



Faculty of Law

Lund University

**Master of European Affairs Programme  
Law**

Master thesis

Jacqueline Hartman

Towards a rights-based approach?

—

Third country nationals legally  
long-term resident within the  
European Union and the  
fundamental freedom of  
movement rights

Peter Gjötler

2001/2002

# Contents

<b>1</b>	<b>INTRODUCTION</b>	<b>4</b>
<b>2</b>	<b>THE CURRENT RIGHT OF FREEDOM OF MOVEMENT FOR LEGALLY LONG-TERM RESIDENT TCNS</b>	<b>7</b>
2.1	<b>The EC Treaty – The exclusion of TCNs</b>	<b>7</b>
2.1.1	Freedom of movement for workers – Article 39 (ex Article 48) EC Treaty	7
2.1.2	Right of establishment – Article 43 (ex Article 52) EC Treaty	8
2.1.3	Freedom of services – Article 49 (ex Article 59) EC Treaty	8
2.2	<b>Limited, derived, rights of freedom of movement</b>	<b>9</b>
2.2.1	Relationship rights	9
2.2.1.1	Relationship with an EU national	9
2.2.1.2	Relationship with an EU company	10
2.2.1.3	The problems of relationship derived freedom of movement	10
2.2.2	Agreement rights	12
<b>3</b>	<b>THE CONFLICT BETWEEN THE EC AND THE MSS</b>	<b>13</b>
3.1	<b>The EC’s perspective – A fundamental right towards the completion of the internal market</b>	<b>13</b>
3.2	<b>The MSS’ perspective – An immigration issue</b>	<b>16</b>
<b>4</b>	<b>THE EXCLUSION OF TCNS WITH ‘FORTRESS EUROPE’ – FROM ROME TO AMSTERDAM</b>	<b>19</b>
4.1	<b>Pre-early 1980s</b>	<b>19</b>
4.2	<b>Mid 1980s – Maastricht</b>	<b>20</b>
4.3	<b>Maastricht – Amsterdam</b>	<b>21</b>
4.4	<b>Amsterdam</b>	<b>23</b>
<b>5</b>	<b>‘JUSTICE CANNOT BE LIMITED TO EU CITIZENS ONLY’</b>	<b>25</b>
5.1	<b>Human rights and fundamental rights</b>	<b>25</b>
5.2	<b>Democratic values</b>	<b>27</b>
5.3	<b>A double standard legal order</b>	<b>27</b>
5.4	<b>Implications for EC, EU and MSS</b>	<b>28</b>

<b>6</b>	<b>THE MOVE TOWARDS FREEDOM OF MOVEMENT RIGHTS FOR LEGALLY LONG-TERM RESIDENT TCNS</b>	<b>30</b>
6.1	A new approach – A rights-based approach	30
6.2	The legal framework – The Treaty of Amsterdam	34
<b>7</b>	<b>SECURING FREEDOM OF MOVEMENT FOR TCNS</b>	<b>38</b>
<b>8</b>	<b>CONCLUSION – TOWARDS A RIGHTS-BASED APPROACH?42</b>	

There is a political and human context to the free movement of persons ...

Commission of the European Communities Report of the High Level Panel on the Free Movement of Persons, Chaired by Mrs Simone Veil, 18/03/1997 at [http://europa.eu.int/comm/internal\\_market/en/people/hlp/hlpen.pdf](http://europa.eu.int/comm/internal_market/en/people/hlp/hlpen.pdf), 30/04/2002.

TCNs who are permanently and legally residing within the Union are usually in a position that is both formally weak and unequal. The prohibition of free movement imposed upon them is the *structural confirmation* of this weakness and inequality.

Foblets MC Europe and its aliens after Maastricht: The painful move to substantive harmonization of member-states' policies towards third-country nationals (1994) 42 *American Journal of Comparative Law* 783.

... while the European Union lacks a good system for the protection of fundamental rights it will lack "a soul" ...

Guild E & Harlow C *Implementing Amsterdam immigration and asylum rights in EC law*, Hart, Oxford, 2001.

# Abbreviations

Charter	Charter of Fundamental Rights of the European Union
Convention	Convention for the Protection of Human Rights and Fundamental Freedoms
EC	European Communities
EC Treaty	Treaty of the European Communities
ECHR	European Court of Human Rights
ECJ	European Court of Justice
EP	European Parliament
EU	European Union
EU Treaty	Treaty of the European Union
MS	Member State
SEA	Single European Act
TCN	third country national
Title IV	Title IV (ex Title IIIa) EC Treaty

# 1 Introduction

Since its inception in the 1950s, many of the goals of the European Community and, since 1 November 1993, the European Union, have been economic in nature. As the EU strives towards ‘an ever close Union’<sup>1</sup>, however, there is recognition, both within the Union, and externally, that the EU and European integration must be approached, and examined, from a broader perspective. There is a realisation that it is necessary to take into account cultural, social and political dimensions in their own right, and not just as ‘supporting measures aimed at facilitating the realization of the central economic goals’<sup>2</sup>, if European integration is to progress. It is clear that in approaching the Union from such a perspective, one must necessarily look beyond those who are considered ‘insiders’, EU citizens, and the rights they possess, and turn to those who are, despite being physically on the inside, ‘outsiders’, for

[t]he treatment of aliens, in the Community and by the Community and its Member States, has become ... a defining challenge to an important aspect of the moral identity of the emerging European polity and the process of European integration<sup>3</sup>.

In both political and academic arenas, particularly since the mid-1980s, there has been a growing interest in those who have become known as TCNs; those individuals who do not hold citizenship from one of the Union member countries. Although such interest has been diverse, ranging from the issue of visas, to length of stays for tourists, to family reunification, to asylum, to human trafficking, to illegal immigration and beyond, one particularly important area of interest is in TCNs legally long-term resident within the borders of the EU, and their rights, or lack thereof; for, on examination, it is clear they do not possess many at all.

As a fundamental freedom, freedom of movement is one of the most important rights granted to EU citizens<sup>4</sup>; yet it is the right which has most obviously been denied legally long-term resident TCNs. The notion of freedom of movement under EC law encompasses a number of different

---

<sup>1</sup> Article 1 (ex Article A) EU Treaty.

<sup>2</sup> Martiniello M ‘European citizenship, European identity and migrants: Towards the post-national state’ in R Miles & D Thrändhardt (eds) *Migration and European integration: The dynamics of inclusion and exclusion*, Pinter Publishers, London, 1995, pp 37-52 at 39.

<sup>3</sup> Weiler JHH Thou shalt not oppress a stranger: On the judicial protection of human rights on non-EC nationals (1992) 3 *European Journal of International Law* 65 at 65.

<sup>4</sup> Hoogenboom T Integration into society and free movement of non-EC nationals (1992) 3 *European Journal of International Law* 36.

ideas; including freedom of circulation<sup>5</sup>, right of residence<sup>6</sup>, freedom from 'discrimination based on nationality ... as regards employment, remuneration and other conditions of work and employment'<sup>7</sup> and freedom of movement of goods<sup>8</sup> and capital<sup>9</sup>. However, it is the 'person associated' freedom of movement rights, which create a right of entry and a right of permanent residence for economic actors, the denial of such freedom of movement rights to legally long-term resident TCNs, the implications of such a denial and the path towards the granting of freedom of movement rights to legally long-term resident TCNs, which is at the focus of this thesis.

As a politically sensitive issue, the security of freedom of movement rights for legally long-term resident TCNs has been problematic. Historically, there has been a persistent clash of wills between the EC, on one hand, and the MSs, on the other; with the EC pro freedom of movement rights for legally long-term resident TCNs, and the MSs, as a group, contra such a development. With no clear Community competence over TCNs until recently, legislative responsibility and control over TCNs turned on a question of classification; if TCN free movement rights are classed as an issue of freedom of movement, essential for the completion of the internal market, they can be seen to fall within the competence of the EC, if, however, they are to be classed as in immigration issue, they, thus, fall under the competence of the MSs. As a result of the opposing opinions of the EC and MSs as to the granting of freedom of movement rights to legally long-term resident TCNs, the issue of classification of such rights, and the fact, that until the Treaty of Amsterdam, it was the MSs who secured control over TCNs, the law addressing the issue of freedom of movement rights, or lack thereof, for legally long-term resident TCNs, as it currently stands, is fragmented, complex and incomplete.

The denial of freedom of movement rights to legally long-term resident TCNs is, however, not only an issue of political will, classification and competency, it is a human and fundamental rights issue; denying legally long-term resident TCNs the right to freedom of movement is in violation of recognised human rights principles

---

<sup>5</sup> A right of mere movement between states, which is presently governed by the Schengen Agreement. Since the Treaty of Amsterdam, however, there is a move towards incorporating the Schengen acquis into the supranational, Community framework. There is currently a Commission Proposal for a Council Directive relating to the conditions in which third-country nationals shall have the freedom to travel in the territory of the Member States for periods not exceeding three months, introducing a specific travel authorisation and determining the conditions of entry and movement for periods not exceeding six months COM (2001) 388 final, under Articles 6(3) and 63(3) of the EC Treaty.

<sup>6</sup> Under Council Directive 90/364 on the right of residence OJ L 180/6, 28/06/1990; Council Directive 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activity, OJ L 180/28, 28/06/1990; and Council Directive 90/366 on the right of residence for students, OJ L 180/30, 28/06/1990.

<sup>7</sup> Article 39(2) (ex Article 48) EC Treaty.

<sup>8</sup> Articles 28 (ex Article 30) and 29 (ex Article 34) EC Treaty.

<sup>9</sup> Article 56 (ex Article 73b) EC Treaty.

of non-discrimination and equality and principles of democracy. On examination, it becomes apparent, that such contraventions not only have implications for legally long-term resident TCNs, based on the fact they are explicitly denied the right to freedom of movement, but also for the EU, EC and the MSs; when one views this institutionalised discrimination against long-term resident TCNs, which results in their exclusion from freedom of movement, in light of the basis upon which the Union has been founded; ‘principles of liberty, democracy, respect for human rights and fundamental freedoms ..., principles which are common to the Member States’<sup>10</sup>. This anomaly, the recognition of which, leads to a clear awareness that the denial of freedom of movement rights to legally long-term resident TCNs, is not acceptable.

In framing the denial of freedom of movement rights for legally long-term resident TCNs as a violation of human rights, fundamental EC rights and EU law, it becomes obvious that the denial of free movement to legally long-term resident TCNs must finally be dealt with. Thus, with the aim being freedom of movement for legally long-term resident TCNs, the conflict between the EC and MSs, which is at the centre of the issue of freedom of movement for legally long-term resident TCNs must necessarily be addressed, both in terms of how the issue should be approached, and the legal framework that is needed, in order to ensure the granting of freedom of movement rights; which is arguably, since 1999, with the implementation of the Treaty of Amsterdam, that which is starting to occur.

---

<sup>10</sup> Article 6 (ex Article F) EU Treaty.



## **2 The current right of freedom of movement for legally long-term resident TCNs**

Prior to an examination of the issues surrounding freedom of movement for legally long-term resident TCNs, it is important to be aware of what ‘person associated’ freedom of movement rights exist and which of those rights TCNs currently possess. As there are no intergovernmental instruments addressing the issue of freedom of movement for legally long-term resident TCNs<sup>11</sup>, it is the current state of EC law that need only be examined.

### **2.1 The EC Treaty – The exclusion of TCNs**

The EC Treaty grants three separate ‘person associated’ freedom of movement rights: freedom of movement for workers, under Article 39 (ex Article 48) EC Treaty, the right of establishment as it applies to the ‘right to take up and pursue activities as self-employed persons and to set up and manage undertakings ...’<sup>12</sup>, and freedom of services, as encompassed by Article 49 (ex Article 59) EC Treaty. Whilst all EU citizens have the ability to exercise these freedom of movement rights, TCNs are denied all three of these rights, either as a result of the terms of the EC Treaty itself or through the provisions of the associated enabling legislation.

#### **2.1.1 Freedom of movement for workers – Article 39 (ex Article 48) EC Treaty**

Article 39 (ex Article 48) EC Treaty, and the related secondary legislation<sup>13</sup>, guarantees freedom of movement for workers. On an examination of this article, it is clear that it is phrased in general, non-exclusionary terms, ensuring that ‘[f]reedom of movement for workers shall be secured within the Community’.

---

<sup>11</sup> Unlike the Schengen Agreement addressing the right of TCNs to move freely between signatory states for a limited duration of time.

<sup>12</sup> Article 43 (ex Article 52) EC Treaty.

<sup>13</sup> Council Directive 64/221 of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, OJ B 56/850, 04/04/1964; Council Regulation 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257/2, 19/10/1968; Council Directive 68/360 of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, OJ L 257/13, 19/10/1968; Commission Regulation 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, OJ L 142/24, 30/06/1970.

However, as a result of the provisions of the implementing legislation, Council Regulation 1612/68 of 15 October 1968 on freedom of movement for workers within the Community<sup>14</sup>, the application of the right to freedom of movement for workers, has been restrictively defined on the basis of nationality<sup>15</sup>, thus excluding TCNs. Despite the existence of many arguments to the contrary<sup>16</sup>, this exclusionary interpretation of the EC Treaty terms, as relating to freedom of movement for TCN workers, has been upheld by the ECJ<sup>17</sup>.

### **2.1.2 Right of establishment – Article 43 (ex Article 52) EC Treaty**

The right of establishment, and the relevant secondary legislation<sup>18</sup>, refers to the right to freedom of movement as a self-employed individual, and extends to include ‘the setting-up of agencies, branches or subsidiaries’<sup>19</sup>. This right applies exclusively, based on the terms of the EC Treaty, to ‘nationals of a Member State’.

### **2.1.3 Freedom of services – Article 49 (ex Article 59) EC Treaty**

Freedom of services, and the related secondary legislation<sup>20</sup>, encompasses both the notion of provision of services and receipt of services<sup>21</sup>. It is clear from the wording of the EC Treaty that, like the right of establishment, freedom of services applies only to ‘nationals of Member States’, however, unlike freedom of establishment, provision has been made within the EC Treaty for freedom of

---

<sup>14</sup> OJ L 257/2, 19/10/1968.

<sup>15</sup> Kostakopoulou T *Citizenship, identity and immigration in the European Union: Between past and future*, Manchester University Press, Manchester, 2001.

<sup>16</sup> Based on, for example, a comparison between the wording of Articles 43 (ex Article 52) and Article 49 (ex Article 59) EC Treaty, which explicitly limits the provisions to ‘nationals of a Member State’, and the logic of the internal market.

<sup>17</sup> Case 283/83 *Meade* [1984] ECR 2631; Case C-355-93 *Eroglu v Land Baden-Württemberg* [1994] ECR I-5113.

<sup>18</sup> The relevant secondary legislation is Council Directive 73/148 of 21 May 1973 on the abolition of restrictions of movement and residence within the community for nationals of Member States with regard to establishment and the provision of services, dealing with rights of entry and residence in relation to exercising the right of freedom of establishment, OJ L 172/14, 28/06/1973, and Council Directive 75/34 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, which addresses the right to remain permanently in the host state after having been self-employed, OJ L 14/10, 20/01/1975.

<sup>19</sup> Article 43 (ex Article 52) EC Treaty.

<sup>20</sup> The relevant secondary legislation is Council Directive 73/148 of 21 May 1973 on the abolition of restrictions of movement and residence within the community for nationals of Member States with regard to establishment and the provision of services, dealing with rights of entry and residence in relation to provision of services, OJ L 172/14, 28/06/1973.

<sup>21</sup> Article 49 (ex Article 59) EC Treaty; Case C-43/93 *Van der Elst* [1994] ECR I-3808.

services to be extended to ‘nationals of a third country who provide services and who are established within the Community’<sup>22</sup>. Currently, no such legislation has been enacted under this provision<sup>23</sup>.

## **2.2 Limited, derived, rights of freedom of movement**

Although there are no EC Treaty rights, which create a personal right to freedom of movement for legally long-term resident TCNs, there are a number of categories of TCNs that have long-held freedom of movement rights under EC law; rights derived on the basis of an individual relationship with an EU national or EU company, or from the terms of an agreement between the EU and the third country of which the TCN is a national.

### **2.2.1 Relationship rights**

As a derived right, the right of freedom of movement of TCNs associated with an EU national, is a right which has not been ‘awarded’ to a TCN as a personal right, as such, but has, rather, been ‘designed as part of a package of measures to eliminate obstacles to the movement of workers’<sup>24</sup> and in the provision of services; existing simply to ensure that neither EU nationals wishing to exercise their right to freedom of movement, nor EU companies wishing to provide services across MS borders, are prevented from exercising their right to freedom of movement, or are placed at a disadvantage when exercising that right. The right of free movement does not belong to the TCN, who is viewed ‘not as an individual and as an end in itself, the fundamental rights of whom must be protected because of his or her humaneness, but rather as an instrumentality, a means to ensure the economic goal of free movement of all factors of production’<sup>25</sup>.

#### **2.2.1.1 Relationship with an EU national**

In all ‘person associated’ freedom of movement rights, there exists a right for family members to accompany the EU national exercising their right of freedom of movement. In relation to freedom of movement of workers, this right is contained

---

<sup>22</sup> Paragraph 2 of Article 49 (ex Article 59) EC Treaty.

<sup>23</sup> Although, it is important to note that a draft proposal dealing with freedom of services for TCN companies established within the Community is currently under negotiation (Proposal for a Council Directive extending the freedom to provide cross-border services to third-country nationals established within the Community COM (99) 3 final). This proposal is to be discussed below.

<sup>24</sup> Cremona M Citizens of third countries: movement and employment of migrant workers within the European Union (1995) *Legal Issues of Economic Integration* 87 at 93.

<sup>25</sup> Weiler, *supra* n3 at 90.

in Council Regulation 1612/68 of 15 October 1968 on freedom of movement for workers within the Community<sup>26</sup>. As regards freedom of establishment and freedom of services, this right is found in Council Directive 73/148 of 21 May 1973 on the abolition of restrictions of movement and residence within the community for nationals of Member States with regard to establishment and the provision of services<sup>27</sup>. Under both Regulation 1612/68<sup>28</sup> and Directive 73/148<sup>29</sup> specified family members have a right of accompaniment ‘irrespective of nationality’; enabling a TCN to exercise an, albeit limited, right of freedom of movement on the basis of the TCNs relationship to, or with, an EU national.

### **2.2.1.2 Relationship with an EU company**

As a principle established as a creature of case law by the ECJ<sup>30</sup>, an EU company which employs TCNs has the right to ‘move’ those TCNs within the EU, in order to provide cross-border services to another MS; thus creating, a short-term, non-permanent right of freedom of movement for the TCN employee.

### **2.2.1.3 The problems of relationship derived freedom of movement**

In order for a TCN to be able to exercise any right of freedom of movement based on a relationship with an EU national, two conditions must be fulfilled; first, there must be a legislatively specified relationship between the TCN and EU national, and secondly, the EU national must exercise their right to freedom of movement<sup>31</sup>. At present, it is only a spouse who may accompany a EU national, not an unmarried partner<sup>32</sup>.

Once a TCN can exercise this derived freedom of movement right, their rights are comparatively extensive, when compared with the freedom of movement rights of TCNs generally. There are, however, numerous limitations<sup>33</sup>. One of the most significant of limitations, is the evaporation of a TCNs derived freedom of

---

<sup>26</sup> OJ L 257/2, 19/10/1968.

<sup>27</sup> OJ L 172/14, 28/06/1973.

<sup>28</sup> Article 10.

<sup>29</sup> Article 1.

<sup>30</sup> Case C-113/89 *Rush Portuguesa* [1990] ECR 1439; Case C-43/93 *Van der Elst* [1994] ECR I-3808.

<sup>31</sup> Hedemann-Robinson M Third-country nationals, European Union citizenship, and free movement of persons: a time for bridges rather than divisions (1996) 16 *Yearbook of European Law* 321.

<sup>32</sup> Under Article 10 Council Regulation 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257/2, 19/10/1968 and Article 1 Council Directive 73/148 of 21 May 1973 on the abolition of restrictions of movement and residence within the community for nationals of Member States with regard to establishment and the provision of services, OJ L 172/14, 28/06/1973. See, however, Case 59/85 *Netherlands v Reed* [1986] ECR 1283.

<sup>33</sup> Hedemann-Robinson, supra n31.

movement right, in the case of the death of the EU national, whom the TCN accompanied, or where the relationship with that EU national ends<sup>34</sup>. This lack of durability of a TCN's freedom of movement right has important implications from a rights perspective<sup>35</sup>, where a TCN and EU national have settled and built a life in a country, with their family, and on dissolution of the relationship the TCN has no right to stay, although their family may, in the case of them being EU nationals themselves. In the case that the family members are not EU nationals, however, they may also be denied the right to remain in the host MS. This situation may also have rights implications, where those TCNs are studying in the host MS and may have difficulties in integrating into a new education system, due to, for example language and culture<sup>36</sup>.

It is also possible to point to restrictions in relation to what activities accompanying family members may undertake in the host MS, due not only to the fact there is no mutual recognition of a TCNs qualifications, unlike that of an EU citizen<sup>37</sup>, but also due to the fact that it is only in the case of an EU citizen exercising their right to freedom of movement as a worker that the accompanying family members have the legislative 'right to take up any activity as an employed persons'<sup>38</sup>, and that Council Directive 77/486 of 25 July 1977 on the education of children of migrant workers<sup>39</sup> applies.

---

<sup>34</sup> Commission of the European Communities A Report of the High Level Panel on the Free Movement of Persons, Chaired by Mrs Simone Veil, 18/03/1997 at [http://europa.eu.int/comm/internal\\_market/en/people/hlp/hlpen.pdf](http://europa.eu.int/comm/internal_market/en/people/hlp/hlpen.pdf), 30/04/2002.

<sup>35</sup> See for example Article 8 Convention on the right to respect for private and family life.

<sup>36</sup> This situation is currently governed by case law. See Joined Cases 389 and 390/87 *Echternack and Moritz v Netherlands Minister for Education and Science* [1989] ECR 723.

<sup>37</sup> See for example Council Directive 89/48 of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, OJ L 19/16, 24/01/1989; Council Directive 92/51 of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48, OJ L 209/25, 24/07/1992; Directive 1999/42 of the European Parliament and of the Council of 7 June 1999 establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the Directives on liberalisation and transitional measures and supplementing the general systems for the recognition of qualifications, OJ L 201/77, 31/07/1999.

<sup>38</sup> Article 11, Council Regulation 1612/68 on freedom of movement for workers within the Community, OJ L 257/2, 19/10/1968.

<sup>39</sup> OJ L 199/32, 06/08/1977.

### 2.2.2 Agreement rights<sup>40</sup>

The EU is signatory to a diverse range of agreements with third countries, as regards relations, trade and, in many cases, freedom of movement, in the broad sense of the idea. Thus, TCNs, who hold the nationality of a third country who is party to such an agreement with the EU, may have a possible right of free movement under the agreement<sup>41</sup>. As a TCN exercising a right under an agreement between the EU and their country of citizenship, protection is found within the terms of the agreement itself, not within EC law, despite the fact the ECJ has held the agreements to be part of EC law, and has relied on principles of EC law in interpreting the agreement provisions<sup>42</sup>.

The most far reaching agreements, and the only agreements granting freedom of movement rights, encompassing a right of entry and permanent residence for economic actors, are the European Economic Area Agreement and EC-Swiss Agreement on Free Movement of Persons. The EEC-Turkey Association Agreement, although it does not presently grant the right to free movement, as presently defined, such a right is, however, eventually envisaged. Neither the European Agreement with the Central and Eastern European States, nor the Association Agreements with the Maghreb states, nor the Cooperation Agreements with the Mashrik and non-Mashrik states, nor the Lomé Agreements with the ACP states, nor the Partnership and Cooperation Agreements with CIS states grant freedom of movement rights, as presently under discussion, to individuals relying on the provisions of the agreements.

---

<sup>40</sup> For a more in-depth discussion on agreement rights, see for example Fiek 'Labour and social non-discrimination provisions within the association agreements', pp225-240 and Groenendijk K 'The growing relevance of Article 39 (ex Article 48) EC Treaty for third country immigrants', pp207-223 in Carlier JY & Verwilghen M (eds) *Thirty years of free movement of workers in Europe*, Proceedings of the Conference Brussels 17-19 December 1998, European Commission/UCL, Brussels, 2000; Cremona, supra n24; Hedemann-Robinson M An overview of recent legal developments at Community level in relation to third country nationals resident within the European Union, with particular reference to the case law of the European Court of Justice (2001) 38 *Common Market Law Review* 525.

<sup>41</sup> On the basis of Articles 300 (ex Article 228) and 310 (ex Article 236) EC Treaty.

<sup>42</sup> See for example Case 12/86 *Demirel v Stadt Schwabisch Gmund* [1987] ECR 3719.

# 3 The conflict between the EC and the MSs

Having regard to the present situation, legally long-term resident TCNs are, clearly, currently denied any right of freedom of movement, unless a derived right of freedom of movement exists. Lying at the centre of this denial is a conflict, which has arisen between the EC and MSs; whether legally long-term resident TCNs should be granted freedom of movement rights, how should such rights be classified and, based on such a classification, who has the competence to act.

## 3.1 The EC's perspective – A fundamental right towards the completion of the internal market

With the rationale behind freedom of movement being to ensure the establishment and completion of the internal market, it is one of, if not the, most important aspects of the EC. Following from this, the EC views the free movement of TCNs as a necessity for the completion of the internal market, due both to the fact that denying TCNs free movement rights is to act directly against the principle of the internal market, and that TCNs themselves possess a market value which must be tapped; TCNs are a

considerable market potential ... [thus, r]estricting their presence in [fifteen] markets, which are sheltered from one another in this respect, is contrary to the principle of a common employment and consumer market which is set out as an objective in Article 2 of the EEC Treaty ... and is at cross purposes with the goals of the internal market<sup>43</sup>.

Thus, for the EC, TCNs should be granted freedom of movement rights; an approach which has been consistently opposed by the MSs<sup>44</sup>.

The EC, represented by the Commission, the ECJ and the EP<sup>45</sup>, bodies acting in the interest of the EC, has continuously attempted to address the issue of legally long-term resident TCNs and freedom of movement, and advocated for the granting of the right of freedom of movement for legally long-term resident TCNs.

---

<sup>43</sup> Hoogenboom, supra n32 at 4.

<sup>44</sup> Guild E Discretion, competence and migration in the European Union (1999) 1 *European Journal of Migration Law* 61.

<sup>45</sup> See for example Hailbronner K *Immigration and asylum law and policy of the European Union*, Kluwer Law International, The Hague, 2000 and Miles & Thrändhardt, supra n2, for a more in-depth discussion as to the positions of the EC institutions.

In setting the ECJ the task of protector of EC law, where it ‘shall ensure that in the interpretation and application of th[e EC] Treaty the law is observed’<sup>46</sup>, the ECJ, necessarily, becomes an important player in the EC law-making process; a role which it usually embraces. Despite the willingness of the ECJ to expand and uphold the strength and supremacy of EC law, as is clearly noticeable in the area of freedom of movement for Union citizens and the internal market<sup>47</sup>, when it comes to rights of TCNs, however, the ECJ is noticeably more reluctant to become involved. This is, arguably, due to the nature of the issue of freedom of movement for TCNs;

[i]n relation to Non-Community nationals the Court has been ... particularly prudent and has eschewed the boldness which characterizes some of its jurisprudence in other areas. It is understandable. This area is a political mine field in which Government reaction to ‘judicial meddling’ may be particularly harsh<sup>48</sup>.

In spite of this fact, however, the ECJ has been the most actively successful of the EC institutions, in protecting the right of free movement of TCNs<sup>49</sup>; due, most certainly, to the independence of the ECJ. This is most notable in the area of derived rights of freedom of movement for TCNs, on the basis of a relationship with a EU national.

Although the derived freedom of movement right of a TCN, based on a relationship with an EU national, is found in the provisions of EC legislation, without the liberal interpretation of the ECJ, the derived right of free movement for TCNs, based on a relationship with an EU company, would not exist, for this right, presently<sup>50</sup>, only exists within the EC’s case law<sup>51</sup>. It must be remembered, however, that essentially the ECJ in this area is not acting to extend freedom of movement rights to TCNs, but rather is seeking to protect the freedom of movement rights of EU citizens and companies.

In relation to a TCN’s derived freedom of movement right, established under an agreement, despite the fact that the ECJ has repeatedly held that the collection of agreements is an integral part of the EC legal system, and that a number of agreement provisions actually have direct effect, and thus may be relied upon by

---

<sup>46</sup> Article 220 (ex Article 164) EC Treaty.

<sup>47</sup> Alexander W Free movement of non-EC nationals: A review of the case-law of the Court of Justice (1992) 3 *European Journal of International Law* 53.

<sup>48</sup> Weiler, *supra* n3 at 81.

<sup>49</sup> Peers S Towards equality: Actual and potential rights of third-country nationals in the European Union (1996) 33 *Common Market Law Review* 7.

<sup>50</sup> It should be noted however, that a proposal for a Directive of the European Parliament and of the Council on the posting of workers who are third-country nationals for the provision of cross-border services COM (99) 3 final is presently under discussion, which, if implemented, would result in the transposition of case law into EC legislation. See discussion below.

<sup>51</sup> Case C-113/89 *Rush Portuguesa* [1990] ECR 1439; Case C-43/93 *Van der Elst* [1994] ECR I-3808.



individuals, the Court has rarely found a MS in breach of such an agreement<sup>52</sup>. This is, arguably, due to the fact that the majority of the agreements are rather limited in the actual freedom of movement rights they grant TCNs<sup>53</sup>.

The Commission and EP, in spite of their vocal support for freedom of movement rights for legally long-term resident TCNs, have been less successful in attempting to act in implementing freedom of movement rights for legally long-term resident TCNs, however. One such failed attempt of the Commission can be seen in the introduction of the Commission's Decision 85/311 of 8 July 1985 setting up a communication and consultation procedure on migration policies in relation to non-member countries<sup>54</sup>, which prompted the MSs to begin proceedings in the ECJ<sup>55</sup>. The EP did act, however, in issuing proceedings against the Commission<sup>56</sup>, for the Commission's inaction in relation to the implementation of Article 14 (ex Article 7A) EC Treaty, successfully provoking the Commission to introduce a number of proposals<sup>57</sup>. Although, a positive outcome, the proposals introduced by the Commission have never been adopted.

In spite of the general approach of the EC, one must, necessarily, recognise the anomaly, created by the EC itself through the implementation of Council Regulation 1612/68 on freedom of movement for workers within the Community<sup>58</sup>, in limiting the definition of Article 39 (ex Article 48) EC Treaty to EU citizens only. As a result of which, 'an internal market, with an unified and single labour market subject to consistent and coherent rules as regards movement of persons, is not possible'<sup>59</sup>. It is necessary to be aware, however, that it is essentially the European Council, whose members act in their capacity as representatives of their own MS, who must accept the final form of any EC legislation; and thus, the noted incongruity may not be as anomalous as it first appears - for

---

<sup>52</sup> See for example Case 12/86 *Demirel v Stadt Schwabisch Gmund* [1987] ECR 3719.

<sup>53</sup> Nielsen R & Szyszczak E *The social dimension of the European Union*, 3<sup>rd</sup> Ed, Handelshøjskolens Forlag, Copenhagen, 1997.

<sup>54</sup> OJ L 217/25, 14/08/1985.

<sup>55</sup> Case 281, 283-285 & 287/85 *German, France, The Netherlands, Denmark and the UK v Commission* [1987] ECR 3245. See below for a more in-depth discussion.

<sup>56</sup> Resolution on the free movement of persons pursuant to Article 8a EEC, OJ 1993 C 255/183 cited in Hedemann-Robinson, supra n31.

<sup>57</sup> Proposal for a Council Directive on the right of third-country nationals to travel in the Community COM (95) 346; Proposal for a Council Directive on the elimination of controls on persons crossing internal frontiers COM (95) 347; Proposal for a European Parliament and Council Directive amending Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families and Directive 73/148 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services COM (95) 348. For a more in-depth discussion see for example Hedemann-Robinson, supra n31.

<sup>58</sup> OJ L 257/2, 19/10/1968.

<sup>59</sup> Guild, supra n44 at 73.

whereas the Council has favoured encouraging Member States to facilitate and enhance the integration of third country national residents within their respective domestic markets, it has consistently denied third country national residents the same level of Community law rights afforded to nationals of Member States, in particular as regards free movement rights between as opposed to merely within (host) Member States<sup>60</sup>.

### **3.2 The MSs' perspective – An immigration issue**

The granting of the right of free movement to legally long-term resident TCNs is, in the eyes of the MSs, of a rather different nature. It is clear that the MSs are not generally against involving TCNs in the completion of the internal market. This is illustrated in the case of freedom of movement of goods and freedom of movement of capital, where both the free movement of TCN goods and capital are protected under the provisions of the EC Treaty.

The EC Treaty explicitly recognises the fact that goods may be of different origin, a concept comparable to an individual's nationality. However, once any good, irrespective of its place of origin<sup>61</sup>, is in free circulation within the borders of the EU, the EC Treaty provisions on free movement of goods apply without distinction. As regards capital, the right of free movement of capital is attached to the capital itself<sup>62</sup>, irrespective of the nationality of the capital owner. Thus, a TCN has the same right to free movement of capital, both between MSs, and between MSs and third countries, as a MS national.

From the perspective of the MSs, it is the fact that 'person associated' freedom of movement rights are so contentiously caught up with the issue of immigration that has, historically, impacted heavily upon the withholding of freedom of movement rights for legally long-term resident TCNs; whereas, the 'Member States got control over security and individuals, the Community got control over corporate interests'<sup>63</sup>.

In framing the issue in terms of immigration, the granting of rights to TCNs becomes redefined as a matter of state sovereignty, for it is inherent in the idea of sovereignty that a state has the right to design, and implement, its own immigration

---

<sup>60</sup> Hedemann-Robinson, *supra* n31 at 327.

<sup>61</sup> See Articles 23 (ex Article 9) and 24 (ex Article 10) EC Treaty.

<sup>62</sup> Article 56 (ex Article 73b) EC Treaty.

<sup>63</sup> Guild E *Moving the borders of Europe: The inaugural lecture delivered during the official ceremony on the occasion of the assumption of the professorship of the CPT Wisselleerstoel at the University of Nijmegen, the Stichting Steunfonds Juridisch (Post) Doctoraal Onderwijs on 30 May 2001* at <http://www.jur.kun.nl/cmr/>, 25/01/02 at 12.

policies<sup>64</sup>. With the question of sovereignty consistently forming the foundation for numerous battles between the EC and the MSs, immigration is one right of a sovereign state that the MSs are not willing to lose a hold on. In exercising their control over the area of immigration, the MSs have adopted many an exclusive<sup>65</sup> measure, restricting<sup>66</sup> immigration into their national territory, and into the EU as a whole.

It is, incongruously, the push towards open borders within the EU which has played a role in influencing the restrictive approach of the MSs towards immigration and TCNs within Europe. As a result of the open borders concept in the EU, the issues of crime, security and TCNs have become grouped together; most visibly seen in the Union's objective of

maintain[ing] and develop[ing] the Union as an area of freedom, security and justice, in which free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime<sup>67</sup>.

This association between crime, security and TCNs has led to the construction of immigration as an issue of security<sup>68</sup>, where, consequently, TCNs have come to be viewed as a threat; for

[t]o put migration on the security agenda means that migrants become actors in a security drama ...[, t]urned into a security problem, the migrant becomes a carrier of death<sup>69</sup>.

With such a 'security rationale'<sup>70</sup> underpinning immigration policies, it is obvious, although not necessary rationale, especially in the case of legally long-term resident TCNs, as to why MSs are so reluctant to all freedom of movement to be granted to TCNs.

Although, logically, it may be assumed, that the opening of internal borders within the EU would create an incentive for MSs to converse on issues of immigration, in an attempt to deal with the issue more effectively; this, however, has not been the case. This idea has been discussed in the following terms:

---

<sup>64</sup> Guild, supra n44; Ugur M Freedom of movement vs. exclusion: A reinterpretation of the 'Insider'-'Outsider' divide in the European Union (1995) 29 *International Migration Review* 964.

<sup>65</sup> Ugur, supra n64.

<sup>66</sup> Oliveira AC 'The position of resident third-country nationals: Is it too early to grant them citizenship in La Torre M (ed) *European citizenship: an institutional challenge*, Kluwer Law International, The Hague, 1998, pp185-199; Niessen J Overlapping interests and conflicting agendas: The knocking into shape of EU immigration policies (2001) 3 *European Journal of Migration and Law* 419.

<sup>67</sup> Article 2 (ex Article B) EU Treaty.

<sup>68</sup> Guild E *Immigration law in the European Community*, Kluwer, The Hague, 2001 at 244.

<sup>69</sup> Huysmans J 'Migrants as a security problem: Dangers of 'securitizing' societal issues Miles & Thrändhardt, supra n2 at 59-60.

<sup>70</sup> Geddes A *Immigration and European integration: Towards fortress Europe*, Manchester University Press, Manchester, 2000 at 26.

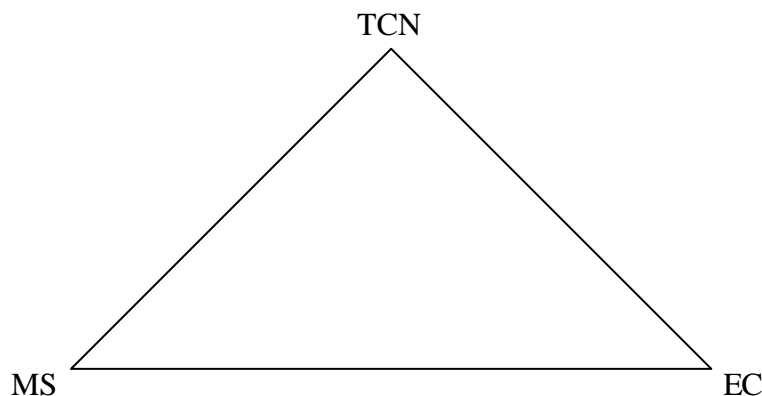
In Western Europe, the Internal Market, with the dismantling of internal border controls, gives every single member state a clear interest in the immigration policies of its fellow member states. Each state is vulnerable to the policies of the others ... One might think that this vulnerability would make immigration issues prime candidates for transference to supranational decision making. Harmonization of the immigration policy of the European Union has, however, been an arduous task. This probably has to do with what [is known as] 'the European dilemma': 'fear of their weak national position leads these countries to join forces, yet it is the same fear which holds them back'<sup>71</sup>.

---

<sup>71</sup> Brochmann G 'The mechanisms of control' in G Brochmann & T Hammar (eds) *Mechanisms of immigration control: A comparative analysis of European regulation policies*, Berg, Oxford, 1999, pp1-27 at 17.

## 4 The exclusion of TCNs with ‘fortress Europe’<sup>72</sup> – From Rome to Amsterdam

Following an examination of the way in which the issue of freedom of movement for TCNs has been defined, it is clear that the conflict between the EC and the MSs has continually supported, and strongly influenced, discussions between the EC and MSs in relation to freedom of movement rights for TCNs. As a result of the, apparently, irresolvable conflict, a structural relationship between MS, EC and TCN<sup>73</sup> has evolved. This relationship can be represented schematically<sup>74</sup>, as follows:



It is this relationship, with its conflicts, interactions and changes in dynamics, which has continually underpinned the denial of freedom of movement rights to legally long-term resident TCNs.

### 4.1 Pre-early 1980s

In the beginning years of the EC, leading up to the early 1980s, much of the activity of the Community, and the MSs with regards to the EC, was focused on economics. During this time, a dialogue between MSs and the EC, in relation to TCNs and freedom of movement, was almost non-existent, and action in this area could only be characterised by ‘inertia and reluctance’<sup>75</sup>.

---

<sup>72</sup> A term coined to refer to the ‘increasing ‘impermeability’ of Europe’ (den Boer M ‘Moving between bogus and bona fide: The policing of inclusion and exclusion in Europe Miles & Thrändhardt, *supra* n2, pp92-111 at 94) for non-EU citizens; referring both to the restricted entry for, and social exclusion of, TCNs (Geddes, *supra* n70).

<sup>73</sup> Guild, *supra* n44 and n68.

<sup>74</sup> Guild, *supra* n68 at 4.

<sup>75</sup> Ugur, *supra* n64 at 986.

It was in 1968, with the expiry of the transitional period of Article 39 (ex Article 48) EC and the introduction of secondary legislation, that the corner stones towards an intra-EC free movement was laid on the ‘basis of nationality and equal treatment’<sup>76</sup>; thus setting the groundwork for the exclusion of TCNs from the right to free movement and laying the foundations of ‘fortress Europe’<sup>77</sup>.

## 4.2 Mid 1980s – Maastricht

In 1985, following a number of failed efforts to capture the attention of the European Council, with the intent of making the Council take some form of action in relation to TCNs, and in an attempt to create an implied EC competence in the area, the Commission adopted Decision 85/311 of 8 July 1985 setting up a communication and consultation procedure on migration policies in relation to non-member countries<sup>78</sup>, arguably, ‘geared towards overcoming the inertia that had lasted for more than a decade’<sup>79</sup> in the area of responsibility of migration of TCNs. The MSs reacted swiftly and, within a week of the Commission’s Decision being published, five countries had brought an action against the Commission for, amongst other reasons, lack of competence; an argument upheld by the ECJ<sup>80</sup>. It is clear the MSs wanted to make certain the EC did not stray too far into the area of TCNs; an area of clear MS competence, which the MSs were determined would remain as such.

Although the Commission’s Decision was held to be void, the Commission did achieve some of what it set out to; action on the part of the MSs in relation to TCNs. The MSs began to act on an intergovernmental level in relation to TCNs, and freedom of movement; an approach towards freedom of movement, characterised by ad hoc structures and suffering from a lack of transparency and legitimacy; a problem typical of intergovernmental action within the EU, but an approach ‘dramatically different from that which dominated the Community’s traditional work on movement of persons’<sup>81</sup>.

It was, in this same period, that the SEA was being discussed, negotiated, adopted and implemented<sup>82</sup>; bringing the issue of TCNs squarely into the EC/MS discussion arena. Although the focus of the SEA was the creation of the internal market, ‘an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of th[e

---

<sup>76</sup> Id at 976.

<sup>77</sup> Id at 977.

<sup>78</sup> OJ L 217/25, 14/08/1985.

<sup>79</sup> Ugur, *supra* n64 at 984.

<sup>80</sup> Case 281, 283-285 & 287/85 *German, France, The Netherlands, Denmark and the UK v Commission* [1987] ECR 3245.

<sup>81</sup> Guild, *supra* n44 at 83.

<sup>82</sup> Signed in February 1986, it came into force July 1987.

EC] Treaty'<sup>83</sup>, as a consequence of the need to abolish intra-EC border controls in order to achieve the goal of the internal market, the Act also brought 'new impetus to the idea of Community citizenship and made visible the exclusion of resident third-country nationals'<sup>84</sup>. Despite many an animated discussion as to the interpretation of Article 14 (ex Article 7a) EC Treaty<sup>85</sup>, inserted into the EC Treaty by the SEA, and the subsequent rights of the EC and/or MSs to act in relation to free movement and TCNs, the MSs made it clear, however, through two declarations annexed to the SEA<sup>86</sup>, despite their legal unenforceability, which reserve and protect their sovereignty, that the MSs were in no way handing over their competence in relation to TCNs through the enactment of the SEA to the EC; the EC's power over free movement was not to be considered exclusive<sup>87</sup>.

### 4.3 Maastricht – Amsterdam

In 1993, when the Treaty of Maastricht<sup>88</sup>, or the Treaty on the European Union came into force, the EU, and the 'pillar system', was born. The Treaty of Maastricht implemented a number of important changes in relation to both freedom of movement and TCNs; it was responsible for granting complete freedom of movement to all EU citizens<sup>89</sup> and, more importantly, it created a framework, the Justice and Home Affairs Third Pillar, on an EC level, to deal with the issue of TCNs and freedom of movement<sup>90</sup>. This compromise, the result of a realisation of the weakness of pure intergovernmental cooperation characteristic of the previous time period, where coordination was clearly the only objective<sup>91</sup>, and an increase in pressures to complete the internal market<sup>92</sup>, was a strange creature.

Despite the obvious progression in the area of TCNs, with the inclusion of the issue of TCNs within the EU Treaty, there was extensive and severe criticism of the intergovernmental Third Pillar<sup>93</sup>. The Treaty provisions were criticised as

---

<sup>83</sup> Article 14 (ex Article 7a) EC Treaty.

<sup>84</sup> Kostakopoulou, supra n15 at 49.

<sup>85</sup> See for example Cremona, supra n24; Guild, supra n68; Hailbronner K Visa regulations and third country nationals in EC law (1994) 31 *Common Market Law Review* 969; Hedemann-Robinson, supra n31.

<sup>86</sup> General Declaration (No 6) on Articles 13 to 19 of the Single European Act and Political Declarations by the Governments of the Member States (No 13) on the free movement of persons.

<sup>87</sup> Hoogenboom, supra n4.

<sup>88</sup> Signed 7 February 1992, it came into force 1 November 1993.

<sup>89</sup> Fevre R Labour migration and freedom of movement in the European Union: Social exclusion and economic development (1998) 3 *International Planning Studies* 75.

<sup>90</sup> Hailbronner, supra n85.

<sup>91</sup> Guild, supra n68.

<sup>92</sup> Guild, supra n44.

<sup>93</sup> See for example Hedemann-Robinson, supra n31 and Monar J Justice and Home-Affairs in the Treaty of Amsterdam: Reform at the price of fragmentation (1998) 23 *European Law Review* 320.

being vague and indefinite, leaving much to the discretion of the MSs, as regards both means and time of implementation, and as lacking clarity, in terms of legal status. The resulting soft law instruments, which were minimal in number, due both to a lack of will and the predominance of unanimity in the cumbersome decision-making processes, can only be characterised as ad hoc reactions, to a perceived ‘crisis’<sup>94</sup>, lacking in any direct, binding legal effect. Both the intergovernmental process, and the resulting soft law, escaped public scrutiny, thus ‘increasing anonymous decision-making, and undermining transparency and public accountability’<sup>95</sup>, and the scrutiny of the EP and the ECJ, which had no jurisdiction over the Third Pillar; an issue of great democratic concern, as

the rise in intergovernmental-based soft law in the European Union in the field of immigration ha[d] direct implications for third country nationals in terms of personal liberty and evidentiary requirements relating to proof of lawful residence[, where a] number of such soft-law instruments, whilst escaping scrutiny from both the European Parliament and the European Court of Justice, ... required Member States to impose obligations on third country nationals<sup>96</sup>.

With the progression of time, such criticism was seen as being justified<sup>97</sup>, as the intergovernmental process was used by the Member State governments as a tool in their national debates on the rights of third country nationals, to legitimate the refusal to extend rights to third country nationals and thereby create a direct relationship with them<sup>98</sup>.

Of the limited number of soft law instruments that did come into being during this time<sup>99</sup>, all resolutions, the most relevant is the Council Resolution of 4 March 1996 on the status of third-country nationals residing on a long-term basis in the territory of the Member States<sup>100</sup>. This Resolution created the status of long-term resident, for those TCNs who have lived for at least 10 years in a MS<sup>101</sup>. Although these long-term residents, along with

the members of his family, should, in accordance with the legislation of the Member State in which they reside, have access to the entire territory of that Member State<sup>102</sup>,

they were not granted the right of freedom of movement<sup>103</sup>. It has been questioned as to whether the enacted resolution creates any ‘rights’ at all for

---

<sup>94</sup> den Boer, supra n72.

<sup>95</sup> Id at 93.

<sup>96</sup> Hedemann-Robinson, supra n31 at 328.

<sup>97</sup> See Leonard D In pursuit of pillar three (2000) 398 *Europe* 4; Monar, supra n93.

<sup>98</sup> Guild, supra n68 at 253.

<sup>99</sup> For example Council Resolution of 30 November 1994 relating to the limitations on the admission of third-country nationals to the territory of the Member States for the purpose of pursuing activities as self-employed persons, OJ C 274/7, 19/09/1996; Council Resolution of 30 November 1994 on the admission of third-country nationals to the territory of the Member States for study purposes, OJ C 274/10, 19/09/1996.

<sup>100</sup> OJ C 80/2, 18/03/1996.

<sup>101</sup> Paragraph III(1).

<sup>102</sup> Paragraph V(1).



TCNs, based on the fact that ‘too much is left up to the political will of individual Member States to implement their ‘soft law’ commitments’<sup>104</sup>.

During this period, the EC was also active in trying, once again, to rouse the MSs into producing more concrete results in the area of TCNs. On 30 July 1997, the Commission submitted a Proposal for a Council Act establishing the Convention on rules for the admission of third-country nationals to the Member States<sup>105</sup>. Although dealing with a number of TCN related issues, it also specifically addressed free movement rights for legally long-term resident TCNs. A clear advancement on the Council Resolution of 4 March 1996<sup>106</sup>, the proposal’s long-term resident status was met after five years of legal residency, under Article 32, half the time required under the Resolution, and, under Article 35, legally long-term resident TCNs were granted, some form of, freedom of movement rights:

A third-country national recognized as a long-term resident may:

(a) apply for employment in another Member State by answering a vacancy known to him...;

(b) apply to pursue a course of study ... in another Member State.

Despite the limitation on the right of freedom of movement for legally long-term resident TCNs<sup>107</sup>, this was a clear advancement in the area, for it was the first time that the issue had been directly addressed in either an intergovernmental, or EU/EC, soft-law instrument. This proposal was, unsurprisingly, never adopted.

## 4.4 Amsterdam

With the implementation of the Treaty of Amsterdam<sup>108</sup>, there came a new commitment to the concept of ‘an area of freedom, security and justice’<sup>109</sup>; with a ‘fundamental reconstruction’<sup>110</sup> of the provisions, and a new approach, relating to TCNs, generally. A new Title IV introduced provisions dealing with the areas of ‘visas, asylum, immigration and other policies related to free movement of persons’<sup>111</sup> into EC law. Those provisions relevant to TCNs and the granting of freedom of movement rights are set out in Appendix I. Title IV essentially brought the issue of TCNs within the scope of EC law, recognising both the fact

---

<sup>103</sup> See Peers S Undercutting integration: Developments in Union policy on third country nationals (1997) 22 *European Law Review* 76, for further criticism of this Resolution.

<sup>104</sup> Hedemann-Robinson, *supra* n31 at 353.

<sup>105</sup> COM (97) 387 final.

<sup>106</sup> Council Resolution of 4 March 1996 on the status of third-country nationals residing on a long-term basis in the territory of the Member States, OJ C 80/2, 18/03/1996.

<sup>107</sup> For a more in-depth discussion see Hailbronner, *supra* n45.

<sup>108</sup> Signed 2 October 1997, it came into force 1 May 1999.

<sup>109</sup> Article 2 (ex Article B) EU Treaty; Article 61 (ex Article 73i) EC Treaty; Leonard, *supra* n97 at 4.

<sup>110</sup> Hailbronner K The Treaty of Amsterdam & migration law (1999) 1 *European Journal of Migration and Law* 9 at 9.

<sup>111</sup> Title IV.

that legally long-term resident TCNs are a special group of concern<sup>112</sup>, and that the issue of TCNs was inextricably linked to free movement; where, in associated TCNs with the concept of free movement, there is finally clarification that ‘the scope of the internal market includes third country nationals’<sup>113</sup>.

The changes that were implemented with the Treaty of Amsterdam, and the effect and implications such changes are having, are to be examined in greater detail below.

---

<sup>112</sup> Under Article 63(4) (ex Article 63k) EC Treaty.

<sup>113</sup> Groenendijk K, Guild E & Barzilay R *The legal status of third country nationals who are long term residents in a member state of the European Union*, Centre for Migration Law, University of Nijmegen, Nijmegen, 2000 at 8.

## 5 ‘Justice cannot be limited to EU citizens only’<sup>114</sup>

Whilst the number of legally long-term resident TCNs within the EU’s borders, is not large in percentage terms, being 3-4%<sup>115</sup> of the total EU population of 379.4 million people<sup>116</sup>, as at 1 January 2002, the figure in actual terms is between 11.4 million and 15.2 million individuals<sup>117</sup>, with a large proportion of these TCNs having spent a large part, or all of<sup>118</sup>, their lives in the EU, the denial of freedom of movement to legally long-term resident TCNs leads to a concern as to the implications of such denial. The treatment of legally long-term resident TCNs, where they are ‘[i]nvisible in the eyes of the European polity, [legally long-term resident TCNs] are socially dead in the European political order’<sup>119</sup>, is, from a human and fundamental rights perspective, in violation of the principles of non-discrimination and equality of treatment, and contrary to the democratic values; principles laid down as the foundation stones of the EU, and espoused by the MSs and EC. This situation has not only obvious implications for legally long-term resident TCNs, but also important implications for the EU, EC and MSs.

### 5.1 Human rights and fundamental rights

Human and fundamental rights law is an important component of the EC legal order. Under both the EU and EC Treaties, since the enactment of Article 6 EU Treaty by the Treaty of Amsterdam, and in EC case law, since 1970, when the ECJ held that under EC law there must be respect for human rights law, that which is common to the legal traditions of the MSs<sup>120</sup>, the protection of human and fundamental rights of individuals has been recognised, and espoused, by the EU and EC. This protection of human and fundamental rights has recently been reinforced with the Charter; which, in spite of its unclear legal status, lack of enforceability and the fact that a number of its provisions are in want of substance,

---

<sup>114</sup> Hailbronner, supra n45 at 2.

<sup>115</sup> Groenendijk et al, supra n113.

<sup>116</sup> Eurostat News release 11/01/2002, Document number 3-11012002-EN-AP-EN at <http://europa.eu.int/comm/eurostat>, 05/03/2002.

<sup>117</sup> It is extremely difficult to determine exact figures of TCNs in the EU, due to the fact that not all EU countries keep independent statistics of the number of legally long-term resident TCNs within their national territory.

<sup>118</sup> Many of who may be second or third generation born within the EU who have elected not to, or, more significantly, but who are not able to (as is the case for many second and third generation born Germans, due to German naturalisation laws (see Groenendijk et al, supra n113)), become EU citizens.

<sup>119</sup> Føllesdal A *Third country nationals as Euro citizens: The case defended*, Arena Working Papers WP 98/9 at [http://www.arena.uio.no/publications/wp98\\_9.htm](http://www.arena.uio.no/publications/wp98_9.htm), 25/02/2002 at 2-3.

<sup>120</sup> Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

is a clear statement from the EU and MSs indicating observance of, at least, a minimum standard of rights of individuals<sup>121</sup>, which may be used as an interpretation tool by the ECJ<sup>122</sup>. This respect for rights extends to the EC Treaty provisions on free movement, to play an important role in both the interpretation, and application, of them<sup>123</sup>.

Within the bounds of the EU, the rights of ‘everyone within [the] jurisdiction’<sup>124</sup> of the contracting parties, including TCNs<sup>125</sup>, are safeguarded by the Council of Europe’s Convention<sup>126</sup>. Despite the fact that the EU is not, and cannot presently become<sup>127</sup>, a contracting party to the Convention, all MSs are; an issue of importance since *Matthews v United Kingdom*<sup>128</sup>, when the ECHR held an individual MS responsible for a breach of the right to vote, a fundamental human right protected under the Convention, where the actions of the MS was bolstered by Community law. The Convention is, further, the most important of human rights instruments to be referred to in determining, and examining, the common human rights laws of the MSs<sup>129</sup>.

The respect for human and fundamental rights, under both EC law<sup>130</sup> and the Convention<sup>131</sup>, includes adherence to the principles of equality of treatment and non-discrimination. This is an increasingly important issue under EC law, where, since the Treaty of Amsterdam, the Council has, also, been giving the competency to be able to ‘take appropriate action to combat discrimination’<sup>132</sup>. It is clear that excluding legally long-term resident TCNs from the right of free movement is discrimination on the ground of nationality; the question must be, however, when, if ever, is such differential treatment between EU citizens and TCNs acceptable, for

---

<sup>121</sup> Hedemann-Robinson, supra n40.

<sup>122</sup> Peers S Immigration, asylum and the European Charter of Fundamental rights (2001) 3 *European Journal of Migration and Law* 141.

<sup>123</sup> Case 36/75 *Rutili v Minstre de l’Intérieur* [1975] ECR 1753.

<sup>124</sup> Article 1 Convention.

<sup>125</sup> See *Moustaquim* Appl 12313/86, 18/02/1991.

<sup>126</sup> It is clear that that protection is also found under other international law instruments, however it is beyond the scope of the paper to explore this issue; it is the Council of Europe’s Convention which is of most importance, and will offer the greatest protection, to those within the bounds of the contracting states.

<sup>127</sup> Opinion 2/94 Accession by the Community to the European Convention of Human Rights [1996] ECR I-1759.

<sup>128</sup> Appl 24833/94, 18 February 1999.

<sup>129</sup> Article 6(2) (ex Article F) EU Treaty; Case 4/73 *Nold v Commission* [1974] ECR 503.

<sup>130</sup> As a result of Article 6 (ex Article F) EU Treaty and Article 12 (ex Article 6) EC Treaty. See also Article 21 Charter. Such protection is clearly limited with respect to discrimination on the ground of nationality as can be seen under Article 12 (ex Article 6) EC Treaty and under Article 21(2) Charter.

<sup>131</sup> Article 14 Convention. Despite the fact that Article 14 Convention does not include the ground of nationality, the ECHR has interpreted its scope as extending to do so (*Gaygusuz v Austria* Appl 17371/90, 16/09/1996).

<sup>132</sup> Article 13 (ex Article 6a) EC Treaty.

if we accept that all human beings are holders of fundamental rights and freedoms and have a natural claim to security and justice by birth, we must accept that Member States must not infringe such rights and claims of the people who fall within their jurisdictions further than necessary for the achievement of their legitimate purposes<sup>133</sup>.

The ECHR has accepted that the Community is a 'special legal order'<sup>134</sup>, which serves as 'objective and reasonable justification'<sup>135</sup> for differentiation between EU citizens and TCNs. However, the ECHR has also held that 'very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention'<sup>136</sup>. Thus, it is arguable, that the longer a legally resident TCN has been living, and has become settled and integrated, within the EU, the harder it will be to justify denial of freedom of movement rights, especially where such a denial is based on a security rationale, solely on the basis of nationality<sup>137</sup>.

## 5.2 Democratic values

The EU, and its MSs, professes to be a democratic Union; where democracy is one of the foundation principles of the EU<sup>138</sup>. In spite of such declarations, there has been much criticism of the lack of democracy that is seen to exist within the EU; termed as the 'democratic deficit'<sup>139</sup>. This lack of democracy appears to be present also in relation to the intergovernmental activity in the area TCNs, with a clear lack of transparency, public accountability, EP involvement and scrutiny by the ECJ, where 'it has traditionally been assumed that polities can introduce restrictive and discriminatory immigration policies without causing any damage to democratic principles'<sup>140</sup>.

## 5.3 A double standard legal order

As a result of the denial of freedom of movement rights to legally long-term resident TCNs, a double standard legal order has been established within the EU. It is clear that all individuals, when within the EU's borders, irrespective of

---

<sup>133</sup> Boeles P 'Introduction: Freedom, security and justice for all' in E Guild & C Harlow (eds) *Implementing Amsterdam immigration and asylum rights in EC law*, Hart, Oxford, 2001, pp 1-12 at 9.

<sup>134</sup> *Moustaquim* Appl 12313/86, 18/02/1991 at paragraph 49; *C v Belgium* Appl 21794/93, 07/08/1996 at paragraph 38.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Gaygusuz v Austria* Appl 17371/90, 16/09/1996 at paragraph 42.

<sup>137</sup> Groenendijk in 5 at 222.

<sup>138</sup> Article 6 (ex Article F) EU Treaty.

<sup>139</sup> See for example Shaw J *Law of the European Union*, 3<sup>rd</sup> Ed., Palgrave, Hampshire, 2000; Steiner J & Woods L *EC Law*, 7<sup>th</sup> Ed., Blackstone, London, 2000.

<sup>140</sup> Kostakopoulou, *supra* n15 at 10.

nationality, must not only comply with the national laws of the MS where they are, but also with EC law. However, when it comes to the right of freedom of movement and the denial of this right to legally long-term resident TCNs, this notion of the inclusion of TCNs in the EC legal system, is contradicted<sup>141</sup>; legally long-term resident TCNs have responsibilities to the internal market, without being granted the corresponding right of freedom of movement. The incongruity can further be seen in the fact, that at a MS level, many legally long-term resident TCNs have been granted a substantial number of rights, often comparable to those rights of national citizens, in many countries being only excluded from political participation, the highest of all citizenship rights, however, at an EU level, the same individuals have only been granted a minimal number of rights<sup>142</sup>, which, presently, are incomparable to those rights of EU citizens; a number of TCNs have been granted a form of derived freedom of movement rights, and all legally resident TCNs have been expressly granted a number of EC Treaty rights, based on residency status<sup>143</sup>. It is apparent, however, that these rights are extremely restricted in their scope, which in conjunction with the denial of an independent right to freedom of movement, has the effect of increasing the social and economic marginalisation, of an already marginalised group, within the Community<sup>144</sup>.

## 5.4 Implications for EC, EU and MSs

It is clear that the main implication, in denying freedom of movement to legally long-term resident TCNs, is a lack of ability to successfully complete the EC internal market; thus, hindering socio-economic development and full economic integration<sup>145</sup>. This, however, as a result of the fact that ‘the rules which govern the internal market are expressly concerned with more far-reaching interests than purely economic ones’<sup>146</sup>, cannot be seen to be the only implication, and, from a human and fundamental rights perspective, freedom of movement being a fundamental right under EC law<sup>147</sup>, is not the most important.

---

<sup>141</sup> Oliveira, supra n66.

<sup>142</sup> Føllesdal, supra n119; Levelt U ‘The EU as a political community through the lens of immigration policy’ in M Martiniello (ed) *Migration, citizenship and ethno-national identities in the European Union*, Avebury, England, 1995, pp199-212.

<sup>143</sup> The EC Treaty grants the right to petition the EP (Article 194 (ex Article 138d) EC Treaty), to complain to the Ombudsmen (Article 195 (ex Article 138e) EC Treaty) and to access documents (Article 255 (ex Article 191a) EC Treaty) to legally resident TCNs. These rights, however, are only procedural, not substantive, rights (Oliveira, supra n75); being enforceable against an EU body, in relation to their own action, or inaction, but not creating a personal right, as such.

<sup>144</sup> Melis B *Negotiating Europe’s immigration frontiers*, Kluwer Law International, The Hague, 2001; Vandamme F Labour mobility within the European Union: Findings, stakes and prospects (2000) 139 *International Labour Review* 437.

<sup>145</sup> Hedemann-Robinson, supra n31; Niessen, supra n66.

<sup>146</sup> Hoogenboom, supra n4.

<sup>147</sup> Ibid.

Following from the above discussion, in not granting freedom of movement rights to legally long-term resident TCNs, there is not only a direct collision with the Convention<sup>148</sup>, but such action is also in breach of Article 10 (ex Article 5) EC Treaty, where it is clear, the denial of freedom of movement rights to legally long-term resident TCNs is not within the spirit of the founding principles of the EU, values advocated by the EC and MSs, found in Article 6 (ex Article F) EU Treaty. Despite the fact that the prohibition against discrimination on the grounds of nationality offered by Article 12 (ex Article 6) only applies ‘without prejudice to any special provisions’<sup>149</sup> within the EC Treaty, such manifest discrimination against TCNs on the basis of nationality clearly ‘flies in the face’<sup>150</sup> of the principles of the Community.

Although it may be unlikely, that an action on such grounds, would succeed, it is blatantly clear that such a claim would negatively impact upon the EU/EC’s and MS’s reputation, ‘damag[ing] Europe’s image as a defender of human rights’<sup>151</sup>.

---

<sup>148</sup> Evans A Third country nationals and the Treaty on European Union (1994) 5 *European Journal of International Law* 199.

<sup>149</sup> Article 12 (ex Article 6) EC Treaty.

<sup>150</sup> Hedemann-Robinson, supra n31 at 348.

<sup>151</sup> Niessen, supra n66 at 419.

## 6 The move towards freedom of movement rights for legally long-term resident TCNs

On realising the effect the denial of freedom of movement rights has on legally long-term resident TCNs, the EU, the EC and MSs, progress towards the granting of freedom of movement rights to legally long-term resident TCNs needs to be ensured. With the conflict between the EC and MSs lying at the centre of the issue of granting freedom of movement rights to legally long-term resident TCNs, it is clear that freedom of movement will only be granted legally long-term resident TCNs when there is a resolution of the conflict; a resolution unlikely to be reached unless there is a change in the way in which freedom of movement for legally long-term resident TCNs is addressed, and an appropriate legal framework exists to support such an approach.

It may be suggested, that simple progression of time will be enough to ensure the granting of freedom of movement rights to legally long-term resident TCNs, considering the progress that has been made in this area, however, one ‘should not blithely assume that the EU is locked into some kind of trajectory of which the endpoint is a common immigration and asylum policy’<sup>152</sup>. Although the EC has finally gained competency over TCNs, as a result of the Treaty of Amsterdam, the Community has inherited a pre-established framework in relation to freedom of movement rights for legally long-term resident TCNs<sup>153</sup>, which is founded on the principles of denial and exclusion. Further, despite the transfer of competency to the EC, there is continued involvement of the MSs, as a result of Title IV, through the Council, representing the will of the MSs, and in the implementation of Community law, for unless the law is in the form of an EC regulation, it falls to the MSs to enact the EC law as a national law. Thus, it is unlikely legally long-term resident TCNs will be granted freedom of movement rights unless there is a change in the approach perspective, influencing the construction of a positive approach towards freedom of movement for legally long-term resident TCNs, and pressuring the MSs to implement such an approach.

### 6.1 A new approach – A rights-based approach

In spite of the aim of freedom of movement within the EU being the completion of the internal market, the actual right to freedom of movement is essentially a fundamental right belonging to an individual<sup>154</sup>. It is this human and fundamental

---

<sup>152</sup> Geddes, *supra* n70 at 43.

<sup>153</sup> *Id.*

<sup>154</sup> Hoogenboom, *supra* n4.



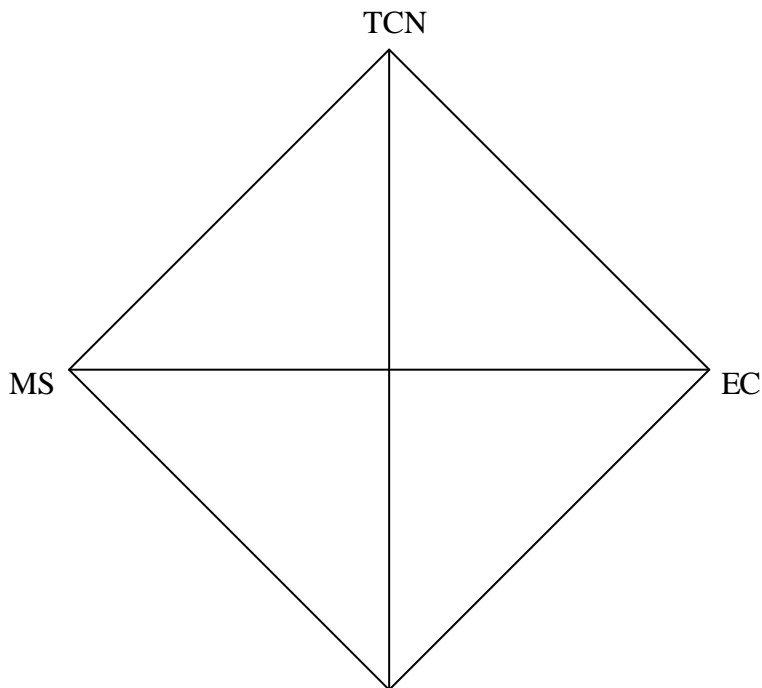
rights perspective that has historically been absent from the approach to freedom of movement of legally long-term resident TCNs; with the EC viewing TCNs as a commodity, whose free movement is a necessity in ensuring the goal of the internal market becomes a reality, and the MSs viewing them as a security threat, to be both restricted and socially excluded from, and in, 'fortress Europe'. Yet, it is from such a rights-based perspective that it becomes clear that legally long-term resident TCNs should be granted freedom of movement rights.

In actively framing freedom of movement for legally long-term resident TCNs as a rights issue, the likelihood exists that the conflict between the EC and the MSs, in terms of both classification and competence, will finally be diffused. In viewing freedom of movement for legally long-term resident TCNs as a human and fundamental rights issue, the discussion is taken outside of the bounds of an internal market versus security debate, into a separate realm, where, as a result of the nature of human and fundamental rights<sup>155</sup>, a compromise between the EC and MSs is more likely to be reached; neither the EC, nor the MSs, will wish to be labelled as a violator of human and fundamental rights, and the MSs are less likely to feel the EC is attacking their sovereignty. To the extent that human and fundamental rights are not absolute, such an approach will also allow for the security concerns of the MSs to be taken into consideration, and respected, in the granting of freedom of movement rights to legally long-term resident TCNs. Most importantly, a human and fundamental rights perspective will act as a check and balance on any action that is taken, in order to ensure that it is rights compliant, and that legally long-term resident TCNs are treated as individuals deserving of rights.

In altering the perspective of freedom of movement for legally long-term resident TCNs, to include human and fundamental rights as a guiding principle, the structural relationship, as defined above, takes on a new form; with the interaction being between the EC, MS, TCN and human and fundamental rights. Schematically, this new relationship is represented as follows:

---

<sup>155</sup> Ugur, *supra* n64.



### Human and Fundamental Rights

Interestingly, since 1998<sup>156</sup>, despite no obvious acknowledgement of the fact and a possible lack of awareness as to the effect such a move could have, a shift in the

---

<sup>156</sup>In December 1998, prior to the implementation of the Treaty of Amsterdam, the Council and Commission published, what has come to be known as, the Vienna Action Plan (Council and Commission Action Plan of 3 of the European December 1998 on how best to implement the Communities provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice, OJ C 19/1, 23/01/1999). This Action Plan addressed the issue of 'how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice', through defining the concepts of freedom, security and justice and setting down those objectives which have priority in achieving the so desired area. It is clear, that it is at this point in time, even before the Treaty of Amsterdam came into force, that there is the beginnings of a shift in approach by the EC, and an awareness of the need to recognise, and protect, the rights of individuals; with 'an area of freedom' being defined as 'not only ensuring the free movement of persons ... but also protecting fundamental rights and combating all forms of discrimination' (at paragraph 2). In November 2000, the Communication from the Commission to the Council and the European Parliament on a Community Immigration Policy (Communication from the Commission to the Council and the European Parliament on a Community immigration policy COM (2000) 757 final) was published. Again the Commission grounded the discussion in the discourse of rights:

'The European Union is by its very nature a pluralistic society enriched by a variety of cultural and social traditions, which will in the future become even more diverse. There must, therefore be respect for cultural and social differences but also of our fundamental shared principles and values: respect for human rights and human dignity, appreciation of the value of pluralism and the recognition that membership of society is based on a series of rights but brings with it a number of responsibilities for all of its members be they nationals or migrants.' (at paragraph 19) The Economic and Social Committee, for the most part, supported this Communication, however, they sought an even stronger, and more explicit, commitment to guaranteeing the rights of TCNs, based on the Charter (Opinion of the

EC's approach towards freedom of movement rights for legally long-term resident TCNs has become apparent, with the EC engaging in a discourse of rights, and employing a language of fairness and justice, in framing the issue; in essence, grounding its discussions in a rights-based approach:

A common approach must ... be developed to ensure the integration into our societies of those third country nationals who are lawfully resident in the Union ... The European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens. It should also enhance non-discrimination in economic, social and cultural life and develop measures against racism and xenophobia ... The legal status of third country nationals should be approximated to that of Member States' nationals. A person who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens ...<sup>157</sup>

This move towards an EC rights-based approach becomes more apparent on an examination of the Charter, which from the perspective of TCNs, it is a positive development. The majority of rights are universally guaranteed, and importantly, the Charter is 'at least a modest recognition of the extent to which many aspects of migration law are now 'rights-based'',<sup>158</sup>, as can be seen in the terms of Article 45, which, in spite of its non-committal language, frames freedom of movement for legally long-term resident TCNs in a rights-based approach:

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.

---

Economic and Social Committee on the 'Communication to the Council and the European Parliament on a Community immigration policy (COM (2000) 757 final)' SOC (2001) 66). It is, however, at the Tampere European Council, the first European Council following the implementation of the Treaty of Amsterdam, that this discourse of rights, and the language of fairness and justice, became prominent (Harlow C 'Endpiece' in Guild & Harlow, supra n133, pp 309-318): 'From its very beginning European integration has been firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law ... The European Union has already put in place for its citizens the major ingredients of a shared area of prosperity and peace: a single market, economic and monetary union, and the capacity to take on global political and economic challenges. The challenge of the Amsterdam Treaty is to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all ... This freedom should not ... be regarded as the exclusive preserve of the Union's own citizens.' (Presidency conclusions: Tampere European Council 15 and 16 October 1999, SN 200/99, 16/10/1999 at paragraphs 1-3). These commitments have recently been reaffirmed at the Laeken European Council in December 2001 (Presidency conclusions: European Council meeting in Laeken 14 and 15 December 2001, SN 300/01, 15/12/2001).

<sup>157</sup> Commission of the European Communities Commission Presidency conclusions: Tampere European Council 15 and 16 October 1999, SN 200/99, 16/10/1999 at paragraphs 4,18 and 21.

<sup>158</sup> Peers, supra n122 at 167.

2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.

With the EC introducing such a human and fundamental rights perspective into the relationship between itself, the MSs and TCNs, the issue of freedom of movement for legally long-term resident TCNs has progressed from an internal market versus immigration discussion, to focussing on legally long-term resident TCNs as individuals, who have a right to non-discriminatory and equal treatment.

## 6.2 The legal framework – The Treaty of Amsterdam

Having outlined the parameters for an approach leading towards the granting of freedom of movement rights to legally long-term resident TCNs, it is clear that such a change in approach would not, in, and of, itself, be sufficient unless there is also an adaptation in the legislative approach framework; without an appropriate structure, allowing for amendments to be implemented, a change in perspective would be rendered meaningless. Despite the substantial, and clearly progressive, amendments made to the EU and EC Treaty provisions relating to TCNs, by the Treaty of Amsterdam, it is necessary to determine whether the resultant framework will be supportive of a rights-based approach to freedom of movement for legally long-term resident TCNs; thus, providing the foundation for the achievement of the goal of freedom of movement rights for legally long-term resident TCNs.

Despite the obvious progression in transferring the issue of TCNs to within the scope of EC law, on an examination of the provisions of Title IV, the relocation of the issue of TCNs from intergovernmental to supranational is neither clear-cut, nor simple, nor a construction previously seen under EC law; for, in essence TCNs have become a ‘domain simultaneously assigned to both the Member States and the Community’<sup>159</sup>. Essentially, there is to be a gradual process of transfer of competency, from the MSs to the EC, in the area of TCNs, where, during a five year transitional period, the MSs retain a right of initiative for legislative acts. Following the end of the transitional period<sup>160</sup>, the MSs lose this right of initiative, leaving the Commission in control; although a MS may still submit a proposal to the Commission, who has a duty to examine it<sup>161</sup>.

Although the EC Treaty demands that most of the action required under Title IV must be taken within the five year transitional period, this does not apply in

---

<sup>159</sup> Hailbronner, supra n110 at 15.

<sup>160</sup> In 2004.

<sup>161</sup> Article 67(2) (ex Article 73o) EC Treaty.

respect of ‘defining the rights and conditions under which nationals of third countries are legally resident in a Member State may reside in other Member States’<sup>162</sup>. Despite the clear disadvantage in this, most importantly, action in relation to legally resident TCNs and freedom of movement is explicitly included under Title IV, and, it is possible, that due to the substantial amount of general action currently required under Title IV it will be seen as advantageous to deal with TCN issues together<sup>163</sup>. In spite of the suggestion that ‘it is highly likely that a considerable period of time will elapse before any substantive changes are made to the existing *acquis* on TCN residents’<sup>164</sup>, action is already being taken by the Commission as regards legally long-term resident TCNs and their rights<sup>165</sup>.

As a result of Title IV, both the ECJ and EP, vocal advocates for TCN rights and important guarantors of democratic rights, are granted rights of involvement in relation to TCNs; important supports for a rights-based approach. For the first time, the ECJ has been granted the right to scrutinise both the interpretation of the EC Treaty and any related Community acts in relation to TCN provisions. Clearly serving as a greater guarantee of the rule of law, uniform interpretation of the law<sup>166</sup> and legal protection for individuals<sup>167</sup>, matters of great concern in relation to TCN issues, the actual involvement of the ECJ in Title IV is, however, limited<sup>168</sup>. Under Article 68(1) (ex Article 73p) EC Treaty, only a national court of final instance may seek a preliminary ruling by the ECJ on questions related to Title IV, if the court, for the court to hand down its judgement, deems such an interpretation necessary. This has important implications, for

[t]here are very few possibilities for an individual to directly challenge Community legislation before the European Court[, and t]he limitation of preliminary rulings further reduces the possibility of obtaining effective protection against Community regulations which allegedly are in violation of fundamental rights<sup>169</sup>.

This limitation is of further concern, as it remains to be seen to what extent Title IV, and legislative acts implemented under the Title, will be directly effective, and thus directly enforceable under national law in national courts<sup>170</sup>.

---

<sup>162</sup> Article 63(4) (ex Article 73k) EC Treaty.

<sup>163</sup> A view which may be supported by the Vienna Joint Action Plan (Council and Commission Action Plan of 3 of the European December 1998 on how best to implement the Communities provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice, OJ C 19/1, 23/01/1999).

<sup>164</sup> Hedemann-Robinson, *supra* n40 at 529.

<sup>165</sup> See discussion below.

<sup>166</sup> Foblets MC Europe and its aliens after Maastricht: The painful move to substantive harmonization of member-states’ policies towards third-country nationals (1994) 42 *American Journal of Comparative Law* 783.

<sup>167</sup> *Ibid.*

<sup>168</sup> Peers S Who is watching the watchmen? The judicial system of the “Area of Freedom, Security and Justice” (1998) 18 *Yearbook of European Law* 337.

<sup>169</sup> Hailbronner, *supra* n110 at 19.

<sup>170</sup> Gortazar C ‘Abolishing border controls: Individual rights and common control of EU external borders in Guild & Harlow, *supra* n133.

Both the role of the ECJ, as its powers of review under Title IV, and that of the EP, indirectly through the possibility for the co-decision procedure, under Article 251 (ex Article 189b) EC Treaty, to be adopted as governing Title IV, is open to assessment, and expansion, at the end of the transition period<sup>171</sup>. Although it is unclear if, and when, such changes will occur, based on the requirement of unanimity of the Council in implementing such changes, and the general position of the MSs in relation to EC involvement in the area of TCNs, the adoption of Article 251 (ex Article 189b) EC Treaty as the governing decision-making procedure, and, thus, the increased involvement of the EP, appears to be a possibility; with Declaration 5, adopted at the recent Conference in Nice, stating:

... The Council will, moreover, endeavour to make the procedure referred to in Article 251 applicable from 1 May 2004 or as soon as possible thereafter to the other areas[, including adopting the measures referred to in Article 63(4),] covered by Title IV or parts of them<sup>172</sup>.

One clear advantage the transferral of the area of TCNs to the EC Treaty and the increase in involvement of both the ECJ and the EP has had, is an increase in the transparency and accountability in the area of TCNs; the lack of which, had been repeatedly criticised in relation to the, previously existing, intergovernmental decision-making processes in this area. With a commitment to implementing the aim that '[t]he area of freedom, security and justice should be based on principles of transparency and democratic control'<sup>173</sup>, the Tampere European Council introduced the concept of 'the scoreboard', requiring the Commission to submit a bi-annual report reviewing the progress towards making the EU an area of 'freedom, security and justice'<sup>174</sup>.

In reaching the eventual compromise on the issue of TCNs, resulting in the implementation of Title IV, the negotiations and positions and interests, which, necessarily, had to be considered and addressed, were numerous<sup>175</sup>. Ultimately, not all MSs could be satisfied, and rather than stalling completely the implementation of provisions relating to TCNs, the United Kingdom and Ireland, and Denmark secured exemptions, in the form of protocols attached to the EC Treaty<sup>176</sup>, from the application of Title IV<sup>177</sup>; thus, the provisions of Title IV do

---

<sup>171</sup> Article 67(2) (ex Article 73o) EC Treaty.

<sup>172</sup> Treaty of Nice at 78.

<sup>173</sup> Commission of the European Communities Presidency conclusions: Tampere European Council 15 and 16 October 1999, SN 200/99, 16/10/1999 at paragraph 7.

<sup>174</sup> See Communication from the Commission to the Council and the European Parliament: Biannual update of the scoreboard to review progress on the creation of an area of "freedom, security and justice" in the European Union (Second half of 2001), COM (2001) 628 for the latest update of 'the scoreboard'.

<sup>175</sup> See for example Gortazar, *supra* n170.

<sup>176</sup> Protocol on the position of the United Kingdom and Ireland; Protocol on the position of Denmark.

<sup>177</sup> Monar, *supra* n93.

not apply to all MSs equally. In spite of the fact that the protocols were ‘the price that had to be paid to realise a transfer of immigration and asylum affairs from the – intergovernmental – Union legal order to the – supranational – Community legal order’<sup>178</sup>, they may, not only, have the effect of depriving TCNs, in the United Kingdom and Ireland, and Denmark, of freedom of movement rights granted by Title IV legislation, but they also ‘allow, in part, a variable geometry to take place with regard to what can be classed as the substantive hard core of Community law: the Internal Market’<sup>179</sup>.

Although the changes made by the Treaty of Amsterdam are open to criticism, they are a clear advancement on the previous frameworks existing to address the issue of TCNs, both in relation to their ‘range and legal quality and potential effectiveness’<sup>180</sup>, and from an individual rights perspective, where provision now exists for the EC to be able to legislate in relation to granting legally resident TCNs freedom of movement rights, not as dependents associated with an EU national, but as individuals who possess rights of their own.

---

<sup>178</sup> Staples H *The legal status of third country nationals resident in the European Union*, Kluwer Law International, The Hague, 1999 at 172.

<sup>179</sup> *Id* at 173.

<sup>180</sup> Monar, *supra* n93 at 327.

## 7 Securing freedom of movement for TCNs

As a result of the continued involvement of the MSs, and the ‘artificial split between communitarised and non-communitarised areas’<sup>181</sup>, under Title IV, in working within the bounds of Title IV, the EC faces a difficult task in trying to implement legislation granting freedom of movement rights to TCNs, under Article 63(4) (ex Article 73k) EC Treaty, as has been, and is, the Community’s goal. In working towards achieving this goal, the EC has consciously changed its approach towards free movement for legally long-term resident TCNs, as is discussed above. This rights-based approach is not only prominent in the dialogues and discussions that are taking place, however, but also in current legislative proposals.

Despite there being no necessity for the EC to act in the area of rights for legally long-term resident TCNs during the transitional period under Title IV, the Commission has already taken action towards granting freedom of movement rights to legally long-term resident TCNs, which belong to the legally long-term resident TCN as an individual, with the introduction of a proposal for a Council Directive concerning the status of third-country nationals who are long-term residents<sup>182</sup>. Such positive rights-based action has not only been limited to this one proposal, however, with the Commission also submitting proposals to secure greater protection of the rights of those TCNs already possessing some form of freedom of movement rights. There is moreover, a realisation that protection of equality and non-discrimination must be actively, and generally, ensured within the EU.

The proposal for a Council Directive concerning the status of third-country nationals who are long-term residents aims at establishing a uniform EU long-term residence status for legally long-term resident TCNs. The proposed Directive establishes the conditions, and procedures, for acquiring the status and sets out those rights to be gained once the status of long-term resident is held. The status of long-term resident is to be granted to those TCNs who have ‘legally and continuously resided for five years in the territory of the Member State concerned’<sup>183</sup> and, once obtained, ensures equal treatment in an extensive number of areas, including the ‘recognition of diplomas, certificates and other qualifications issued by a competent authority’<sup>184</sup>.

---

<sup>181</sup> Id at 326.

<sup>182</sup> COM (2001) 127 final.

<sup>183</sup> Article 5(1).

<sup>184</sup> Article 12(1)(c).



With the proposed Directive, the right of freedom of movement for legally long-term resident TCNs, is finally addressed; extending from freedom of movement for workers and freedom of establishment, to include freedom of movement for students and those financially self-sufficient<sup>185</sup>. As is made clear in the Explanatory Memorandum, the time is more than ripe:

The Commission considers that full integration also entails the right for long-term residents to reside in other Member States and that the time has come to implement Article 63(4) of the EC Treaty. A genuine area of freedom, security and justice, a fundamental objective of the European Union, is unthinkable without a degree of mobility for third-country nationals residing there legally, and particularly for those residing on a long-term basis. It must also be stressed that Article 45 of the Charter of Fundamental Rights of the European Union confirms that "freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third-countries legally resident in the territory of a Member State" ... The Commission is aware of the importance of the task it has set itself; there are no relevant provisions in Community law as it stands ... This situation is discriminatory in relation to citizens of the Union who, under the Treaty and the current secondary legislation, enjoy the freedom of movement of persons<sup>186</sup>.

The relevant provisions of the proposed Directive are contained in Appendix II. The proposed Directive is, impressively, progressive and grants legally long-term resident TCNs protection of a wide number of rights<sup>187</sup>, guarantees a right of accompaniment for family members<sup>188</sup>, explicitly limits a MS's right of refusal<sup>189</sup> and withdrawal<sup>190</sup> of residency to a specified number of clearly defined grounds, and establishes a number of procedural guarantees<sup>191</sup>.

The right of freedom of services has been specifically addressed in two separate proposals. The first deals with the right of a EU company to post employees who are TCNs in another MS in the provision of services<sup>192</sup>. This is a codification of the ECJ case law on this area<sup>193</sup>, and adds little in terms of rights for individual TCNs. The second proposal addresses the issue of the right of freedom of

---

<sup>185</sup> Article 16(1).

<sup>186</sup> Paragraphs 5.6—5.8.

<sup>187</sup> Article 12.

<sup>188</sup> Article 18.

<sup>189</sup> Articles 19 and 20.

<sup>190</sup> Article 25.

<sup>191</sup> Article 22.

<sup>192</sup> Proposal for a Directive of the European Parliament and of the Council on the posting of workers who are third-country nationals for the provision of cross-border services COM (99) 3 final, as amended by COM (2000) 271 final.

<sup>193</sup> Case C-113/89 *Rush Portuguesa* [1990] ECR 1439; Case C-43/93 *Van der Elst* [1994] ECR I-3808.

services to TCN companies established in the EU<sup>194</sup>, and, although broadening the right of TCNs, it is also less rights-based, depending on Article 49(2) (ex Article 59) EC Treaty for its legal basis. In spite of the fact both proposals are not framed in the language of rights, they do offer formal legal protection for TCNs engaged in cross-border service provision, and guarantee ‘recognition of diplomas, certificates and other qualifications acquired within the Community’<sup>195</sup>, related to the activity to be carried out.

Proposed amendments to existing freedom of movement rights for TCNs, further act to support freedom of movement rights for TCNs, as they recognise, and address, issues of existing concern in the protection of rights of individual of TCNs. The proposed expansion of the definition of family members who may accompany an EU citizen exercising their freedom of movement right<sup>196</sup> will mean that it will no longer only be spouses who have the right of accompaniment, but this right will be extended to include unmarried partners<sup>197</sup>. The concern for the lack of rights of a TCN, who has accompanied an EU national, in not being able to remain in that MS after the death of the EU national or collapse of the relationship, has been formally recognised, and is being addressed; with such TCNs to retain their right of residence, subject to the TCN being able to prove financial independence<sup>198</sup>. It is, furthermore, proposed that social security protection offered in Council Regulation 1408/71 be extended to all TCNs who have previously been denied its protection, based solely on the grounds of their nationality<sup>199</sup>; in order to satisfy ‘the requirement of equal treatment of Community citizens and third country nationals legally resident in the Community’<sup>200</sup>.

In 1997, the European Monitoring Centre on Racism and Xenophobia was established in Vienna, with the aim that it would assist in combating racism,

---

<sup>194</sup> Proposal for a Council Directive extending the freedom to provide cross-border services to third-country nationals established within the Community COM (99) 3 final.

<sup>195</sup> Article 3(4) in both Proposal for a Directive of the European Parliament and of the Council on the posting of workers who are third-country nationals for the provision of cross-border services COM (99) 3 final and Proposal for a Council Directive extending the freedom to provide cross-border services to third-country nationals established within the Community COM (99) 3 final.

<sup>196</sup> Which at present is defined in Article 10 Council Regulation 1612/68 on freedom of movement for workers within the Community, OJ L 257/2, 19/10/1968, and Article 1 Council Directive 73/148 of 21 May 1973 on the abolition of restrictions of movement and residence within the community for nationals of Member States with regard to establishment and the provision of services, OJ L 172/14, 28/06/1973.

<sup>197</sup> Article 2(2) Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States COM (2001) 257 final. This proposal will actually repeal both Council Directive 73/148 and Articles 10 and 11 Council Regulation 1612/68.

<sup>198</sup> Articles 12 and 13.

<sup>199</sup> Proposal for a Council Regulation extending the provisions of Regulation 1408/71 to nationals of third countries who are not already covered by these provisions solely on the ground of their nationality COM (2002) 59 final.

<sup>200</sup> Id at 2.

xenophobia and anti-Semitism within the EU<sup>201</sup>, and promote a non-discriminatory, pluralistic society. With the EC Treaty, since the Treaty of Amsterdam, containing provision for the EC to be able to ‘take appropriate action to combat discrimination’<sup>202</sup>, the EC was able to introduce Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin<sup>203</sup>; creating a legal framework in which European Monitoring Centre on Racism and Xenophobia can operate. In charging this agency with the task of actively observing and implementing the protection of rights, and implementing the Directive, the EC is visibly acting to ensure the protection of rights of minority groups within the EU who are discriminated against, including legally long-term resident TCNs.

---

<sup>201</sup> Council Regulation 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, OJ L 151/7, 10/06/1997.

<sup>202</sup> Article 13 (ex Article 6a) EC Treaty.

<sup>203</sup> OJ L 180/22, 19/07/2000.

## 8 Conclusion – Towards a rights-based approach?

As of today, despite the fact legally long-term resident TCNs do not possess individual freedom of movement rights, the outlook for legally long-term resident TCNs being granted such rights is extremely different to that which existed previously.

This positive expectation is due to the fact that the conflict, which has been at the centre of the denial of free movement rights to legally long-term resident TCNs, between the EC and the MSs, as to whether legally long-term resident TCNs should be granted freedom of movement rights, how should such rights be classified and, based on such a classification, who has the competence to act, is finally being addressed. No longer is the approach to the granting freedom of movement rights to legally long-term resident TCNs caught up in the rhetoric of the internal market and immigration, there having been a realisation that freedom of movement rights for legally long-term resident TCNs can no longer remain divorced from issues of human and fundamental rights.

As a result of this shift in approach by the EC, towards a rights-based approach, and the implementation of a legal framework, the Treaty of Amsterdam, capable of supporting such an approach, there is now an active move towards granting legally long-term resident TCNs freedom of movement rights; as evidenced by recent Commission proposals.

Although none of the proposals have, to date, been accepted by the Council, in basing its approach on a rights-based model, and in employing a discourse of rights, the EC is placing the MSs between a rock and a hard place; where they must either adopt the rights-based legislation, or face the consequences as being seen to be in clear violation of recognised human rights standards. What is to be hoped for now, is

a transformation of the political will of the Member States of the Union into positive action on the terms advocated by the other institutions, and that the establishment of a distinct, properly codified status for [legally long-term resident TCNs] concerned may become legally possible in the near future<sup>204</sup>.

With the realisation of this aspiration, the Union, and the MSs, will be one step closer towards being applauded as being respectful of, and loyal to, human and

---

<sup>204</sup> Vila Costa B 'The quest for a consistent set of rules governing the status of non-Community nationals' in Alston P (ed) *The European Union and human rights*, OUP, Oxford, 1999, pp 411-446 at 436.

fundamental rights traditions, and supportive of the goal of a pluralistic society; and, most significantly, legally long-term resident TCNs will finally be granted the right to freedom of movement.

# Appendix I

## Relevant Title IV Provisions

### Article 61 (ex Article 73i)

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

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

### Article 63 (ex Article 73k)

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

(4) measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.

Measures adopted by the Council pursuant to [point] ... 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements.

Measures to be adopted pursuant to [point] ... 4 shall not be subject to the five year period referred to above.

### Article 67 (ex Article 73o)

1. During a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament.

2. After this period of five years:

- the Council shall act on proposals from the Commission; the Commission shall examine any request made by a Member State that it submit a proposal to the Council;

- the Council, acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas covered by this Title to be governed by the procedure referred to in Article and adapting the provisions relating to the powers of the Court of Justice.

...

**Article 68 (ex Article 73p)**

1. Article 234 shall apply to this Title under the following circumstances and conditions: where a question on the interpretation of this Title or on the validity or interpretation of acts of the institutions of the Community based on this Title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

...

3. The Council, the Commission or a Member State may request the Court of Justice to give a ruling on a question of interpretation of this Title or of acts of the institutions of the Community based on this Title. The ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become *res judicata*.

**Article 69 (ex Article 73q)**

The application of this Title shall be subject to the provisions of the Protocol on the position of the United Kingdom and Ireland and to the Protocol on the position of Denmark and without prejudice to the Protocol on the application of certain aspects of Article 14 of the Treaty establishing the European Community to the United Kingdom and to Ireland.

# Appendix II

Chapter III Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents COM (2001) 127 final.

## **Article 12**

### **Equal treatment**

1. Long-term residents shall enjoy equal treatment with nationals as regards:

(a) access to employment and self-employed activity, provided such activities do not entail even occasional involvement in the exercise of public authority, and conditions of employment and working conditions, including conditions regarding dismissal and remuneration;

(b) education and vocational training, including study grants;

(c) recognition of diplomas, certificates and other qualifications issued by a competent authority;

(d) social protection, including social security and health-care;

(e) social assistance;

(f) social and tax benefits;

(g) access to goods and services and the supply of goods and services made available to the public, including housing;

(h) freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations;

(i) free access to the entire territory of the Member State concerned.

2. Member States may extend the benefit of equal treatment to matters not referred to in paragraph 1.

## **Article 15**

### **Principle**



1. A long-term resident may exercise the right of residence in the territory of Member States other than the one which granted him the status, for a period exceeding three months, as provided by this Chapter.

2. This Chapter does not concern the residence of long-term residents in the territory of the Member States:

(a) as employed workers posted by a service provider for the purposes of cross-border provision of services; or

(b) as providers of cross-border services.

## **Article 16**

### **Conditions**

1. The exercise of the right of residence in a second Member State by a long-term resident shall be subject to compliance with the following conditions:

(a) exercise of an economic activity in an employed or self-employed capacity; or

(b) pursuit of studies or vocational training, and possession of adequate resources available to avoid becoming a burden on the second Member State during the period of residence and sickness insurance covering all risks in the second Member State; or

(c) possession of adequate resources available to avoid becoming a burden on the second Member State during the period of residence and sickness insurance covering all risks in the second Member State.

2. Long-term residents exercising the right of residence in a second Member State as worker in an employed or self-employed capacity shall retain their status as workers if:

(a) they sustain a temporary incapacity for work as a result of illness or accident;

(b) they are unemployed and entitled to unemployment benefits; in this case, the status of worker shall be retained as long as such entitlement subsists;

(c) they embark on vocational training. Unless they are in a state of involuntary unemployment, the retention of worker status depends on the existence of a relation between the previous occupational activity and the training concerned.

## **Article 17**

### **Checks on conditions for the exercise of the right of residence**

1. No later than three months after entering the territory of the second Member State, the long-term resident shall apply to the competent authorities of that Member State for a residence permit.

2. To check for compliance with the conditions provided for by Article 16(1)(a), the second Member State may ask the persons concerned to present with their application for a residence permit:

(a) their long-term resident's permit and an identity document; and

(b) evidence that they have an employment contract or a statement by the employer that they are hired, or that they exercise an economic activity in a self-employed capacity, or that they have the resources needed to exercise an economic activity in a self-employed capacity, together with a detailed description of that activity.

3. To check for compliance with the conditions provided for by Article 16(1)(b), the second Member State may ask the persons concerned to present with their application for a residence permit:

(a) their long-term resident's permit and an identity document; and

(b) evidence of enrolment in an accredited establishment in order to pursue studies or vocational training;

(c) evidence that they have adequate resources and sickness insurance covering all risks in the second Member State.

4. To check for compliance with the conditions provided for by Article 16(1)(c), the second Member State may ask the persons concerned to present with their application for a residence permit:

(a) their long-term resident's permit and an identity document; and

(b) evidence that they have adequate resources and sickness insurance covering all risks in the second Member State.

## **Article 18**

### **Family members**

1. Members of the family, as already constituted in the first Member State, shall have the right to accompany or join a long-term resident who has exercised his right of residence in a second Member State. No later than three months after

entering the territory of the second Member State, the family members shall apply to the competent authorities of that Member State for a residence permit.

2. The second Member State may ask the family members concerned to present with their application for a residence permit:

(a) their long-term resident's permit or residence permit and an identity document; and

(b) evidence that they have resided as member of the family of the long-term resident in the first Member State; and

(c) evidence that they have adequate resources and sickness insurance covering all risks in the Second Member State or that the long-term resident has such resources and insurance for them.

3. Where the family was not already constituted in the first Member State, Directive .../.../EC [on the right to family reunification] shall apply.

## **Article 19**

### **Public policy and domestic security**

1. Member States may refuse applications for residence from long-term residents or family members where the personal conduct of the person concerned constitutes an actual threat to public order or domestic security.

2. Criminal convictions shall not in themselves automatically warrant the refusal referred to in paragraph 1. Such a refusal may not be founded on economic considerations.

## **Article 20**

### **Public health**

1. The only diseases or infirmities that may justify a refusal to allow entry or the right of residence in the territory of a Member State shall be the quarantinable diseases referred to by the World Health Organisation's International Health Regulation No 2 of 25 May 1951 and such other infectious or contagious parasite-based diseases as are the subject of protective provisions in relation to nationals in the host country. Member States may not introduce new more restrictive provisions or practices.

2. Diseases or infirmities contracted after the first residence permit was issued shall not justify a refusal to renew the permit or expulsion from the territory.

3. A Member State may impose a medical examination, performed free of

charge, for persons to whom this Directive applies, in order to certify that they do not suffer from any of the diseases referred to in paragraph 1. Such medical examinations may not be performed on a systematic basis.

## **Article 21**

### **Examination of applications and issuance of a residence permit**

1. The competent national authorities shall examine applications within three months after they are lodged. If an application is not accompanied by the documentary evidence listed in Article 17(2), (3) and (4) and Article 18(2), the competent national authorities shall inform the third-country national concerned and allow additional time. In this event the three-month period shall be suspended and shall run again from the time when the additional documentary evidence is provided.

2. If the conditions provided for in Articles 16 and 18(1) are met, then, subject to the provisions relating to public policy, domestic security and public health in Articles 19 and 20, the second Member State shall issue the long-term resident with a renewable residence permit. The period of validity of this permit shall correspond to the foreseeable duration of residence. The long-term resident shall inform the Member State which granted him long-term resident status.

3. The second Member State shall issue members of the long-term resident's family with renewable residence permits valid for the same period as the permit issued to the long-term resident.

4. Permits shall be issued free of charge or against payment of a sum not exceeding the charges required of nationals for the issuance of identity cards.

## **Article 22**

### **Procedural guarantees**

1. Reasons shall be given for any decision rejecting an application for a residence permit. It shall be notified in writing to the third-country national concerned. The notification shall specify the redress procedures available and the time within which he may act.

2. Where an application for a residence permit is rejected, or the permit is not renewed or is withdrawn, the person concerned shall have the right to apply to the courts of the Member State concerned.

## **Article 23**

## **Maintenance of status in the first Member State**

1. Long-term residents exercising their right of residence in a second Member State shall retain their long-term resident status in the first Member State for as long as they do not acquire that status in the second Member State.
2. Members of the family of a long-term resident exercising his right of residence who are not themselves long-term residents shall retain the residence permits issued in the first Member State until they expire.
3. If the family members have not yet acquired an autonomous residence permit as provided for by Article 13 of Directive .../.../EC [on the right to family reunification], their period of legal residence in the second Member State shall be taken into account in the first Member State for the purposes of acquiring the autonomous residence permit.

## **Article 24**

### **Rights in the second Member State**

1. As soon as they have received the residence permit provided for by Article 21 in the second Member State, long-term residents shall in that Member State enjoy the rights enumerated in Article 12, with the exception of social assistance and study grants.
2. As soon as they have received the residence permit provided for by Article 21 in the second Member State, members of the family of the long-term resident shall in that Member State enjoy the rights listed in Article 12(1) and (2) of Directive .../.../EC [on the right to family reunification].

## **Article 25**

### **Withdrawal of residence permit**

1. During a five-year transitional period, the second Member State may take a decision to expel a long-term resident and/or family members:
  - (a) on grounds of public policy or domestic security as defined in Article 19;
  - (b) where the conditions provided for by Articles 16 and 18 are no longer met.
2. Expulsion decisions may not be accompanied by a permanent ban on residence.

## **Article 26**

### **Obligation to readmit**

1. If the residence permit is withdrawn by the second Member State, the first Member State shall immediately readmit the long-term resident and his family members.

2. The obligation to readmit referred to in paragraph 1 shall apply even if:

(a) the long-term resident's EC residence permit has expired;

(b) the family members' residence permit has expired.

### **Article 27**

#### **Acquisition of long-term resident status in the second Member State**

1. After five years' legal residence in its territory, long-term residents who have exercised the right of residence in the territory of the second Member State may apply to that Member States' competent authorities for long-term resident status.

2. The second Member State shall grant long-term residents the status provided for by Article 8, subject to the provisions of Articles 6 and 7. The second Member State shall notify its decision to the first Member State, which shall withdraw the status from the persons concerned.

3. The procedure laid down in Article 8 shall apply to the presentation and examination of applications for long-term resident status in the second Member State. Article 9 shall apply for the issuance of the residence permit. Where the application is rejected, the procedural guarantees provided for by Article 11 shall apply.

# Bibliography

## Articles

- Alexander W Free movement of non-EC nationals: A review of the case-law of the Court of Justice (1992) 3 *European Journal of International Law* 53.
- Alston P (ed) *The European Union and human rights*, OUP, Oxford, 1999.
- Boeles P, Fernhout R  
Goodwin-Gill GS,  
Guild E & van Selm-  
Thornburn J Developments: AGIT: Academic Group on [Im]migration – Tampere: Efficient, effective and encompassing approaches to a European immigration and asylum policy (9 June 1999) (1999) 11 *International Journal of Refugee Law* 338.
- Brochmann G &  
Hammar T (eds) *Mechanisms of immigration control: A comparative analysis of European regulation policies*, Berg, Oxford, 1999.
- Carlier JY &  
Verwilghen M (eds) *Thirty years of free movement of workers in Europe*, Proceedings of the Conference Brussels 17-19 December 1998, European Commission/UCL, Brussels, 2000.
- Commission of the  
European Communities Communication from the Commission to the Council and the European Parliament on a Community immigration policy COM (2000) 757 final.
- Communication from the Commission to the Council and the European Parliament on an open method of coordination for the Community immigration policy COM (2001) 387.
- Communication from the Commission to the Council and the European Parliament: Biannual update of the scoreboard to review progress on the creation of an area of “freedom, security and justice” in the European Union (Second half of 2001) COM (2001) 628.

Living in an area of freedom, security and justice: Justice and home affairs in the European Union, European Commission information brochure for the general public, December 2000.

Presidency conclusions: Tampere European Council 15 and 16 October 1999, SN 200/99, 16/10/1999.

Presidency conclusions: European Council meeting in Laeken 14 and 15 December 2001, SN 300/01, 15/12/2001.

Report of the High Level Panel on the Free Movement of Persons, Chaired by Mrs Simone Veil, 18/03/1997 at [http://europa.eu.int/comm/internal\\_market/en/people/hlp/hlpen.pdf](http://europa.eu.int/comm/internal_market/en/people/hlp/hlpen.pdf), 30/04/2002.

Convey A & Kupiszewski M

Keeping up with Schengen: Migration and Policy in the European Union (1995) 29 *International Migration Review* 939.

Council and Commission of the European Communities

Council and Commission Action Plan of 3 December 1998 on how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice, OJ C 19/1, 23/01/1999.

Cremona M

Citizens of third countries: movement and employment of migrant workers within the European Union (1995) *Legal Issues of Economic Integration* 87.

Curtin D & Geurts M

Race discrimination and the European Union anno 1996: From rhetoric to legal remedy? (1996) 14 *Netherlands Quarterly of Human Rights* 147.

Economic and Social Committee

Opinion of the Economic and Social Committee on the 'Communication to the Council and the European Parliament on a Community immigration policy (COM (2000) 757 final)' SOC (2001) 66.

Opinion of the Economic and Social Committee on the 'Proposal for a Council Directive concerning the



status of third-country nationals who are long term residents', OJ C 36/59, 08/02/2002.

- ECOTEC Research & Consulting *Admission of third-country nationals for paid employment or self-employed activity* at [http://www.europa.eu.int/comm/justice\\_home/unit/immigration\\_en.htm](http://www.europa.eu.int/comm/justice_home/unit/immigration_en.htm), 25/01/2002.
- Eurostat News release 11/01/2002, Document number 3-11012002-EN-AP-EN at <http://europa.eu.int/comm/eurostat>, 05/03/2002.
- Evans A Third country nationals and the Treaty on European Union (1994) 5 *European Journal of International Law* 199.
- Fevre R Labour migration and freedom of movement in the European Union: Social exclusion and economic development (1998) 3 *International Planning Studies* 75.
- Foblets MC Europe and its aliens after Maastricht: The painful move to substantive harmonization of member-states' policies towards third-country nationals (1994) 42 *American Journal of Comparative Law* 783.
- Føllesdal A *Third country nationals as Euro citizens: The case defended*, Arena Working Papers WP 98/9 at [http://www.arena.uio.no/publications/wp98\\_9.htm](http://www.arena.uio.no/publications/wp98_9.htm) 25/02/2002.
- Geddes A *Immigration and European integration: Towards fortress Europe*, Manchester University Press, Manchester, 2000.
- Groenendijk K Long-term immigrants and the Council of Europe (1999) 1 *European Journal of Migration and Law* 275.
- Groenendijk K & Guild E Converging criteria: Creating an area of security of residence for Europe's third country nationals (2001) 3 *European Journal of Migration and Law* 37.

- Groenendijk K,  
Guild E & Barzilay R *The legal status of third country nationals who are long term residents in a member state of the European Union*, Centre for Migration Law, University of Nijmegen, Nijmegen, 2000.
- Guild E Discretion, competence and migration in the European Union (1999) 1 *European Journal of Migration Law* 61.
- Immigration law in the European Community*, Kluwer, The Hague, 2001.
- Moving the borders of Europe: The inaugural lecture delivered during the official ceremony on the occasion of the assumption of the professorship of the CPT Wisselleerstoel at the University of Nijmegen, the Stichting Steunfonds Juridisch (Post) Doctoraal Onderwijs on 30 May 2001* at <http://www.jur.kun.nl/cmr/>, 25/01/02.
- The developing immigration and asylum policies of the European union, adopted Conventions, Resolutions, Recommendations, Decisions and Conclusions*, Kluwer Law International, The Hague, 1996.
- Guild E (ed) *The legal framework and social consequences of free movement of persons in the EU*, Centre of European Law, KCL, 1999.
- Guild E & Harlow C *Implementing Amsterdam immigration and asylum rights in EC law*, Hart, Oxford, 2001.
- Guild E &  
Minderhoud P (eds) *Security of residence and expulsion: Protection of aliens in Europe*, Kluwer Law International, The Hague, 2001.
- Hailbronner K *Immigration and asylum law and policy of the European Union*, Kluwer Law International, The Hague, 2000.
- The Treaty of Amsterdam & migration law (1999) 1 *European Journal of Migration and Law* 9.

- Visa regulations and third country nationals in EC law (1994) 31 *Common Market Law Review* 969.
- Handoll J *Free movement of persons in the EU*, Wiley Chancery, London, 1994.
- Hansen R & Weil P (eds) *Towards a European nationality: Citizenship, immigration and nationality law in the EU*, Palgrave, Hampshire, 2001.
- Hedemann-Robinson M An overview of recent legal developments at Community level in relation to third country nationals resident within the European Union, with particular reference to the case law of the European Court of Justice (2001) 38 *Common Market Law Review* 525.
- Third-country nationals, European Union citizenship, and free movement of persons: a time for bridges rather than divisions (1996) 16 *Yearbook of European Law* 321.
- Hoogenboom T Integration into society and free movement of non-EC nationals (1992) 3 *European Journal of International Law* 36.
- Justice and Home Affairs DG *Cooperation in the field of Justice and Home Affairs* at <http://ue.eu.int/jai/pres.asp?lang=en>, 24/10/2001.
- Kostakopoulou T *Citizenship, identity and immigration in the European Union: Between past and future*, Manchester University Press, Manchester, 2001.
- La Torre M (ed) *European citizenship: an institutional challenge*, Kluwer Law International, The Hague, 1998.
- Leitner H Reconfiguring the spatiality of power: the construction of a supranational migration framework for the European Union (1997) 16 *Political Geography* 123.
- Leonard D In pursuit of pillar three (2000) 398 *Europe* 4.

- Magleby Sørensen J *The exclusive European citizenship: The case for refugees and immigrants in the European Union*, Avebury, England, 1996.
- Martiniello M (ed) *Migration, citizenship and ethno-national identities in the European Union*, Avebury, England, 1995.
- Melis B *Negotiating Europe's immigration frontiers*, Kluwer Law International, The Hague, 2001.
- Miles R & Thrändhardt D (eds) *Migration and European integration: The dynamics of inclusion and exclusion*, Pinter Publishers, London, 1995.
- Monar J Justice and Home-Affairs in the Treaty of Amsterdam: Reform at the price of fragmentation (1998) 23 *European Law Review* 320.
- Niessen J Overlapping interests and conflicting agendas: The knocking into shape of EU immigration policies (2001) 3 *European Journal of Migration and Law* 419.
- Consultations on immigration policies in the European Union (2002) 4 *European Journal of Migration and Law* 79.
- Nielsen R & Szyszczak E *The social dimension of the European Union*, 3<sup>rd</sup> Ed, Handelshøjskolens Forlag, Copenhagen, 1997.
- O'Leary S *The evolving concept of Community citizenship: From the free movement of persons to Union citizenship*, Kluwer Law International, The Hague, 1996.
- Peers S Building fortress Europe: The development of EU migration law (1998) 35 *Common Market Law Review* 1235.
- Immigration, asylum and the European Charter of Fundamental rights (2001) 3 *European Journal of Migration and Law* 141.

Key legislative developments on migration in the European Union (2001) 3 *European Journal of Migration and Law* 231.

Key legislative developments on migration in the European Union (2002) 4 *European Journal of Migration and Law* 85.

Towards equality: Actual and potential rights of third-country nationals in the European Union (1996) 33 *Common Market Law Review* 7.

Undercutting integration: Developments in Union policy on third country nationals (1997) 22 *European Law Review* 76.

Who is watching the watchmen? The judicial system of the “Area of Freedom, Security and Justice” (1998) 18 *Yearbook of European Law* 337.

- Shaw J *Law of the European Union*, 3<sup>rd</sup> Ed., Palgrave, Hampshire, 2000.
- Staples H *The legal status of third country nationals resident in the European Union*, Kluwer Law International, The Hague, 1999.
- Steiner J & Woods L *EC Law*, 7<sup>th</sup> Ed., Blackstone, London, 2000.
- Ugur M Freedom of movement vs. exclusion: A reinterpretation of the ‘Insider’-‘Outsider’ divide in the European Union (1995) 29 *International Migration Review* 964.
- Vandamme F Labour mobility within the European Union: Findings, stakes and prospects (2000) 139 *International Labour Review* 437.
- Verschuere H EC social security coordination excluding third country nationals: still in line with fundamental rights of the Gaygusuz judgement? (1997) 34 *Common Market Law Review* 991.
- Weiler JHH Thou shalt not oppress a stranger: On the judicial protection of human rights on non-EC nationals

(1992) 3 *European Journal of International Law*  
65.

Winter JA & ors (eds) *Reforming the Treaty on European Union: The  
legal debate*, Kluwer, The Hague, 1996.

Zimmerman KF Tackling the European migration problem (1995) 9  
*The Journal of Economic Perspectives* 45

# Table of Cases

## European Court of Human Rights

*C v Belgium* Appl 21794/93, 07/08/1996.

*Gaygusuz v Austria* Appl 17371/90, 16/09/1996.

*Matthews v United Kingdom* Appl 24833/94, 18/02/1999.

*Moustaquim* Appl 12313/86, 18/02/1991.

## European Court of Justice

Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

Case 4/73 *Nold v Commission* [1974] ECR 503.

Case 36/75 *Rutili v Minstre de l'Intérieur* [1975] ECR 1753.

Case 283/83 *Meade* [1984] ECR 2631.

Case 59/85 *Netherlands v Reed* [1986] ECR 1283.

Case 281, 283-285 & 287/85 *German, France, The Netherlands, Denmark and the UK v Commission* [1987] ECR 3245.

Case 12/86 *Demirel v Stadt Schwabisch Gmund* [1987] ECR 3719.

Joined Cases 389 and 390/87 *Echternack and Moritz v Netherlands Minister for Education and Science* [1989] ECR 723.

Case C-113/89 *Rush Portuguesa* [1990] ECR 1439.

Case C-43/93 *Van der Elst* [1994] ECR I-3808.

Case C-355-93 *Eroglu v Land Baden-Württemberg* [1994] ECR I-5113.

Opinion 2/94 Accession by the Community to the European Convention of Human Rights [1996] ECR I-1759.

# Table of Charters, Conventions, Secondary Legislation and Treaties

## Charters

Charter of Fundamental Rights of the European Union, OJ C 364/7, 18/12/2000.

## Conventions

Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Rome, 1950.

## Secondary Legislation

### Legislation in force

Council Directive 64/221 of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, OJ B 56/850, 04/04/1964.

Council Directive 68/360 of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, OJ L 257/13, 19/10/1968.

Council Regulation 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257/2, 19/10/1968.

Commission Regulation 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, OJ L 142/24, 30/06/1970.

Council Regulation 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, OJ L 149/2, 05/07/1971.

Council Directive 73/148 of 21 May 1973 on the abolition of restrictions of movement and residence within the community for nationals of Member States with regard to establishment and the provision of services, OJ L 172/14, 28/06/1973.



Council Directive 75/34 of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity, OJ L 14/10, 20/01/1975.

Council Directive 75/35 of 17 December 1974 extending the scope of Directive 64/221 to include nationals of a Member State who exercise the right to remain in the territory of another Member State after having pursued an activity in a self-employed capacity, OJ L 14/14, 20/01/1975.

Council Directive 77/486 of 25 July 1977 on the education of children of migrant workers, OJ L 199/32, 06/08/1977.

Commission Decision 85/311 of 8 July 1985 setting up a communication and consultation procedure on migration policies in relation to non-member countries, OJ L 217/25, 14/08/1985.

Council Directive 89/48 of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, OJ L 19/16, 24/01/1989.

Council Directive 90/364 of 28 June 1990 on the right of residence, OJ L 180/6, 13/07/1990.

Council Directive 90/365 of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, OJ L 180/28, 28/06/1990.

Council Directive 92/51 of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48, OJ L 209/25, 24/07/1992.

Council Directive 93/96 of 29 October 1993 on the right of residence for students, OJ L 317/59, 18/12/1993.

Council Resolution of 30 November 1994 relating to the limitations on the admission of third-country nationals to the territory of the Member States for the purpose of pursuing activities as self-employed persons, OJ C 274/7, 19/09/1996.

Council Resolution of 30 November 1994 on the admission of third-country nationals to the territory of the Member States for study purposes, OJ C 274/10, 19/09/1996.

Council Resolution of 4 March 1996 on the status of third-country nationals residing on a long-term basis in the territory of the Member States, OJ C 80/2, 18/03/1996.

Council Regulation 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, OJ L 151/7, 10/06/1997.

Directive 1999/42 of the European Parliament and of the Council of 7 June 1999 establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the Directives on liberalisation and transitional measures and supplementing the general systems for the recognition of qualifications, OJ L 201/77, 31/07/1999.

## Proposals

Proposal for a Council Directive on the right of third-country nationals to travel in the Community COM (95) 346.

Proposal for a Council Directive on the elimination of controls on persons crossing internal frontiers COM (95) 347.

Proposal for a European Parliament and Council Directive amending Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families and Directive 73/148 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services COM (95) 348.

Proposal for a Council Act establishing the Convention on rules for the admission of third-country nationals to the Member States COM (97) 387 final.

Proposal for a Council Regulation amending Regulation 1408/71 as regards its extension to nationals of third countries COM (97) 561.

Proposal for a European Parliament and Council Regulation amending Council Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community COM (98) 394 final.

Proposal for a Directive of the European Parliament and of the Council on the posting of workers who are third-country nationals for the provision of cross-border services COM (99) 3 final.

Proposal for a Council Directive extending the freedom to provide cross-border services to third-country nationals established within the Community COM (99) 3 final.

Amended proposal for a Directive of the European Parliament and of the Council on the posting of workers who are third-country nationals for the provision of cross-border services COM (2000) 271 final.

Amended proposal for a Council Directive extending the freedom to provide cross-border services to third-country nationals established within the Community COM (2000) 271 final.

Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents COM (2001) 127 final.

Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States COM (2001) 257 final.

Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities COM (2001) 386 final.

Proposal for a Council Directive relating to the conditions in which third-country nationals shall have the freedom to travel in the territory of the Member States for periods not exceeding three months, introducing a specific travel authorisation and determining the conditions of entry and movement for periods not exceeding six months COM (2001) 388.

Proposal for a Council Regulation extending the provisions of Regulation 1408/71 to nationals of third countries who are not already covered by these provisions solely on the ground of their nationality COM (2002) 59 final.

## **Treaties**

Treaty of the European Union, OJ C 34/145, 10/11/1997.

Treaty of the European Communities, OJ C 34/173, 10/11/1997.

Single European Act

Treaty of Nice, OJ C 80/1, 10/03/2001.