2. Citizens from countries with whom Guinea has reciprocal agreements do not need visas. 7. Even where reciprocal agreements exist, the Guinean government can forbid a foreigner's entry for public security reasons. 14. Foreigners must be in possession of an appropriate health certificate.
Guinea-Bissau	Decree Law No. 1/92 3. Preconditions for entry include valid travel document, visa (if necessary), proof of means to support self, not subject to a prohibition of entry. 17.1 Must be age of majority, must not be subject to a deportation or expulsion order, must not be involved in activities which could result in deportation.
Liberia	The Alien and Nationality Law of the Republic of Liberia, Amended 9 May 1974 5.1. Grounds for exclusion include: aliens who are feeble-minded, insane, mentally defective or epileptic, drug or alcohol addicts; those suffering from tuberculosis or leprosy; paupers, criminals, or prostitutes; persons without employment papers but seeking employment and likely to become a public charge (conditional entry permissible in some circumstances); persons previously deported; stowaways, drug traffickers or those engaging in activities endangering the security of the country; those accused of being anarchists, communists, dissidents or spies. 5.10. Foreigners must have a valid passport and medical certificate.

Mali	Law No. 04-058 relating to the Conditions of Entry, Stay and Employment of Foreigners in the Republic of Mali, 25 November 2004 2. Foreigners must hold a valid passport or travel document, entry visa (if needed), return or continuation ticket (or other proof of ability to repatriate, see Article 43), and an international medical certificate.
Niger	Ministry of Interior Decree No. 87-076/PCMS/MI/MAE/A regulating the conditions of entry and stay of foreigners in the Niger, 18 July 1987 2. Foreigners must show a national passport or travel document with Niger visa (if necessary), international vaccination certificate, return ticket (or proof of resources to cover departure). 3. Notwithstanding the above, foreigners can still be expelled or refused authorisation to continue their stay in the Niger.
Nigeria	Nigeria Immigration Act, amended 1972 17. Prohibited migrants include those likely to become a public charge; idiots and insane persons; those convicted of crimes; whose presence is deemed contrary to the interest of national security; persons against whom an order of deportation is in force; and individuals without a valid passport.
Senegal	Decree No. 71-860 relating to the conditions of admission, stay and establishment of foreigners [in Senegal], 28 July 1971 1. Foreigners must have a valid passport, entry visa, proof of sufficient funds to repatriate, and international health vaccination certificates.
Sierra Leone	The Non-Citizens (registration, immigration, and expulsion) Act, 1965 19.2. Prohibited persons include those likely to become paupers; idiots and insane persons; those deemed undesirable or dangerous to peace; persons with an expulsion order against them; persons not in possession of valid travel documents; prostitutes, brothel keepers, or persons who allow the defilement of young girls. 20. The Governor General may prohibit entry of any non-citizen with absolute discretion.

Togo	Law No. 87-12 relating to policy on foreigners 11. Residence permits can be refused at the discretion of the authorities. 12. Residence permits are revoked in the case of individuals convicted of crimes.

Source: Adepoju et al. (2007).

Indeed, complete free movement of persons in the region has yet to be fully realised. As described below, additional Protocols have been voted,[93] including one on the implementation of Phase II, as well as one on Phase III. To date, only Phase I has been fully implemented in the Member States. In fact, in 1984, five years after the signing of the Protocol and more than four years after its entry into force (5 June 1980), the Authority felt compelled to issue a resolution appealing to Member States to 'take the necessary measures in order to ensure the effective implementation of this Protocol', having noted that 'certain Members [were] not applying [the Protocol] effectively' (ECOWAS, 1984). It later adopted a decision urging Member States to set up national committees to monitor the implementation of ECOWAS decisions and protocols on free movement of persons and vehicles, but so far this decision has only been applied in the following Member States, which have actually set up committees: Benin, Burkina Faso, Ghana, Guinea, Mali, the Niger, Nigeria, Senegal, Sierra Leone and Togo. Nevertheless, some specific measures have been taken to further improve free movement of persons within the region.

In 1988, two years after the Supplementary Protocol on the Right of Residence (ECOWAS, 1986), ECOWAS decided on the introduction of a harmonised immigration and emigration form, (ECOWAS, 1992*a*) to be used only in 'exceptional cases' (Decision C/DEC.3/12/92, Article 1.2.a). In principle, ECOWAS nationals travelling with their national passports or the ECOWAS Travel Certificate may have these documents stamped without filling out any forms. The 'exceptional cases' in which the harmonised forms would be of use are not explained in the decision, so the reason behind these forms is not too clear, except that 'the adoption of a harmonised Community immigration and emigration form will facilitate and simplify cross-border formalities in Member States' (Preamble). By 2000, no Member State had introduced these forms. As a result, ECOWAS nationals holding perfectly valid documents continue to fill out immigration and emigration forms. According to the ECOWAS Secretariat, 'this leads to enormous

93 1985 Supplementary Protocol A/SP.1/7/85 on the Code of Conduct for the implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment; 1986 Supplementary Protocol A/SP.1/7/86 on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment; 1989 Supplementary Protocol A/SP.1/6/89 amending and complementing the provisions of Article 7 of the Protocol on Free Movement, Right of Residence and Establishment; and 1990 Supplementary Protocol A/SP.2/5/90 on the implementation of the Third Phase (Right of Establishment) of the Protocol relating to Free Movement of Persons, Right of Residence and Establishment.

waste of time at borders. Member States would appear to be unaware that the form exists, despite its having been widely distributed' (ECOWAS, 2000).

Citizenship

The original ECOWAS Treaty identified automatic Community citizenship to all Member State nationals as an important goal, in its Article 27. In 1982, Protocol A/P.3/5/82 relating to the Definition of Community Citizen was passed. As its name suggests, it defines Community citizenship and under what conditions that may be acquired. It also sets out conditions for the withdrawal or loss of citizenship, as well as its reintegration. It prohibits ECOWAS citizenship to individuals benefiting from a nationality outside ECOWAS Member States (Article 1.d.i), and grants it to people who have resided in a Member State for a period of fifteen years at least (Article 1.d.ii). Although the Protocol does not develop citizenship further than this point, it was an important symbol towards further integration.

Travel facilitation for the free movement of persons

Another important step forward was the institution of the Brown Card Motor Vehicle Insurance Scheme, which aimed at providing insurance coverage of 'at least the same guarantees as those required by the laws in force in the territory of each of the parties' (ECOWAS, 1982, Preamble, para. 8). These stipulations sought to implement further the dispositions of Phase I, regarding the ninety-day stay for vehicles. Twelve countries currently apply the scheme: Benin, Burkina Faso, Côte d'Ivoire, Ghana, Guinea, Guinea-Bissau, Mali, the Niger, Nigeria, Senegal, Sierra Leone and Togo. Nevertheless, there are currently two motor vehicle insurance systems that coexist within the subregion: the ECOWAS Brown Card and the CIMA code. These need to be harmonised.

In 1985, convinced 'of the need and advisability of adopting a harmonised travel document other than national passports for use within ECOWAS, in order to facilitate and simplify formalities governing movement of persons across the borders of Member States' (ECOWAS, 1985*a*, Preamble, para. 3) the Authority voted a decision to introduce the ECOWAS Travel Certificate. Its objective was to dispense with immigration and emigration forms (including those mentioned above) when travelling between Member States. The decision deals with the administrative form and content of the document (Article 1), as well as the requirements for issue (Articles 3 and 4). In the same way as in Article 4 of the Free Movement Protocol, ECOWAS refuses to infringe upon national sovereignty, by declaring that the requirements for the Travel Certificate are determined by the domestic laws and regulations of the applicant (Article 3.1). The Travel Certificate is in circulation in seven Member States: Burkina Faso, the Gambia, Ghana, Guinea, the Niger, Nigeria and Sierra Leone. However, the certificates as they are currently printed differ in colour, format and quality; while high printing costs are a prohibitive factor for some Member States (ECOWAS, 2000). ECOWAS has asked for financial assistance

from several donors in order to print the certificates. The aim of the Travel Certificate is to evolve, 'in the long term' (ECOWAS, 2000 –*Introduction of the Travel Certificate*) into an ECOWAS international passport, similar to the one used by European Union countries. Indeed, in May 2000, the Heads of State and Government Summit voted the adoption of the ECOWAS passport. This passport, to date, has only been issued by a minority of Member States: Benin, Guinea, Liberia, the Niger, Nigeria and Senegal have put the three ECOWAS passports (ordinary, service, diplomatic) into circulation. The other states claim that they have not yet used up their current supply of national passports (Afrique en ligne, 2008).

Monetary measures

In order to further remove administrative barriers to the free movement of persons and goods, and mindful of the ECOWAS monetary cooperation programme (intended to achieve, in the medium and long term, the convertibility of West African currencies and the creation of a single ECOWAS currency), in 1992 the Council of Ministers issued a Decision relating to the use of local currencies by Community citizens for payment of services rendered in connection with travel within the region. The aim was for all Member States to remove, in the short term, all non-tariff barriers of a monetary nature. To this end, Community citizens were to be allowed to use local currencies for payment of airport taxes and hotel bills, and for the purchase of air tickets (ECOWAS, 1992*b*, Article 3). The following twelve countries have removed all non-tariff barriers of a monetary nature: Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, the Gambia, Guinea, Guinea-Bissau, Mali, the Niger, Nigeria, Senegal and Togo. Ghana demands only the payment of road transit tax in foreign exchange. The other three Member States still require that non-residents purchase air tickets and pay airport taxes, etc., in foreign currency

2.a.a Right to reside

Phase II aimed at extending residency, including the right to seek and carry out income-earning employment, to Community citizens in host ECOWAS states, provided they had obtained an ECOWAS residence card or permit. Additionally, it obliged Member States to grant migrant workers, complying with the regulations governing their residence under ECOWAS, equal treatment with nationals in areas such as security of employment, participation in social and cultural activities and, in certain cases of job loss, re-employment and training.

In 1986, the Supplementary Protocol on the Right of Residence A/SP.1/7/86 (ECOWAS, 1986) was voted. It requires states to grant to Community citizens, nationals of other Member States, 'the right of residence in its territory for the purpose of seeking and carrying out income-earning employment' (Article 2). The Protocol defines 'migrant

workers' in its Preamble,[94] and conditions the right of residence (and thus seeking and carrying out income-earning employment) on the possession of an ECOWAS residence card or permit (Article 5). The definition of 'migrant worker' excludes 'persons whose working relations with an employer have not been established in the host Member State' (Preamble), which in effect excludes a majority of migrants, as most people in the subregion work in the informal sector. It requires Member States to harmonise 'the rules and regulations relating to the conditions for the issuance of residence card or residence permit' in view of establishing an ECOWAS residence card (Article 9). Further, it prohibits mass expulsion (Article 13) and limits grounds for individual expulsion to national security, public order or morality, public health, and non-fulfilment of essential conditions of residence (Articles 14.1.a, 14.1.b, 14.1.c). It stipulates that 'no matter the conditions of their authorisation of residence, migrant workers who comply with rules and regulations governing residence, shall enjoy equal treatment with nationals of the host Member State' (Article 3.1) in areas such as security of employment, participation in social and cultural activities, re-employment in certain cases of job loss and training, access to institutions of general and professional education as well as to training centres for children, and benefit of access to social, cultural and health facilities.

This Protocol has been ratified, and ECOWAS considers that, as regards the 'right of residence and settlement, most Member States respect the provisions of the Protocol' (ECOWAS, 2000). A detailed assessment is in progress.

In 1990, the authority voted a decision to establish a residence card in ECOWAS Member States (ECOWAS, 1990*a*). It establishes form and content, and the conditions of issuance and renewal of the card. The validity of the residence card is three years (Article 13), an application for a card can be rejected at the discretion of the issuing authority, and an appeal is not possible; the applicant must leave the country on being notified of the rejection (Article 15). Application for the card is subject to stamp duties, in conformity with the stamp and registration code of the host country, but the decision stipulates that the issuance of the card 'shall not be subject to any other form of taxation' (Article 10.2). As Table 7 shows, however, the right to residence – whether through the residence card or permit, or other means – usually has, in practice, a price attached to its enjoyment.

Table 7. Fees charged for residence entitlement under ECOWAS

Country	Annual fees for ECOWAS residence permit
Benin	20,000 FCFA* (US$40)
Burkina Faso	Proof of payment of applicable residence tax plus 500 FCFA (US$1) stamp

94 'any citizen who is a national of one Member State, who has travelled from his country of origin to the territory of another Member State of which he is not a national, and who seeks to hold or proposes to hold or is holding or has held employment'.

Cape Verde	30,000 Cape Verdean escudos (US$374)
Côte d'Ivoire	Although a five-year ECOWAS residence permit could technically be obtained until recently at the cost of 35,000 FCFA (US$73), such permits were not issued in practice and will be abolished officially in the near future. Instead, renewable Temporary Stay documents allow all foreigners to remain in Cote d'Ivoire for six months and costs 2,000 FCFA (US$4).
Gambia	Two documents are required, the Aliens Card, which costs 1,000 dalasis (US$55) for ECOWAS citizens and the Residence/Work Permit B, which costs 1,300 dalasis (US$72) for ECOWAS citizens. The combined total cost is thus 300 dalasis (US$127).
Ghana	1,850,000 cedis (US$200). The fee is waived for refugees (referred by UNHCR).
Guinea	5,000 FCFA (US$10)
Guinea-Bissau	5,500 FCFA (US$11)
Liberia	5,500 Liberian dollars (US$95). The ECOWAS residence card is no longer in use. Instead, all non-nationals must obtain a Liberian residence permit booklet (US$75) and registration form (US$20).
Mali	No legislation or regulations governing the acquisition of residence permits in Mali has been put in place. In the interim, citizens of ECOWAS countries need only ID to enter and stay in Mali. There is no charge. Other foreigners require long- or short-stay visas.
Niger	No legislation or regulations governing the acquisition of residence permits in the Niger has been put in place. In the interim, citizens of ECOWAS countries need only ID to enter and stay in the Niger. There is no charge. Other foreigners require long- or short-stay visas.
Nigeria	25,000 naira (US$197) for Togolese citizens. 6,580 naira (US$52) for Ivorian citizens. 5,500 naira (US$43) for other ECOWAS citizens.
Senegal	National Identity Card for Foreigners entitles residence and is valid for one year, renewable. Its cost varies according to the nationality and financial capacity of the applicant.
Sierra Leone	50,000 leone (US$17)

Togo	50,000 FCFA (US$100)

*FCFA = Franc Communauté Financière Africaine

Source: Adepoju et al. (2007, p. 7).

The protocols do not actually prohibit nor allow fees for residence issuance (Adepoju et al., 2007, p. 6), but the practice may be seen as contrary to the entire ECOWAS objective of further regional integration, in particular with regard to poverty in the region: fees of US$100 for Togo, or US$200 for Ghana, for example, are extremely high for most of the population in West Africa. Further, many citizens of ECOWAS Member States migrated to another Member State, and established themselves there, many years before the entry into force of this Protocol. As a consequence, these migrants have become irregular since the adoption of the text (Kabbanji et al., 2005, p. 12). The 1989 Supplementary Protocol A/SP.1/6/89, amending and complementing the provisions of Article 7 of the Protocol on Free Movement, Right of Residence and Establishment, amends the provisions of Article 7 of the initial 1979 Protocol to confirm the obligation on signatories to amicably resolve disputes regarding the interpretation and application of the Protocol (ECOWAS, 1989, Article 2).

2.a.b Equal treatment and non-discrimination

In 1985, the Supplementary Protocol on the Code of Conduct for the implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment was voted. It sets up the roles and obligations of the Member States as regards free movement of persons, as well as defining the rights and obligations of migrants within the Community. The Member States were to 'ensure that their nationals who travel to the territory of another Member State possess valid travel documents recognised within the Community' (ECOWAS, 1985*b*, Article 2.1), as well as to provide 'all necessary information' (Article 2.2) that would permit migrants to legally enter the Member States' territory. Provisions were made in order to guarantee irregular migrants' fundamental human rights (Article 3),[95] protection of irregular migrants is assured; and conditions given

95 'In the event of clandestine or illegal immigration, both at national as well as Community level, measures shall be taken to guarantee that illegal immigrants enjoy and exercise their fundamental human rights. Article 3.2: The fundamental human rights of expelled immigrants or of the immigrant subject to such a measure by virtue of the laws and regulations of the host Member State, as well as the benefits accruing from his employment, shall be respected. Any expulsion orders shall be enforced in a humane manner without injury to the person, rights or properties of the immigrant. Article 3.3: Any person under an expulsion order shall be given a reasonable period of time to return to his country of origin. Article 3.4: Any expulsion order which may lead to the violation of fundamental human rights is prohibited. Article 3.5: By virtue of the fundamental human rights enjoyed by clandestine immigrants, host Member States shall ensure that repatriation takes place under legal and properly controlled procedures. Article 3.6: Where it is absolutely necessary, expulsion shall be contemplated solely on strictly legal grounds; in any case, it shall be effected with due respect for the human dignity of the expelled immigrant. Article 3.7: Any immigrant citizen of the Community travelling to a Member State other than his state of origin or desiring to reside

in order to regularise an irregular situation (Article 5).[96] The property of migrants is also protected and discriminatory measures relating to property are prohibited (Article 7).[97]

As mentioned above, the 1986 Supplementary Protocol A/SP.1/7/86 on the Second Phase (Right of Residence) stipulates that 'no matter the conditions of their authorisation of residence, migrant workers who comply with rules and regulations governing residence, shall enjoy equal treatment with nationals of the host Member State' (ECOWAS, 1986, Article 23)[98] in areas such as security of employment, participation in social and cultural activities, re-employment in certain cases of job loss and training, access to institutions of general and professional education as well as to training centres for children, and benefit of access to social, cultural and health facilities.

The rights guaranteed in the Protocol 'may not be withdrawn' (ECOWAS, 1986, Article 25),[99] and the provisions cannot be interpreted either by law, legislation or practice in a Member State, or by any international agreement in force vis-à-vis the Member

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or establish in such a Member State shall fulfill the conditions stipulated under the different protocols on the free movement of persons, right of residence and establishment.

96 Article 5.1: Member States shall take all possible steps to ensure or facilitate the obtaining of the correct documents by illegal immigrants, if desired and possible. Article 5.2: The regularisation of the status of illegal immigrants shall be effected under the conditions stipulated in the different Protocols relating to the free movement of persons, the right of residence and establishment and on the basis of the following factors : the existence of an ample political consensus making regularisation of stay desirable or necessary; the acceptability of the immigrants by a large section of society; deadline of admissibility; a convincing information campaign directed at the entire population and designed to ensure their support and understanding; the absence of legal punitive measures against persons wishing to regularise their stay.

97 Article 7.1: The host Member State shall protect properties legally acquired on her territory by immigrants who are Community citizens, and shall respect their rights deriving therefrom. Article 7.2: Member States shall not apply any measures detrimental to the properties, rights and benefits legally acquired on their territory by citizens and nationals of other Member States which would not be applicable to their own nationals under the same conditions. Article 7.3: Any measure taken by a Member State which is detrimental to goods, movable properties or fixed assets legally acquired by Community citizens who are nationals of another Member State shall be liable to payment of a fair and equitable compensation. Article 7.4: Host Member States shall not enact any tax laws of a kind that may result in a less favourable treatment of immigrant Community citizens residing or established in their territories. This provision applies to both natural and legal persons. Article 7.5: Community citizens who are nationals of a Member State shall have on the territories of other Member States, under the same conditions as their nationals, freedom to prosecute and defend their rights under any jurisdiction.

98 Article 23.1 covers the following matters: a. security of employment; b. possibility of participating in social and cultural activities; c. possibilities of re-employment in case of loss of job for economic reasons; in this case, they shall be given priority over other workers newly admitted to the host country; d. training and advanced professional training; e. access to institutions of general and professional education as well as to professional training centres for their children; f. benefit of an access to social, cultural and health facilities. Article 23.2: Migrant workers who comply with the rules and regulations governing residence shall enjoy equal treatment with nationals of the host Member State in the holding of employment or the practice of their profession.

99 Articles 25.1, 25.2: Any form of pressure exerted on migrant workers or members of their families to force them to give up any of these rights or to refrain from exercising them shall be prohibited. Article 25.3: Any clause of an Agreement or Contract of designed to force the migrant worker to give up any of these rights or refrain from exercising them shall be null and void according to the provisions of this Protocol.

State concerned, to negatively affect the rights or liberties guaranteed to migrant workers or members of their families (Article 24.1). Further, Member States must guarantee, in accordance with their constitutional procedures, that any person whose rights and liberties (as stipulated in the Protocol) have been infringed upon, 'shall enjoy the right of recourse, even when this infringement has been committed by persons exercising their official functions' (Article 26.a), and Member States cannot infer from the dispositions of the Protocol any right to undertake any type of action designed to remove the rights and liberties recognised in the Protocol.[100] In relation to the right of recourse, Member States 'guarantee that competent judicial, administrative or legislative authority, or any other competent authority, according to the laws of the Member State, shall rule on the rights of the person who is making an appeal' (Article 26.b). Measures were to be taken by all Member States for the implementation of this Protocol (Article 27). As shown below, the legislation in some Member States cannot be said to correspond with these dispositions.

In 1990, the Supplementary Protocol on Phase III (Right to Establishment) came into being. It emphasises non-discriminatory treatment of nationals and companies of other Member States except as justified by exigencies of public order, security or health (ECOWAS, 1990*b*, Article 4).[101] It also forbids the confiscation or expropriation of assets or capital on a discriminatory basis and requires fair and equitable compensation where such confiscation or expropriation happens (Article 7).[102]

2.a.c Right to establishment

Phase III, the final five-year period, focused on the facilitation of business through the right of Community citizens to establish enterprises (have access to, carry out and manage economic activities) in Member States other than their states of origin. Its realisation was intended to occur seamlessly, following the five years dedicated to implementing the right of residence.

As examined above, the Protocol seeks to reinforce the non-discriminatory provisions already developed in previous protocols. Further, in accordance with its Article 12.4, Member States are to cooperate closely in order to 'make possible the acquisition and exploitation of landed property situated in the territory of one Member State by a national

100 Article 24.2: No provision of this Protocol may be interpreted as implying the right of any Member State to undertake an activity or action designed to remove the rights or liberties recognised in this Protocol or to any restriction of such rights or liberties beyond those stipulated in the Protocol.

101 Article 4.1: In matters of establishment and services, each Member State shall undertake to accord non-discriminatory treatment to nationals and companies of other Member States. Article 4.3: The provisions of this Protocol and measures taken as a result thereof shall be without prejudice to the application of legislative and administrative provisions, which provide a special treatment for non-nationals and are justified by exigencies of public order, security or public health.

102 Article 7.1: Assets and capital invested by ECOWAS citizens who are not nationals of the Member State of establishment, having been duly authorised, shall not be subject to any act of confiscation or expropriation on a discriminatory basis. Article 7.2: Any act of confiscation, expropriation or nationalisation must be followed by fair and equitable compensation.

of another Member State'. They shall also undertake to encourage the establishment or enhancement of export financing and regional payment mechanisms likely to facilitate intra-Community trade (ECOWAS, 1990*b*, Article 8), as well as undertake to harmonise national legislation and regulations governing investments, in order to establish the foundations for the Community guarantee and insurance systems (Article 9).

Here, however, as in most ECOWAS provisions, state sovereignty is carefully maintained. There are loopholes in the non-discriminatory stipulations. The wording of the text makes it open to wide interpretation. Indeed, if a Member State is unable to accord non-discriminatory treatment to nationals and companies of other Member States, it must 'indicate as much, in writing, to the Executive Secretariat' (Article 4).[103] As a result, other Member States will not be bound to accord non-discriminatory treatment to nationals and companies of the state concerned, but this does once again limit the provisions. In addition, Article 12.4, relating to the cooperation of Member States in order to allow the acquisition of land by nationals of another Member State, is limited by the fact that this is to be done only 'in-so-far as this is permitted by the laws and regulations of the host Member State'. The Protocol has yet to be ratified (it will enter into force, provisionally, upon ratification by seven signatory members).

2.a.d Expulsion

In spite of many measures of protection in case of expulsion, the ECOWAS provisions are potentially undermined by over-broad recourse to expulsion (Adepoju et al., 2007, p. 11). Both the 1993 revised ECOWAS Treaty and the 1994 ECOWAS Convention on Extradition[104] specified procedures for migrant admission and expulsion consistent with international human rights standards, in particular the International Covenant on Civil and Political Rights,[105] the International Covenant on Economic, Social and Cultural Rights[106] and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[107]

Further, the 1979 Protocol on Free Movement of Persons, the Right of Residence and Establishment provides requirements for the expulsion of ECOWAS citizens. The Protocol states that the decision to expel any citizen of the Community must be notified to the

103 Article 4.2: If, however, for a specific activity, a Member State is unable to accord such treatment, the Member State must indicate as much, in writing, to the Executive Secretariat. Other Member States shall then not be bound to accord non-discriminatory treatment to nationals and companies of the state concerned.

104 A/PI/8/94. The ECOWAS *Convention on Extradition* was signed by all Member States (at that time including Mauritania) in Abuja (Nigeria), on 6 August 1994.

105 Adopted by UN General Assembly Resolution 2200 on 16 December 1966, entered into force 23 March 1976.

106 Adopted by UN General Assembly Resolution 2200 on 16 December 1966, entered into force 3 January 1976.

107 Adopted by UN General Assembly Resolution 45/158 of 18 December 1990, entered into force 1 July 2003.

person concerned (Article 11.1),[108] and the expenses in case of expulsion are incumbent on the Member State that expels the person (Article 11.2).[109] In case of repatriation, citizens bear the cost themselves (or the country of origin in case of inability to pay). The 1979 Protocol also stipulates the need for the protection of citizens, and of their property (Article 11.3).[110] The Code of Conduct Protocol adds further requirements for the treatment of persons being expelled (Article 3); the property of immigrants legally acquired in the Member States is protected (Article 7), discriminatory tax laws are prohibited (Article 7.4), and Community citizens enjoy the 'freedom to prosecute and defend their rights under any jurisdiction' (Article 7.5) within the territory of other Member States.

The regulations on expulsion were further developed in the 1986 Supplementary Protocol on the Right of Residence (Phase II). It prohibits expulsion *en masse* (Article 13), insisting on the study of each case on an individual basis. The Protocol also limits the grounds for individual expulsion (Article 14.1).[111] The regulations for expulsion are enumerated in four categories. The first two relate to reasons of national security, public order or morality, or public health (these conditions echo those same reasons for refusing a right of residence in the first place) (Article 3.1). The third category allows expulsion for 'non-fulfilment of essential conditions of residence'. In the light of Member States' legislation

108 A decision to expel any citizen of the Community from the territory of a Member State shall be notified to the citizen concerned as well as the government of which he is a citizen and the Executive Secretary of ECOWAS.

109 The expenses incurred in the expulsion of a citizen shall be borne by the Member State which expels him.

110 In case of expulsion, the security of the citizen concerned as well as that of his family shall be guaranteed and his property protected and returned to him without prejudice to a third party.

111 Migrant workers and members of their families whose status complies with the residence requirements may only be expelled from the host Member State: (a) for reasons of national security, public order or morality; (b) if, having been duly informed of the consequences, they refuse to comply with the orders given to them by a public medical authority for the purpose of protecting public health; (c) if an essential condition for the issuance or the validity of their authorization of residence or work permit is not fulfilled; (d) in accordance with the laws and regulations applicable in the host Member State. 2. Any form of expulsion may only be based on a well-founded legal or administrative decision taken in accordance with the law. 3. The immigrant, the government of his country of origin and the executive secretariat should receive written notice of the decision for information purposes. 4. When an expulsion order is made out by a legal or an administrative authority the immigrant concerned may appeal, or may have recourse to an appeal in accordance with the rules and regulations of the host Member State. The recourse to an appeal shall constitute a suspension of the expulsion order, unless it is not explicitly justified by reasons of national security or public order. If such a decision has already been executed and is subsequently annulled, the person concerned is entitled to claim damages in accordance with the law. 5. In case of expulsion, the immigrant concerned shall be granted a reasonable period of time to allow him to collect any salaries or other allowances due to him from his employer, settle any contractual commitments and, when required – for reasons of personal security – to obtain authorization to go to a country other than his country of origin. The situation of the family of the immigrant concerned shall also be taken into consideration. 6. The expulsion or departure from the host Member State shall conversely affect the entitlements obtained through legislation by the migrant worker or a member of his family. 7. In case of expulsion, the authorities of the host Member State shall bear the expenses resulting therefrom and shall not pressurise those affected in any way to accept a simplified procedure, such as 'voluntary departure' if such affected persons have not expressly requested it.

in the domain of residence and work authorisation, this provision rather undermines the protection against expulsion. The fourth category allows expulsion 'in accordance with the laws and regulations applicable in the host Member State' (Article 14.1.d). As seen with Article 4 of the 1979 Protocol (the right accorded to Member States to refuse admission to any ECOWAS citizen based on domestic legislation) and the rules on inadmissibility, this provision somewhat limits the protections against mass expulsion. Mass expulsions were an element of migration management in West Africa before the implementation of ECOWAS, and although there has been improvement since the ratification of the Treaty and subsequent protocols, Member States have continued to proceed to mass expulsions, as well as to close their borders, at different moments in history (Adepoju et al., 2007). In September 1982, Ghana closed its borders with Togo. In December 1982, Sierra Leone expelled members of the Foulah Community. In 1983, Liberia expelled its so-called foreigners. Also in 1983, Nigeria evicted nearly 1.5 million West African migrants and, in 1985, a further 700,000 citizens of Ghana, the Niger and other ECOWAS states. In 1985, Côte d'Ivoire expelled 10,000 Ghanaians. In 1990, Senegal deported approximately 500,000 Mauritanians. Early in 1996, and again in 2003 and 2004, Nigeria closed its border with the Republic of Benin. Even as recently as February 2007, in the run-up to its elections in April, Nigeria indicated that it intended to deport ECOWAS migrants (Adepoju et al., 2007). Indeed, according to the BBC, the Niger and Chad appeared to have been 'singled out in the clampdown with thousands of their nationals packed into lorries and taken to the border. People from Ghana, Togo, Cameroon and other West African countries [were] also removed from at least eight major cities across [Nigeria]'.[112]

Box 3. Summary of main regulations in ECOWAS

Major features of the Protocol and four Supplementary Protocols:

1979 Protocol A/P.1/5/79 relating to Free Movement of Persons, Residence and Establishment

- Sets out right of Community citizens to enter, reside and establish in territory of Member States (Article 2(1))
- Establishes three-phased approach over fifteen years to implementation of (I) right of entry and abolition of visas, (II) residence and (III) establishment (Article 2).
- Conditions entitlement to enter territory of Member State on possession of valid travel document and international health certificate (Article 3(1))
- Reserves right of Member States to refuse admission into territory of Community citizens deemed inadmissible under domestic law (Article 4)
- Establishes some requirements for expulsion (Article 11)

112 http://news.bbc.co.uk/2/hi/africa/6387053.stm

- Confirms that Protocol does not operate to detriment of more favourable provisions in other agreements concluded by Member States (Article 12)

1985 Supplementary Protocol A/SP.1/7/85 on the Code of Conduct for the implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment

- Obliges Member States to provide valid travel documents to their citizens (Article 2(1))
- Establishes additional (to Article 11 of Protocol) requirements for treatment of persons being expelled (Article 4)
- Enumerates protections for irregular immigrants (Articles 5 and 7)

1986 Supplementary Protocol A/SP.1/7/86 on the Second Phase (Right of Residence)

- Requires states to grant to Community citizens who are nationals of other Member States 'the right of residence in its territory for the purpose of seeking and carrying out income-earning employment' (Article 2)
- Conditions entitlement to residence (and thus seeking and carrying out of income-earning employment) on possession of an ECOWAS residence card or permit (Article 5) and harmonisation by Member States of rules appertaining to the issuance of such cards/permits (Article 9)
- Prohibits expulsion en masse (Article 13) and limits grounds for individual expulsion to national security, public order or morality, public health, non-fulfilment of essential condition of residence (Article 14)
- Stipulates equal treatment with nationals for migrant workers complying with the rules and regulations governing their residence in areas such as security of employment, participation in social and cultural activities, re-employment in certain cases of job loss and training (Article 23)

1989 Supplementary Protocol A/SP.1/6/89 amending and complementing the provisions of Article 7 of the Protocol on Free Movement, Right of Residence and Establishment

- Amends provisions of Article 7 of Protocol to confirm obligation on signatories to resolve
- Amicably disputes regarding the interpretation and application of Protocol (Article 2)

1990 Supplementary Protocol A/SP.2/5/90 on the Implementation of the Third Phase (Right to Establishment)

- Defines the right of establishment emphasising non-discriminatory treatment of nationals and companies of other Member States except as justified by exigencies of public order, security or health (Articles 2–4)
- Forbids the confiscation or expropriation of assets or capital on a discriminatory basis and requires fair and equitable compensation where such confiscation or expropriation (Article 7)

Source: Adepoju et al. (2007).

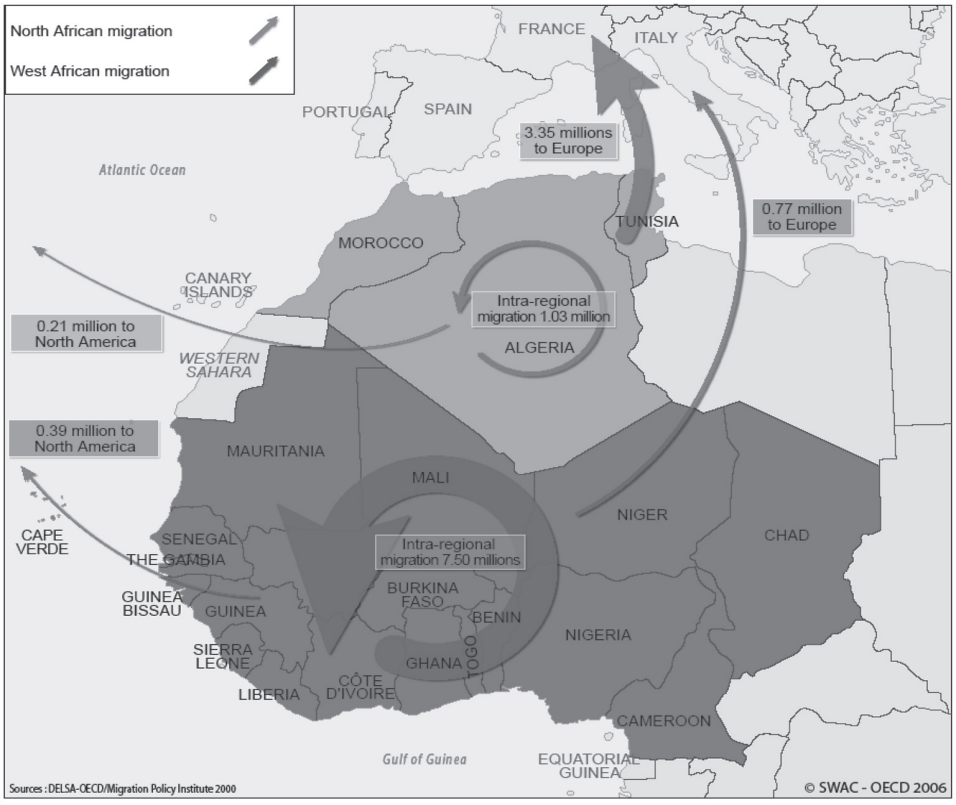
2.b Overview of current state of implementation

Africa currently hosts fourteen subregional integration schemes and, of these, six have protocols, articles or objectives in their treaties aiming to promote visa-free movement, and the corresponding rights of residence and establishment.[113] ECOWAS Member States may also belong to other regional integration schemes, which can create coexisting similar provisions (such as the ECOWAS Brown Card and the CIMA code), tending to limit their effectiveness in practice.

ECOWAS was one of the first subregional plans for integration in West Africa, and it can assert major achievements towards reinforcing better and closer cooperation between Member States. It has succeeded in bringing together francophone and Anglophone states, as well as the lusophone ones. In the thirty-four years since ECOWAS came into being, much has been accomplished in the area of free movement of persons (it is the only subregional organisation that is visa-free), and intra-regional migration has been and still is part of the socio-economic evolution of the area, as shown in Map 1, but many problems and difficulties remain in the actual implementation of the provisions.

113 Common Market for East and Southern Africa (COMESA), East African Community (EAC), Economic Community of Central African States (ECCAS), ECOWAS, Southern African Development Community (SADC), West African Economic and Monetary Union (UEMOA): see Cholewinski et al. (2007, chap. 20).

Map 1. Intra-regional migration within West Africa (2000)



Source: SWAC/OECD (2006*a*).

Although the visa and entry permit requirement has been abolished in all ECOWAS Member States, numerous problems remain. The 1979 Protocol coincided with growing economic recession in most of the subregion, together with exploding oil-led employment opportunities in Nigeria, the demographic giant of the Community. The boom attracted thousands of ECOWAS nationals, in regular and irregular situations. The economic opportunities and oil boom having been badly managed, there followed a huge drop in living and working conditions that the government struggled to deal with. National currency was devalued, inflation was high, and in early 1983 the Nigerian Government partly dealt with these problems by revoking Articles 4 and 27 of the Protocol in order to expel between 0.9 million and 1.3 million irregular aliens, mainly Ghanaians (Adepoju, 2005, p. 6). Since then, as has been shown, other mass expulsions have taken place. Difficulties linked to employment shortages and economic recession in a Member State are frequently, as is often the case worldwide, linked to too great an influx of migrants. Nearly all states still maintain numerous checkpoints (Table 8).

Table 8. Checkpoint posts in ECOWAS Member States

Highways	Distance/km	Checkpoint posts per 100 km
Lagos-Abidjan	992	7
Cotonou-Niamey	1036	3
Lomé-Ouagadougou	989	4
Accra-Ouagadougou	972	2
Abidjan-Ouagadougou	1122	3
Niamey-Ouagadougou	529	4

ECOWAS citizens are subjected to administrative harassment and extortion (ECOWAS, 2000). As shown in Table 6, domestic legislation is not always in phase with the stipulations of the 1979 Protocol. Officials and Community citizens alike are unaware of the provisions regarding the free movement of persons and the objectives of ECOWAS towards facilitating movement within the region.

The Community is seeking to improve, however. In April 2008, it organised a three-day seminar in Accra (Ghana), in order to address the problems linked to the harassment and extortion that exists at its frontier control posts and on the inter-state roads. The Community had previously issued a memorandum on the state of implementation of the free movement protocols, and on the right of establishment and residence. A committee was set up to examine the current situation as regards free movement of persons and to issue recommendations, and it appears to have given a transparent analysis of the existing conditions. It underlines the fact that apart from Burkina Faso, which recently considerably reduced its checkpoints, a great number of barriers continue to exist and even to be set up, in total disregard for ECOWAS dispositions on the free movement of persons. Further, it states that systematic extortion is carried out by frontier officials. The security patrols, set up in order to fight against organised crime, have become heavy-duty checkpoints, where security agents, immigration, police and frontier control officers obtain under duress the little money travellers often dispose of. Some frontier posts that should be open 24 hours a day are closed at 22.00, which creates greater opportunities for criminal activity. The committee also notes that, in spite of the ratification by Member States of the free movement protocols, and the additional texts, many frontier officials refuse to recognise national identification cards as valid documents allowing people within the subregion to travel freely within the ECOWAS Community. The seminar sought to address these problems (Afrique en ligne, 2008).

In spite of this condemning report, it must be said that in many states measures have been taken to properly implement the ECOWAS provisions. In Mali, for example, in airports and stations there is a specific stand for ECOWAS citizens, which dispenses with visa requirements. The only obligation is to have valid national identification (Ba, 2005).

Although ECOWAS citizenship was established in the founding Treaty, and further defined in the subsequent Protocol, it does not allow much in practice and needs further development. It does not, for example, allow ECOWAS citizens to vote in a state other than their state of origin. As regards the rights and obligations of Community citizens in another Member States, as has been seen, national legislation can be voted that limits or cancels out the non-discriminatory measures promulgated.

Here, as in many areas of ECOWAS implementation, it is to be hoped that the Court of Justice set up in October 1999 following a two-day meeting of Justice Ministers in Abuja, will have an important role. The court was to address complaints from Member States and institutions of ECOWAS, as well as issues relating to defaulting nations. As yet, it has played a minor role but in coming years greater responsibilities are expected to evolve. As regards citizenship, poor dissemination of information on the part of ECOWAS officials and member governments leads to poorly informed citizens.

Work also remains to be done regarding travel facilitation, although the travel certificate has been put into place and the ECOWAS passport is slowly being adopted by some Member States. As is unfortunately often the case in the region, the lack of resources and infrastructure is a major handicap.

Whether examining the specific dispositions regulating travel facilitation, or the free movement of persons in general in the region, poor dissemination of information to both frontier officials and Community citizens is patently obvious and causes many of the difficulties. The availability of information on migration is crucial to potential migrants. Immigration and emigration would necessarily be better organised and the principle of free movement better applied if potential migrants had access to entry requirements, and orientation on employment opportunities and regulations in the other Member States. Mali and Senegal have recently set up information centres (in Bamako and Dakar, with an aim to establishing satellites in other major cities) to provide information, orientation and training to people wishing to migrate. The information collected by these states should be shared between the Member States, and made available to the population. Potential migrants unaware of ECOWAS provisions will often leave their country of origin in an irregular situation, despite being legally entitled to valid travel documents and to enjoy the right of freedom of movement within the Community. Irregular migration being widespread also makes it difficult to collect accurate statistics and information on the state of migration within the subregion (Adepoju et al., 2007, p. 4).

There is also a huge gap in the information available to analysts. The ECOWAS website has many links that do not in fact function correctly; the few data available on the website are totally out of date; and any maps or statistics are generally ten to twenty

years old. A recent International Law Organization report declares that 'existing statistics on international labour migration in the subregion are generally agreed to be scarce, unreliable and subject to problems of comparability and availability'.[114]

Considering the lack of availability of statistics and other information important to this study, it was decided that interviews carried out with ECOWAS citizens living in an ECOWAS Member State other than their country of origin would be of great interest. The objective was to determine how Community citizens felt about free movement of persons in the region, and whether they considered implementation within the host country to be in phase with ECOWAS dispositions.[115]

All the interviewees reported difficulties in crossing borders. Fees were generally demanded by frontier officials, and although these were not excessive (around 1,000 FCFA/US$2.5), such a price is high when a day's salary in the region for unskilled labour is little more than the fee (in Senegal, for example, a builder will earn 1,000–2,000 FCFA a day).

The persons interviewed further reported discrimination in access to education. In Senegal, for example, university fees for a Senegalese student vary from 10,000 FCFA to 15,000 FCFA per year. For a foreign student – no distinction is made whether the student is from an ECOWAS Member State or not – the fees are multiplied by ten (150,000 FCFA, for an Ivorian student). The same is true of Burkina Faso, where a national will pay 10,000 FCFA university fees, whereas the Ivorian interviewed had to spend a remarkable 250,000 FCFA. These dispositions would seem to be manifestly in violation of the 1986 Protocol on the Right to Residence provisions. As previously pointed out, Article 23.1.e states that a migrant worker (as defined in the Preamble: 'any citizen who is a national of one Member State, who has travelled from his country of origin to the territory of another Member State of which he is not a national, and who seeks to hold or proposes to hold or is holding or has held employment') shall enjoy equal treatment with nationals of the host state as regards access to institutions of general and professional education. However, the definition of 'migrant worker' in the Protocol excludes 'persons whose working relations with an employer have not been established in the host Member State' (Article 1.1.c), which can be interpreted to mean most ECOWAS citizens, as so many of them work in the informal sector. Nevertheless, as regards students, the payment of fees up to twenty-five times higher than those required from nationals should be considered as discriminatory, and measures taken forthwith.

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114 *Globalement, il est admis que les statistiques existantes dans la sous-région concernant les migrations internationales de main d'oeuvre sont à la fois éparses, peu fiables et sujettes à des problèmes de comparabilité et de disponibilité* (Ba, 2005).

115 The interviewees were asked to give specific examples in their daily life as to how free movement of persons was facilitated and/or limited. The interviewees were:(a) three Ivorians living in Senegal (a student; a person looking for work in the business area; a person looking for work and having previously worked in an international organisation); (b) an Ivorian living in Burkina Faso (student, now looking for work); (c) a Guinean living in Senegal (holder of a small household items shop); (d) a Senegalese living in Mali (working for an international organisation).

In addition, access to formal employment was considered difficult for foreigners. All interviewees agreed that there was no official preference given to nationals, but that in practice that was the case. Some jobs are prohibited to foreigners, such as doctor, chemist, lawyer, bailiff (Kabbanji et al., 2005, p. 12).

The Ivorian in Burkina Faso applied for a job in a telecommunications agency, and was told that although his knowledge and experience would be very interesting for the company, and that his profile fitted the job description, it was reluctant to employ him as extra taxes would be payable for a worker who was not a Burkina national.

The Guinean had not experienced these problems as he worked in the informal economy, but he stated that he was made to pay at the frontier, in spite of travelling with valid identification. It was interesting to note that he had little information on the regional rules on free movement, and he knew nothing about his rights in the Community.

ECOWAS citizens living in another Member State usually have to pay a fee in order to formalise their residence (Table 7). In the light of ECOWAS provisions, this seems to go against the entire objective of better and closer regional integration. As yet, however, residence fees must still be paid.

As the Protocol on the right to Establishment is not yet applied (although the fifteen-year period within which ECOWAS hoped to put into practice full free movement of persons has elapsed) little analysis can be made on the subject.

As regards social security, this remains a matter of national competence, so foreign workers risk exclusion from work-related benefits. Although the Social and Cultural Affairs Commission for ECOWAS adopted the General Convention on Social Security in 1993 'to ensure the equality of treatment for cross-border workers and the preservation of their rights when living abroad', it seems that the actual implementation of the agreement is not put into practice (Robert, 2004). In principle, it guarantees the same rights and obligations as the nationals of the Member State to all ECOWAS citizens under the host state's social security laws.

As shown above, expulsions have been carried out both before and since the ratification of the founding ECOWAS Treaty, and the regulations regarding the treatment of both regular and irregular migrants have not always been respected, for example in Nigeria during the oil boom, at the start of the unrest in Côte d'Ivoire linked to the concept of *ivoirité*, or more recently in Nigeria during the 2007 elections.

2.c Evaluation of the possibility of free movement in the region

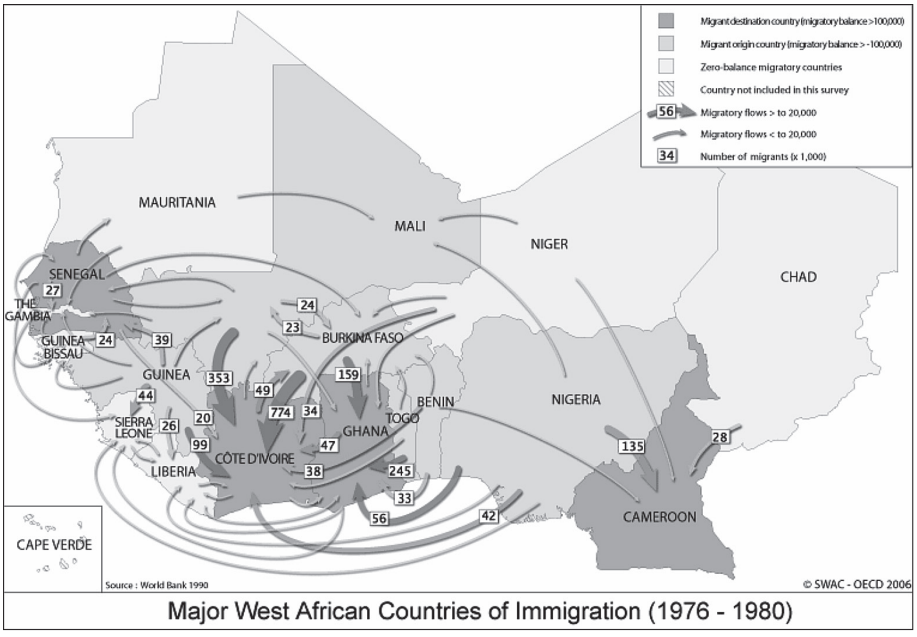
The geographical area of ECOWAS covers approximately 6 million km2. In 2000 the overall population of the region was estimated at 250,000, and it was thought to host more than 42 per cent of international African migrants (Kabbanji et al., 2005, p. 1). Migration is historically a way of life in West Africa (Adepoju, 2007, p. 161). For generations, people have migrated in response to demographic, economic, political and related factors: population pressure, environmental disasters, poor economic conditions, conflicts and the effects of macro-economic adjustment programmes. Migrants have included temporary cross-border workers, seasonal migrants, clandestine workers, professionals and refugees. Cross-border migrants (especially farm labourers, unskilled workers, nomads, and women engaged in trade) paid little attention to arbitrary national borders, and population movements in search of greater security prevailed over wide areas (ECA, 1983). Today, intra- and inter-country movements continue to be a central feature of many people's lives. Much of this movement has taken place across great distances, from the northern zones to the coastal regions, and has been short-term and male-dominated (Adepoju, 2007).

Colonial rule set up artificial frontiers that did not heed cultural and ethnic links between African populations, so that ethnic groups were split up in different countries. Through these frontier designations peoples were merged into a 'nation', possibly with few cultural and historical affinities. In reality, 'many ethnic groups split by pencil sketches in adjacent countries regarded movements across artificial boundaries simply as an extension of internal migrations, in line with longstanding ethnic solidarity. Free movement across frontiers was facilitated by cultural affinity, especially where immigrants speak the same language, and share the same customs with the indigenous population of the host country. A great deal of migration was undocumented, unhindered by long, unpoliced borders lacking physical landmarks. In Ghana/Togo and Nigeria/Benin borders, for example, frontier workers commuted daily between their homes and place of employment. Nomadic pastoralists also moved clandestinely in search of grazing land for their herds across international frontiers in Sahelian West Africa' (Adepoju, 2007).

Although these frontiers were mainly kept at the time of independence, and national identity has been slowly developing and asserting itself, free movement of persons continued in a similar way, naturally and without documentation. Thus, as passports and other documents were disregarded, migration was general and unmanaged. The 15,000 km of borders between ECOWAS countries are difficult to police, and people could easily cross borders without necessarily knowing they have done so.

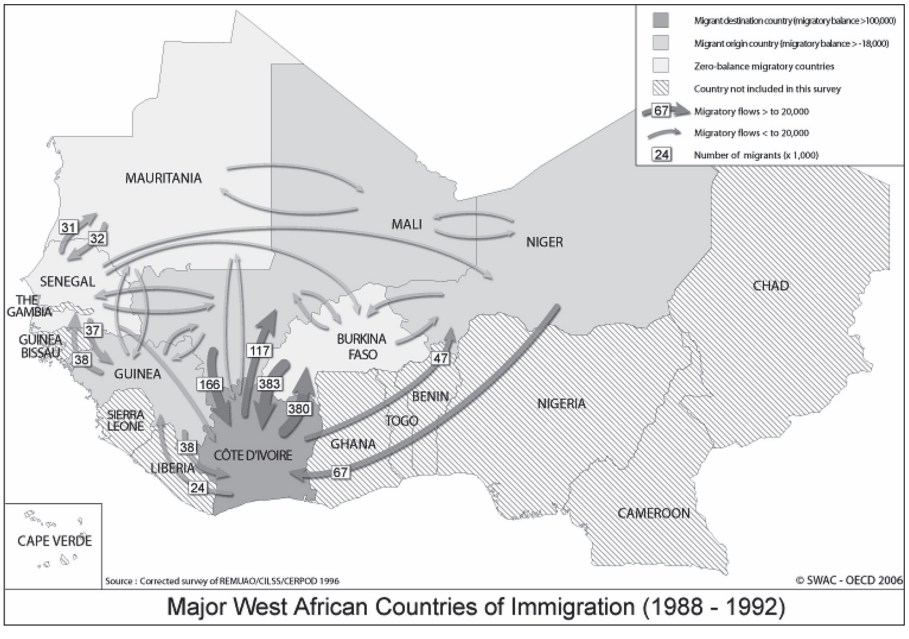
Maps 2 and 3 indicate the evolution of migratory movement within the region before and after the adoption of the Free Movement of Persons Protocol.

Map 2.



Source: World Bank (1990).

Map 3.



Source: Corrected survey of MEMUAO/CILSS/CERPOO (1996)').

Since colonisation, intra-regional mobility in West Africa has been generally dominated by a predominantly North-South movement from the landlocked countries of Sahel West Africa (Mali, Burkina Faso, the Niger and Chad) to the more prosperous plantations, mines and cities of coastal West Africa (predominantly Côte d'Ivoire, Liberia, Ghana, Nigeria, Senegal and the Gambia). There has also been considerable transversal migration *within* the coastal zone of mostly seasonal workers to the relatively wealthy economies of Côte d'Ivoire, Ghana (before the 1970s) and Nigeria (since the 1970s). Due to the relatively small size of most West African countries and the fact that arbitrary colonial borders often separated members of the same ethnic groups, such migration often acquired an international dimension. These coast-bound international migration patterns have often been reproduced inside countries, with people moving from the relatively arid and underdeveloped inland zones to the more humid and prosperous agricultural as well as urbanised zones, generally located in the south and, in the case of Senegal and Mauritania, to the west. Some more northerly cities such as Kano in Nigeria or the new, centrally located capitals of Yamoussoukro (Côte d'Ivoire) and Abuja (Nigeria) have also become migration destinations in their own right. A distinct *im*migrant group was the Lebanese, a group of traders and entrepreneurs who established themselves throughout West Africa. These colonial migration patterns largely persisted in the late 1950s and 1960s. In particular the relatively prosperous economies of the Ghana-Côte d'Ivoire migration pole attracted large numbers of internal labour migrants as well as international migrants from countries such as Togo and Nigeria (mainly to Ghana), Burkina Faso and Guinea (mainly to Côte d'Ivoire) and the Niger and Mali (to both). In a strong anti-colonial spirit of pan-Africanism, the presidents of Ghana and particularly of Côte d'Ivoire welcomed immigrants to work and stay. A smaller migration system centred around Senegal because of trade and groundnuts, with most migrants coming from neighbouring countries and the Gulf of Benin (de Haas, 2007).

In spite of its failings, it may be said that the ECOWAS region is institutionally asserting itself as a sphere of free movement (SWAC/OECD, 2006*b*, p. 21). People migrate essentially by road through more than 15,000 km of borders between ECOWAS countries as well as the 8,500 km that separate ECOWAS Member States and their neighbours: Cameroon, Chad, Mauritania and North Africa. As shown in Map 1, calculations carried out on the basis of population censuses indicate that the countries of the region (West Africa) today shelter around 7.5 million migrants originally from another West African country, or nearly 3 per cent of the regional population (French Government, 2007). These figures do not apply only to the ECOWAS region, but they are a fair indicator of the rate of migration in the area. As already mentioned, statistics on the region are both difficult to obtain and not necessarily reliable. The numbers may in fact be far higher. The percentage rate (3 per cent) of migrants from one country living in another West African country has been rising since 1990, and 'is higher than the African average (2 per cent) and greatly surpasses that of the European Union' (French Government, 2007).

Table 9. Migratory characteristics of ECOWAS Member States

Country	Population (thousands)		Migrant stock (% of population)[a]		Refugees (% of population)[b]		Net migration (thousands)[c]	
	1990	*2000*	*1990*	*2000*	*1990*	*2000*	*1990*	*2000*
Benin	4 655	6 272	1.6	1.6	0.6	4.3	9	–19
Burkina Faso	9 008	11 535	4.9	9.7	0.1	0.1	–28	–60
Cape Verde	341	427	2.6	2.4	–	–	–2	–1
Côte d'Ivoire	12 582	16 013	15.5	14.6	13.9	5.2	40	12
Gambia	928	1 303	12.7	14.2	0.1	6.5	14	11
Ghana	15 138	19 306	3.3	3.2	1.6	2.1	8	–22
Guinea	6 139	8 154	6.6	9.1	79.9	57.6	70	–48
Guinea-Bissau	946	1 199	1.5	1.6	21.6	39.3	3	–3
Liberia	2 144	2 913	3.8	5.5	43.4	–	–57	90
Mali	8 778	11 351	0.7	0.4	22.4	17.5	–60	–50
Niger	7 707	10 832	1.5	1.1	0.7	–	1	–1
Nigeria	85 953	113 862	0.5	0.7	0.8	1.0	–19	–19
Senegal	7 327	9 421	4.0	3.0	19.8	7.3	–14	–10
Sierra Leone	4 061	4 405	2.8	1.1	–	14.0	–76	–33
Togo	3 453	4 527	4.7	4.0	2.1	6.8	–24	25
West Africa	171 157	224 189	2.9	3.0	17.9	10.5	–138	–119

a. Number of people born outside the country (estimation at mid-year).

b. UNHCR estimates at end of year.

c. Estimates represent annual median for the periods 1990–1995 and 1995–2000.

Source: United Nations, International Migration Report 2002, in Kabbanji et al. (2005).

The statistics in Table 9, indicating the migratory characteristics of ECOWAS Member States, again are not recent, but it is interesting to note the evolution between 1990 and 2000, as regards the migrant stock, as a percentage of the population.

There is an overwhelmingly regional orientation of West African international migration. In Benin, Burkina Faso, Ghana, Guinea, Mali, Mauritania, the Niger and Togo, over two-thirds of emigrants are believed to live within West and Central Africa. According to the same estimates, over half of emigrants from only Cape Verde, Côte d'Ivoire, Liberia, Gabon, Sierra Leone, Senegal and the Gambia are living in North America or Europe. For the region as a whole, 61.7 per cent of emigrants live in the region, 8.2 per cent in Central Africa, 0.3 per cent in the Gulf, 14.8 per cent in North, West and Southern Europe and 6.0 per cent in North America.[116]

It is very difficult to analyse international migration in Africa. This is not only because of the lack of sufficient statistics and population information to make comparative data analyses, but also because of the frequent absence of identity documents and the habit of some individuals of declaring themselves to be from one state when, in fact, they are citizens of another (van Moppes, 2006).

Political instability has not helped move regional integration forward and promote better conditions for the free movement of persons (Côte d'Ivoire is a case in point, but Liberia and Sierra Leone are also examples of strong instability over some years, which has caused forced migration and displaced many people in horrific conditions). In effect, although until 1990 it can be said that provisions were made and solutions sought in order to improve free movement in the region (in spite of weak institutions, based largely on state-to-state relations, and a weak secretariat) (Adepoju, 2005, p. 9). ECOWAS followed this by devoting itself to crisis and conflict management (Kabbanji et al., 2005) thus limiting the energy that might have been spent on free movement.

On the basis of the current situation in the Community and in the Member States, several elements can be identified as having a negative impact on the exercise of the right of free movement that should be enjoyed by all ECOWAS citizens.

- Lack of basic structures and resources in order to better implement the provisions.
- Too great an emphasis on state sovereignty within the Community texts. Integration cannot move forward if Member States will not allow some flexibility and adaptation towards ECOWAS provisions.
- Lack of information on free movement and its management, which should be made available to state officials and to citizens of the Community.
- Ambiguity in legal texts.
- Lack of implementation of ECOWAS dispositions on the part of Member States.

The list is not exhaustive, but these are some of the most urgent elements that need to be addressed.

116 Calculations based on 2000 population data (UNPD) and bilateral migration estimates compiled by University of Sussex and World Bank and adapted by World Bank. Bilateral migration matrix (updated 7 December 2006) downloaded on 15 January 2007 from World Bank (2007).

Part 3: Comparison of the two legal systems

It is obvious that a comparison of the two legal systems has to take into consideration the very different levels of implementation and of detail. A quick look at this report shows how complex and detailed EU legislation is compared with the ECOWAS system, which is more recent and less well established.

Part 3 of the report briefly recapitulates the similarities and differences on a purely legal level and then, in Part 4, evaluates what factors seem to influence both the legislation and the mobility of people governed in more or less detail by the respective regulations.

One major difference may be noted from the outset, even in the table of contents: the absence of a section on 'Regulations influencing the free movement of persons' under ECOWAS, as the region is still focusing on regulations 'directly governing' free movement.

Rules regarding entry

Certain similarities can be noted in the regulations regarding entry into another Member State in the two regions.

In ECOWAS, the Protocol dispenses with the necessity of obtaining a visa for all citizens of ECOWAS possessing a 'valid travel document and an international health certificate' and visiting a Member State for a period of time not exceeding ninety days.

In the EU, Member States have to allow Union citizens to enter their territory with a valid identity card or passport, and family members who are not nationals of a Member State can enter with a valid passport. No entry visa or equivalent formality may be imposed on Union citizens. The Member State may require the person concerned to report their presence within its territory within a reasonable and non-discriminatory period of time. Without prejudice to Article 5(5),[117] for periods of residence longer than three months, the host state may require Union citizens to register with the relevant authorities. The deadline for registration may not be less than three months from the date of arrival.

117 The Member State may require the person concerned to report their presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.

A registration certificate should be issued immediately, stating the name and address of the person registering and the date of the registration. Failure to comply with the registration requirement may render the person concerned liable to proportionate and non-discriminatory sanctions.

For the registration certificate to be issued, Member States may only require that (a) Union citizens who are workers or self-employed present a valid identity card or passport, a confirmation of engagement from the employer or a certificate of employment, or proof that they are self-employed persons; (b) Union citizens with sufficient resources present a valid identity card or passport and provide proof that they satisfy the conditions of not becoming a burden on the social assistance system of the host Member State during their period of residence and having comprehensive sickness insurance cover in the host Member State; (c) Union citizens who are enrolled at a private or public establishment, accredited or financed by the host state who present a valid identity card or passport, provide proof of enrolment at an accredited establishment and of comprehensive sickness insurance cover and the declaration or equivalent means. Member States may not require this declaration to refer to any specific amount of resources (Directive 2004/38/EC, Article 8.1-3).

The three-month period is common to the two systems, during which there are no formal requirements of registration or permits. After three months, a citizen of the region may be asked to fulfil certain formalities, more elaborate in the EU than in ECOWAS, as is the case of most regulations.

Regarding the required documents, ECOWAS asks for a health certificate which is not the case under EU regulations, but the EU does ask for health insurance or equivalent (in order to ensure that the citizen will not become a burden on the host state), when it comes to obtaining residence.

A fact that certainly influences the ECOWAS formalities on registration and short-term stay is the tradition of informal migration and the practical difficulties of controlling the many borders and possible crossing points in the region.

Right to equal treatment

Another similarity between the two systems is that residence confers the right to equal treatment.

In the EU, citizens must be treated equally in respect of terms and conditions of employment, and in respect of social and tax advantages. Detailed case law has also established what Member States must do in order to avoid both direct and indirect discrimination. An EU national working in another Member State must be treated in exactly the same way as colleagues who are nationals of that state as concerns working conditions, covering for example pay, training, dismissal and reinstatement. This right to

non-discrimination on grounds of nationality also applies to regulations which, unless objectively justified and proportionate to their aim, are intrinsically liable to affect migrant workers more than national workers and consequently risk placing migrant workers at a particular disadvantage (usually referred to as 'indirect discrimination'). This fundamental right to equal treatment requires that when a Member State concludes a bilateral convention on social security with a third country (which takes account of periods of insurance in the third country for the acquisition of entitlement to benefits), it must grant nationals of other Member States the same advantages as those enjoyed by its own nationals. There is thus prohibition of both direct and indirect discrimination. It follows also that working conditions (remuneration, training, promotion, membership of trade unions) must be the same for nationals and non-nationals. Further, there should be no discrimination with respect to social and tax advantages (Regulation 1612/68, Article 7, para. 2).

The ECOWAS 1986 Protocol on the Right of Residence stipulates that 'no matter the conditions of their authorisation of residence, migrant workers who comply with the rules and regulations governing residence, shall enjoy equal treatment with nationals of the host Member State' in areas such as security of employment, participation in social and cultural activities, re-employment in certain cases of job loss and training, access to institutions of general and professional education as well as to training centres for children, and benefit of access to social, cultural and health facilities.

The areas covered, in which equal treatment must be guaranteed, are very similar, even if the jurisprudence elaborating on the protection is much more detailed within the EU system. The core rights are however the same.

Interestingly, the ECOWAS Protocol mentions treatment of irregular migrants and the protection of their rights. This would be inappropriate in the EU as it is technically impossible for a Union citizen to be in an irregular situation. The ECOWAS Protocol on Phase III emphasises non-discriminatory treatment of nationals and companies of other Member States except as justified by exigencies of public order, security or health. It also forbids the confiscation or expropriation of assets or capital on a discriminatory basis and requires fair and equitable compensation where such confiscation or expropriation happens. This would simply fall into a prohibition of discrimination and non-equal treatment in EU law, but the emphasis in the ECOWAS Protocol may lead to the belief that such practices have taken place and the need to include a specific provision has been felt, again showing how different experiences in different regions clearly influence and shape regional (as well as national) legislation.

Citizenship

The concept of regional citizenship was part of the ECOWAS Protocols from the outset. But although citizenship was established in the founding Treaty, and further defined in the subsequent Protocol, it does not permit much in practice and needs further development.

It does not yet allow ECOWAS citizens to vote in a state other than their state of origin, or provide any extra rights to citizens. Indeed, as has been seen, national legislation can be voted that limits or cancels out the non-discriminatory measures promulgated.

In the EU, on the other hand, the idea of citizenship came only after a certain period of time and only in 2006 did the 'EU citizens' directive' have to be implemented. As seen above, this has largely followed the idea of citizenship developed by the European Court of Justice on the basis of the TEC, and now grants rights of free movement, residence and equal treatment on the mere fact of being a Union citizen. So even if the concept developed later it may be said to be much better developed and to create much better protection for citizens, perhaps giving credence to the idea that such a concept has to develop over time to make any true difference and have any true meaning within a regional context.

Definition of 'worker'

Another aspect worth noting is the definition of 'worker' in the two systems. In ECOWAS 'migrant worker is' defined by the 1986 Protocol on the Right of Residence in its Preamble as 'any citizen who is a national of one Member State, who has travelled from his country of origin to the territory of another Member State of which he is not a national, and who seeks to hold or proposes to hold or is holding or has held employment'.

In the EU, in order to be considered a 'worker' with the rights derived from the right to free movement of *workers* a person has to have the nationality of one of the EU Member States (or that of Norway, Iceland or Lichtenstein). What constitutes a worker, and self-employed, follows the interpretation given by the European Court of Justice, which has given a rather wide definition based on effectively three criteria: the worker must be carrying out effective and genuine work, under the direction of another person, and be remunerated; this includes, for example, part-time work, trainees, remuneration in kind. As the definition of 'worker' defines the scope of the fundamental principle of freedom of movement, it must not be interpreted in a restrictive way.

The European Court of Justice has also extended the definition to include those seeking work for a period of at least three months Article 14(4)(b) of Directive 2004/38/EC follows this line, making it clear that Union citizen job-seekers cannot be expelled as long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged. No time limit is specified.

Again it is clear how much more detailed the regulations are in the EU, but the core elements of the definitions are common to both regions: those currently active in the labour market, those seeking employment and those at least temporarily unemployed are to be considered 'workers' and benefit from the regulations relating to this group of people.

Establishment

The TEC provides that restrictions on the free establishment of nationals in the territory of another Member State shall be prohibited. In practice this means that the self-employed also have the right to establish themselves in another Member State. The self-employed work outside a relationship of subordination, they bear the risk for success or failure, and they are paid directly and in full. The European Court of Justice has focused on the prohibition of discrimination, also in relation to the right to establishment and the acknowledgment of professional qualifications of self-employed professionals who have obtained their qualifications in another Member State, in an attempt to remove obstacles to access the host state's market and to exercise that freedom.

Phase III in ECOWAS, the final five-year period, focused on the facilitation of business through the right of Community citizens to establish enterprises (have access to, carry out and manage economic activities) in Member States other than state of origin. Its realisation was intended to occur seamlessly, following the five years dedicated to implementing the right of residence.

Here, however, as in most of the ECOWAS provisions, state sovereignty is carefully maintained. There are loopholes in the non-discriminatory stipulations, and the wording of the text makes it open to wide interpretation. Indeed, if a Member State is unable to accord non-discriminatory treatment to nationals and companies of other Member States, it must 'indicate as much, in writing, to the Executive Secretariat'. The 1990 Protocol still has to enter into force

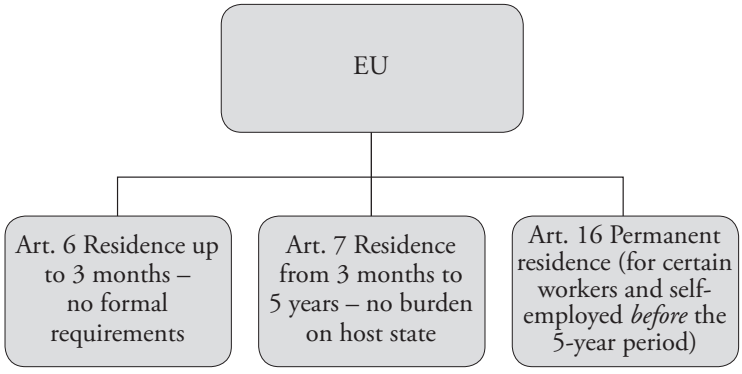
Establishment can be seen to have the same meaning in the two systems, but the right to be 'self-employed' is severely restricted in ECOWAS – or will be so even when the Protocol enters into force – whereas in the EU the self-employed are basically covered by the same regulations as workers, and as with any other EU citizen restrictions on self-employment are now in most cases illegal (regulations on certain professional occupations excepted).

Residence

An EU citizen has the right of residence on the territory of another Member State for a period of longer than three months if they (a) are a worker or self-employed person; (b) have sufficient resources for themselves and their family members not to become a burden on the host Member State; (c) are enrolled at a private or public establishment for the principal purpose of following a course of study. Permanent residence will be obtained after five years in the host state. In the EU, the right of permanent residence in the host state shall be enjoyed before completion of a continuous period of five years of residence by certain retirees; workers or self-employed persons who have resided continuously in the host state for more than two years and stop working there as a result of permanent incapacity; workers or self-employed persons who, after three years of continuous

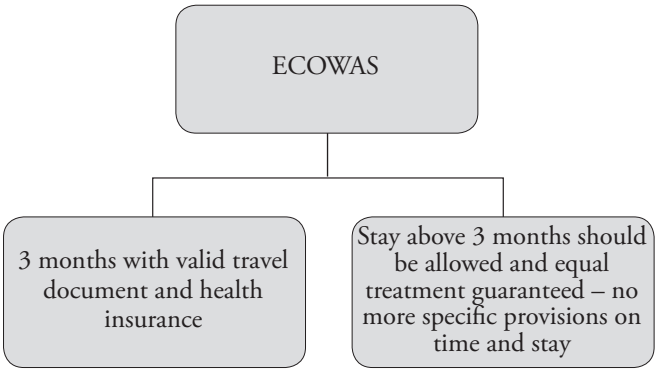
employment and residence in the host state, work in an employed or self-employed capacity in another Member State (Figure 5). Further, there are detailed rules for those not currently employed.

Figure 5. Right of residence in the EU



In ECOWAS, the 1986 Protocol on the Right of Residence requires states to grant to Community citizens, nationals of other Member States, 'the right of residence in its territory for the purpose of seeking and carrying out income-earning employment'. As pointed out elsewhere, the definitions of 'worker' have characteristics in common in the two systems, but ECOWAS regulations on the right to reside are not at the same point of specification as EU regulations. Periods and differentiation of various cases have not yet been elaborated (see Figure 6).

Figure 6. Right of residence in ECOWAS



Recognition of professional qualifications

Whereas detailed provisions have been created in the EU to facilitate the recognition of professional qualifications, which were greatly needed as this has been mentioned as one of the major obstacles to free movement,[118] such provisions do not exist in the ECOWAS region. Nonetheless, it is possible to make a comparison. As noted, within the complex EU system some professions are particularly regulated and others (especially public officials) may be limited to nationals. In ECOWAS Member States, some professions are prohibited to foreigners, such as doctor, chemist, lawyer and bailiff. Although this is not the case in EU Member States, it is true that special regulations apply, especially to people working in the health sector, so a similarity does exist even if the degree of regulation differs. Clearly, such professions in regions where limitations in their practice would be prohibited are also recognised as requiring regulation.

Expulsion

Expulsion is one of the most invasive steps that a state can take against an individual on its territory. This is clear in the strict regulations on expulsion of Union citizens in the EU.

Before taking an expulsion decision on grounds of public policy or public security, the host state shall take account of considerations such as how long the individual concerned has resided on its territory, their age, state of health, family and economic situation, social and cultural integration into the host state and the extent of their links with the country of origin. The host state may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they (a) have resided in the host state for the previous ten years; or (b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989 (Directive 2004/38/EC, Article 28).

Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Personal conduct has to be socially harmful and there must be a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

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118 French citizen moving to Spain. The citizen gave up trying to practise law, even as a legal advisor and not as a lawyer because of specific difficulties in having qualifications recognised.

In ECOWAS, the rules on expulsion are somewhat different. The 1986 Supplementary Protocol on the Right of Residence (Phase II) prohibits expulsion *en masse* (Article 13), insisting on the study of each case on an individual basis. The Protocol also limits the grounds for individual expulsion (Article 14). The rules for expulsion are enumerated in four categories. The first two relate to reasons of national security, public order or morality, or public health (these conditions echo those same reasons for refusing a right of residence in the first place) (Article 3). The third category allows expulsion for 'non fulfilment of essential conditions of residence'. In the light of Member States' legislation in the domain of residence and work authorisation, this provision rather undermines the protection against expulsion. The fourth category allows expulsion 'in accordance with the laws and regulations applicable in the host Member State' (Article 14.1.d). As shown above with respect to Article 4 of the 1979 Protocol and the rules on inadmissibility, this provision somewhat limits the protections against mass expulsion. Mass expulsions were an element of migration management in West Africa before the implementation of ECOWAS, and although there has been improvement since the ratification of the Treaty and subsequent protocols, Member States have continued to proceed to mass expulsions, as well as to close their borders, at different moments in history (Adepoju et al., 2007).

The provisions do not require such laws and regulations to be within national security, public order, morality or public health grounds. Thus, it would appear to affirm whatever discretionary authority Member States reserve to themselves on the matter of expulsion in their domestic laws. Given the breadth of states' inadmissibility provisions, which are undoubtedly 'laws and regulations applicable in the host Member State', the protocols' apparent circumscription of grounds for expulsion appears somewhat illusory (Adepoju et al., 2007).

From this it is clear that protection from expulsion, even if at first glance the motives on which a citizen can be expelled are analogous, is much more elaborated in the EU, but also that EU citizens are much better protected against expulsion than ECOWAS citizens, not only because of the level of detail of the rules, but because of the core content of the protection, which is very different in the two regions. ECOWAS clearly leaves a much wider margin to states that wish to expel other ECOWAS citizens than does the EU, thus leaving citizens much less protected in this sphere and giving more sovereignty to States. What however is similar are the *references* to public health, public order and security.

Specific difficulties

The implementation levels specific to the two regions are obviously very different. Where confusion regarding some rules, especially social security and practical problems, may hinder free movement in the EU, lack of information on even the core provisions is a problem in ECOWAS. As shown in Part I, in the EU rules on entry and exit are no longer a problem and are followed without much trouble in the Member States, whereas they continue to create problems for migrants between ECOWAS Member States. Whether examining the specific dispositions regulating travel facilitation, or the free movement

of persons in general in the region, poor dissemination of information to both frontier officials and Community citizens is patently obvious and the cause of many difficulties. The availability of information on migration is crucial to potential migrants. Immigration and emigration would necessarily be better organised and the principle of free movement better applied if potential migrants had access to entry requirements, and orientation on employment opportunities and regulations in the other Member States. Potential migrants being unaware of ECOWAS provisions will often leave their country of origin in an irregular situation, despite being legally entitled to valid documents of travel and to enjoy the right of freedom of movement within the Community. Irregular migration being widespread, this also makes it difficult to collect accurate statistics and information on the state of migration within the subregion (Adepoju et al., 2007).

It can thus be concluded that specific difficulties in the EU are very often linked to the more complex areas of law, whereas in ECOWAS core provisions for free movement, even for entry, also create practical difficulties. But dissemination and effective information to citizens seems to be lacking on existing rules in *both* systems.

Final comments

It is clear that any comparison on detailed rules on social security, pension, taxation, students, family and people not active in the labour market would make no sense, as such detail does not yet exist in the ECOWAS system. This by no means indicates that the above analysis of these detailed regulations within the EU have not served its purpose, to give a just and thorough analysis of EU legislation and identify problems for free movement – but also to make the comparison and to demonstrate exactly how complex the European system is compared with ECOWAS. Further, as treated below, the level of regulation of these points is significant for the understanding of how the systems work.

ECOWAS free movement regulations are still based on one Protocol and its four supplementary protocols, whereas the EU system of rules on free movement has mushroomed and extends to many detailed spheres of life, exactly because the free movement, and movement in general, of persons affects many parts of life.

It is also true that whereas many of the more detailed rules in the EU are still subject to case law at the European Court of Justice, which shows that states still need to adapt legislation on certain points, entry and exit regulations now create hardly any trouble. This is not the case in ECOWAS, where problems of administrative harassment and extortion remain. Further domestic legislation is not always synchronised with the stipulations of the 1979 Protocol. Officials and Community citizens alike are unaware of the provisions regarding the free movement of persons and the objectives of ECOWAS towards facilitating movement within the region. This lack of awareness also creates problems in the EU, mainly with operators at secondary or tertiary levels and regarding rules having an *impact* on free movement, which however is no less troublesome for the EU citizen.

Systems such as EURES and other schemes facilitating contact between employers and potential employees are practically absent in the ECOWAS region and seem to have a limited but not unimportant effect in the EU. It may also be noted that mobility in the EU seems to mainly affect people with a higher professional profile who are more likely to take advantage of opportunities that facilitate mobility, or have easier access to them, whereas this is not the case in the ECOWAS region where more low-skilled workers migrate between the Member States – paradoxically not always regularly given the problems this causes.

In the EU, the main difficulties and obstacles to increased mobility have been identified by different stakeholders as management issues attached to a mobile workforce, differences between internal policies, inconsistency of terms upon which international workers are employed, lack of employment opportunities for spouses, increasing difficulty in getting highly skilled senior managers to accept international assignments, time and complexity of immigration procedures, pension plans, lack of integrated European-wide employment legislation, differences in tax systems between Member States, lack of language skills as a practical obstacle, differences in benefit systems between Member States, lack of mutual recognition of professional qualifications, and the availability of information on international employment opportunities.

In ECOWAS, citizens identified difficulties in crossing borders, high fees and problems in accessing the formal labour market as the main obstacles to mobility. Further difficulties have been identified as the lack of basic structures and resources in order to better implement the provisions, and too great an emphasis on state sovereignty within the Community texts. Integration cannot move forward if Member states will not allow some flexibility and adaptation towards ECOWAS provisions. Also mentioned was the lack of information on free movement and its management, both for state officials and citizens of the Community; ambiguity in legal texts; and the poor implementation of ECOWAS dispositions on the part of the Member States.

While it is evident that in the EU it is 'secondary' legislation, such as taxes and pensions, which creates many problems, whereas in ECOWAS even entry regulations may do so, it is also evident that some problems are common to the two systems, such as lack of information and lack of a common employment policy and/or legislation. One thing which is clearly very different is the question of sovereignty – there can be no doubt that implementation of a system of free movement require states to give up some of their sovereignty on related issues, something that the EU Member States have been willing to do which is not yet the case in ECOWAS.

An interesting final point is that migration between EU states remains significantly lower than migration between ECOWAS states, which clearly shows how migration and mobility is not only dependent on legislation facilitating movement but also on traditions of migration in the respective regions. It is also true that mobility in the EU can no longer

be irregular,[119] whereas paradoxically ECOWAS citizens seem to suffer the realities of irregularity in some cases. From a purely legal point of view, mobility in the EU ought to be higher than it is in ECOWAS, but this is not the case. The reason probably lies in the specific obstacles to mobility in the EU mentioned above, such as differences in language and the practicalities of moving, and to the fact that migration and movement between ECOWAS Member States traditionally have been much more common and borders much less significant.

119 Even if in some Member States there may be a tendency to confuse the regulations on free movement relating to the EU15 and their citizens' regular movements between EU Member States. For detailed transition regulations and the so-called '2+3+2'.

Part 4: Conclusion

Although the visa and entry permit requirement has been abolished in all ECOWAS Member States, numerous problems remain. The 1979 Protocol coincided with growing economic recession in most of the subregion. The boom attracted thousands of ECOWAS nationals, in regular and irregular situations. For generations, people have migrated in response to demographic, economic, political and related factors: population pressure, environmental disasters, poor economic conditions, conflicts, and the effects of macro-economic adjustment programmes. Migrants have included temporary cross-border workers, seasonal migrants, clandestine workers, professionals and refugees. Cross-border migrants (especially farm labourers, unskilled workers, nomads, and women engaged in trade) paid little attention to arbitrary national borders, and population movements in search of greater security prevailed over wide areas. Today, intra- and inter-country movements continue to be a central feature of many people's lives (Adepoju, 2007, p. 161). Further, there is a practical difficulty in controlling borders in a region which is mainly flat with thousands of kilometres of borders. For states, it is practically impossible to guard every conceivable entry point, for individuals non-regularised migration is not at all as complex as in a region where entry points are well and easily guarded.

Most probably the fact that migrants in this region continue to pay little attention to arbitrary national borders is one reason why the region's legal framework on free movement is, first of all, little elaborated as yet, and secondly poorly implemented. The legal framework may not entirely correspond to the context in which is has to be inserted. And yet it is obvious that situations of irregularity create completely unnecessary problems for migrants, who should be able to travel regularly without major problems. These problems signal that a legal framework, effectively implemented, is *not* irrelevant in this setting, on the contrary.

Contemporary West Africa has recently been described as the most mobile part of Africa. At first sight, this seems to be true for intra-regional mobility. Census-based estimates by the United Nations Population Division suggest that West Africa has the largest absolute international immigrant stock (based on place of birth data) in Africa. It is also the only part of sub-Saharan Africa where migration stocks relative to the total population have been increasing over the past few decades, whereas other parts of Africa have shown a relative and sometimes even *absolute* decline. This largely reflects the intense intra-regional migration characterising West Africa, but fails to capture migration from West African countries to other parts of Africa and trans-continental migration, mainly to Europe, North America and the Gulf. In addition, trans-continental emigration *out of*

Africa seems be more intense in West Africa than elsewhere on the continent, with the clear exception of North Africa. In order to understand the recent increase in irregular migration to North Africa and Europe, this section starts by analysing the colonial and postcolonial migration history of West Africa (de Haas, 2007).

There is a steady reluctance on the part of states in general to hand over competence regarding migration matters to a supranational body. This is still seen at the European level concerning regulations on regular migration from third countries, which remains the competence of the individual Member States. Such reluctance may be part of the reason why ECOWAS Member States have been slow in implementing even the relatively basic regulations existing in the region.[120] Another specific obstacle to implementation may be financial, as can be clearly seen from the fact that financial constraints are a factor in issuing a common travel document – which many states simply have not found the funds to print.

It is clear that regulations on free movement in the EU, on the other hand, are extremely well developed. The success or failure in establishing real movement within the region has been discussed above and it suffices to say here that notwithstanding the many obstacles to free movement, mainly practical but also legal and administrative, there can be no doubt that without this strong focus on the part of European legislators it would still be much harder to move around within the Union. However, it would probably be wise to render the free movement regulations more 'user friendly', not necessarily by changing them but by making the options and possibilities more visible, and by raising awareness of existing regulations at the 'lower' levels of national administration – the levels EU Union citizens encounter upon arrival and settlement.

Another reason why the two systems are so different in detail may also be the simple fact that the EU is composed of states with a very detailed *national* regularisation of many subjects, such as tax, social security and pension schemes. Thus in order to create the possibility of transportability of such rights, legislation must correspond to the detailed level of national regulations, and in some way try to create a 'supranational' level. Less regulation in the EU does not seem at all feasible, as free movement touches upon many aspects of daily and practical life. Simpler regulations may in some cases be desirable and may be on their way, as in the example of social security which has been recognised as being too complex. On the other hand, it is natural that in a region with twenty-seven Member States and just as many legal systems, regulations relating to the free movement of citizens are bound to be at a certain level of complexity, but it is indeed positive that there seems to be a tendency to reduce this.

120 Reluctance to hand over sovereignty to a regional or other supranational body is not uncommon. For a variety of reasons, especially its experiences of colonialism, it can be detected also in the OAU Charter and in the African Charter on Human and People's Rights, that a major importance is attached to the defence of the States Parties 'sovereignty, their territorial integrity and independence' (see also Steiner et al., 2008). Such general resistance against giving up sovereignty is more than comprehensible when talking about States with a relatively new independence and may influence also the sphere of regular migration between Member States.

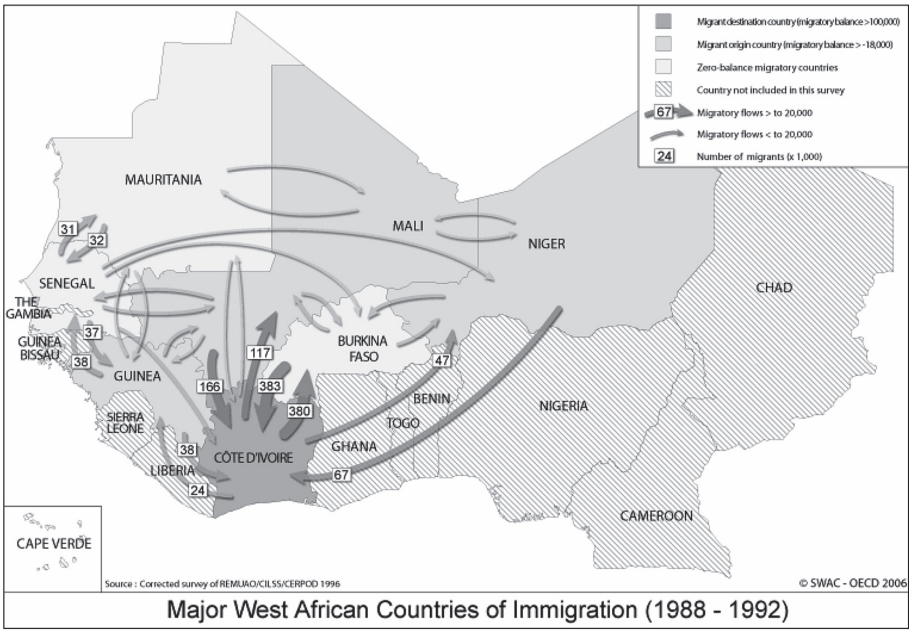
Many of the core regulations of the two systems may be said to be alike (visa waiving, no requirements for stay for up to ninety days, main rules (at face value at least) on limits of expulsion). It does not seem to be these regulations that limit movement within the EU, and even without effective implementation they do not hinder irregular migration in ECOWAS – which obviously is something of a paradox. It is very likely that, if implemented, these core regulations would make migration within ECOWAS much easier and better regulated. There should, however, be no doubt that the ECOWAS region is moving towards better implementation of Phase I.

Finally, it may be mentioned that the differences between the two systems can also influence to a certain point the interaction between the regions and the perception of migration. The relatively high level of informal and thus irregular migration in West Africa is bound to have an impact on irregular migration, cooperation and perception of migration in the EU.

Until the 1980s, only limited numbers of West African students and mainly highly skilled workers migrated to the Europe as well as to North America, mainly following francophone/Anglophone colonial/linguistic divides. This emigration was very limited in comparison to the large-scale labour migration of unskilled workers from the Maghreb countries to Europe. Only workers from Cape Verde (mainly to Portugal and the Netherlands) and pockets in the Senegal river basin in northern Senegal and the Kayes region of western Mali (mainly to France) joined the northbound movement of low-skilled North African labour migrants to West Europe of the 1960s and 1970s. Since 1990, however, there has been a striking increase in migration to Europe and North America, principally from Nigeria, Ghana and Senegal, as well as a geographical diversification of migration destinations beyond the former colonisers France, Portugal and the United Kingdom. This migration comprised both regular, skilled migration, for example of health workers to the Gulf, the United Kingdom and the United States, and relatively low-skilled, often irregular, migration, which was increasingly oriented towards Spain and Italy. Whereas most West Africans used to enter Europe by air, a shift in migration patterns took place towards the turn of the century. Tightening of European visa policies and the intensification of migration controls at airports and other official ports of entry, prompted an increasing number of West African migrants to avoid official air and maritime links and to cross the Mediterranean irregularly from North Africa after crossing the Sahara overland (de Haas, 2007).

Migrants use numerous land, sea and air routes to reach their desired destinations in North Africa and Europe. Restrictive immigration policies and intensified migration controls have led to a growing reliance on overland routes, although migrants who can afford it make at least part of the journey to North Africa by plane. An emerging body of empirical studies strongly suggests that the trans-Saharan journey is generally made in several stages and may take anything between one month and several years (de Haas, 2007).

Map 4. African and Mediterranean irregular migration routes



MTM = Mediterranean Transit Migration

Source: ICMPD/EUROPOL/FRONTEX (2006).

Interestingly, the title of this map is 'African and Mediterranean irregular migration routes'. But in fact parts of these routes are not irregular, as they link states that have a free movement agreement. The irregularity will only come into play once an individual embarks upon part of these routes between states with no such agreements, and it is somewhat incorrect and misleading to characterise migration routes between ECOWAS (and the Community of Sahel-Saharan States, CEN-SAD) states as 'irregular'. This shows quite clearly how perceptions may distort reality and also perhaps influence cooperation and policies. It is however true that these routes are used by migrants who, in the end, seek to go to the EU and also do so in an irregular manner and in this sense are 'irregular migration routes', but it is important to keep in mind that part of the movement is quite regular even if it may not necessarily suit the control purposes of the final destination states.

It is commonly assumed in the media, policy and academic literature that most West Africans enter Europe by crossing the sea in wooden and unseaworthy *pateras* (from Morocco to Spain) or *pirogues* (from West Africa to the Canary Islands). However, extensive media coverage of this assumed 'African exodus' and the *visibility* of this type of migration obscure the fact that the majority of irregular immigrants in the EU have entered legally, on some sort of visa, and then overstayed. If possible, North *and* West Africans avoid entering Europe by perilous crossings on fishing boats. For example, in 2002 only 10 per cent of the irregular migrant population in Italy entered the country

irregularly by sea. What is even less well-known is that there are many other ways of entering Europe irregularly. Migrants with sufficient financial means or networks either secure a tourist visa or residency permits through (real or fake) marriage or arranged work contracts, travel with forged documents or documents of family look-alikes, or travel by air using so-called via/via systems. Some scale the fences surrounding the Spanish enclaves of Ceuta and Melilla in northern Morocco or attempt to swim around them. Other migrants embark on larger and safer passenger or cargo ships sailing from North and West Africa to Europe. This can be done either clandestinely or by bribing the ship's crew or the drivers of the cars, vans or trucks in which they often hide. Nevertheless, the relative importance of entry by *patera* or *pirogue* seems to be comparatively high for West Africans because of the recent date of their settlement in Europe. More established immigrant groups, such as North Africans, can more often rely on their extended family networks to enter Europe on visas, forged documents or by hiding in others migrants' cars and vans (de Haas, 2007).

The data suggest that West African migration to Europe is relatively modest, certainly in comparison with North Africa. Since the 1990s, European states have responded to persistent irregular immigration mainly by intensifying border controls. This has involved the deployment of semi-military and military forces and hardware in the prevention of migration by sea (de Haas, 2007). At the same time, migrants and smugglers have continuously adapted their strategies to changes in immigration controls. The capacity to prevent migrants travelling across the Sahara crossing the Mediterranean and the Atlantic is limited, for the reasons mentioned above. But the difficulties in controlling the West African borders and the frequent informal/irregular migration condition collaboration between the two regions in migration matters.

Pressure by EU states on West African countries such as Senegal, the Gambia and Guinea to crack down on irregular migration is unfortunately potentially at odds with the freedom of movement enshrined in the 1979ECOWAS Protocol. Although the implementation of the Protocol on free movement may leave much to be desired, West African states have few legal means to 'combat irregular migration' as long as migrants' presence on their territories is basically regular. Also, on a practical level, it is virtually impossible to stop people from moving.[121]

Thus, the two systems may at times be at odds with each other when they encounter different realities and different priorities.

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121 In 2002 Mauritania withdrew from the ECOWAS Community, which implies that most ECOWAS citizens now need a visa to enter the country. It is not clear to what extent this relates to its increasing collaboration with EU countries on migration issues. The recent increase in crossings to the Canary Islands is probably not as unwelcome as it seems, because it has given the Mauritanian Government leverage to negotiate migration agreements with European countries in exchange for financial support. Yet the Mauritanian Government is more or less caught between two fires: the significant contribution that cheap immigrant workers and smuggling make to its economy and its interest in maintaining good relationships with its African neighbours on the one hand, and the pressure it feels from European countries to 'combat' undocumented migration on the other. See de Haas (2007).

The differences in level of implementation render comparison of the systems difficult, but the results that have emerged above seem nonetheless interesting:

In the EU practical differences linked to a move between two states, but also two cultures, may render free movement more difficult than the EU institutions might wish for. Obstacles of a legal but mainly of an administrative nature, and sometimes of a linguistic or socio-cultural nature, continue to hamper EU citizens' freedom of movement and to discourage them from taking advantage of the opportunities for mobility that may arise. Apprehension towards such moves is also often linked to lack of information on the existing opportunities or the related support mechanisms in the EU.

In ECOWAS, the time frame for implementation foreseen in the Protocol has obviously not been respected and the regional system is only in its very first phase.

Economic, social and security factors also have to be taken into consideration when comparing the two systems. In the EU the Member States have long been established as independent states, which affects both their sense of security as independent, and thus their readiness to give up some of their sovereignty to a regional body, without fear of losing their independence, but also the fact that travelling between them has long been a 'formal' matter, regulations regulating free movement superseding those on travelling between states. Between ECOWAS Member States, on the contrary, travelling has long been an 'informal' affair, crossing borders perhaps not perceived as truly relevant. Thus the strength of the state as an entity actually plays at two levels: the stronger the sense of a historically strong state the easier it is for that state to enter into regional (or international) agreements in which it actually hands over some sovereignty, but historically fixed borders also bring formality to travel which when creating an area of free movement must then be formally re-regulated as 'open'.

Further, Europe has since the Second World War lived in stability and, since the end of the Cold War, in stability and collaboration. In ECOWAS, political instability has not helped to move forward regional integration and promote better conditions for the free movement of persons, and instability in the region has, understandably, taken precedence over the creation of a free movement regime. The vast 'machinery' of the EU also operates as a regional institution and does not experience the same economic constraints as ECOWAS.

Notwithstanding the very different levels of detail in the provisions and their implementation, it is interesting to note how some aspects are indeed very common and also how regional experiences and characteristics, whether legal, social, historical or economic (for example a high level of national legislation and traditionally well-defined and controlled borders in contrast to a tradition of 'informal' movement) shape the two systems and also how the legislation and its current level of implementation has shaped the reality of mobility in the respective regions.

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This research analyses the legal framework in the European Union and the Economic Community of West African States relating to the free movement of persons, and on that basis examines how mobility is facilitated or hindered, together with the major problems in realising effective mobility within regions. Part 1 focuses on the European Union, where legislation on the free movement of citizens is very detailed, having been elaborated over four decades, and the principle of free movement is considered to be one of the key policies of the EU. Part 1 passes from analysis of the legislation to an evaluation of the difficulties and incentives to move for EU citizens. Mobility between Member States is in fact quite low, even surprisingly so – about 2 per cent – whereas the number of regulations governing these 2 per cent of European citizens is vast.

Part 2 of the report focuses on the Economic Community of West African States, again starting with an analysis of current legislation and moving on to an evaluation of actual mobility and the constraints and facilitation of such mobility within the system. Part 3 compares the EU and ECOWAS systems in terms of regulations and obstacles to mobility. This comparison obviously had to take into account the differences in complexity and detail of the two legal systems, but similarities do exist in many fields, including regulations on exit and entry; residence and the right to equal treatment; and the concept of regional citizenship.

The differences between the two systems can influence the interaction between the regions and the perception of migration to the point where the focus is broadened to the migration *between* the two regions, in which the EU requires more control on the part of their African counterparts.

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