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THE EUROPEAN COURT OF JUSTICE AND THE SCOPE OF WORKERS' FREEDOM OF MOVEMENT IN THE EUROPEAN ECONOMIC COMMUNITY

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INTRODUCTION

Since the adoption of the Treaty of Rome[1] in 1957, the European Court of Justice has played an essential role in the drive toward European unity. The European Court of Justice is the most successful of the European Economic Community's (EEC) institutions[2] in implementing the Treaty's goal of economic integration.[3] As the countries of the EEC[4] work towards political and monetary union,[5] the primary in-

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1. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (1958) [hereinafter Treaty of Rome]. The Treaty Establishing the European Coal and Steel Community, 261 U.N.T.S. 143 (1957), was adopted on April 18, 1951. The Treaty Establishing the European Atomic Energy Commission, 298 U.N.T.S 169 (1958), was entered into force on January 1, 1958. The jurisdiction of the European Court of Justice encompasses the interpretation of the treaties establishing each of the three European Communities.

2. The EEC's primary institutions, other than the European Court of Justice, are the Council of Ministers, the European Commission, and the European Parliament. The Council of Ministers, which is made up of representatives from each member state, enacts legislation designed to "ensure the coordination of the general economic policies of the member States. . . ." Treaty of Rome, *supra* note 1, arts. 156, 145, 298 U.N.T.S. at 71, 69. The European Commission is composed of 17 commissioners who oversee a vast bureaucracy. The Commission may propose and enact legislation. Commission members must "perform their duties in the general interest of the Community with complete independence. . . . They shall not seek or accept instructions from any Government or other body." *Id.* art. 157(2), 298 U.N.T.S. at 72. The European Parliament consists of 518 members directly elected to five year terms. The Parliament operates in primarily an advisory role, and exercises supervision over the Commission and the Council. *See generally* J. STEINER, TEXTBOOK ON EEC LAW 7-13 (1988) (explaining the roles of EEC institutions).

3. The Treaty of Rome states that "[i]t shall be the aim of the Community . . . to promote throughout the Community a harmonious development of economic activities. . . ." Treaty of Rome, *supra* note 1, art. 2, 298 U.N.T.S. at 15.

4. *See* K. BORCHARDT, THE ABC OF COMMUNITY LAW 6 (2d ed. 1986) (stating that the 12 EEC member states include Belgium, Denmark, France, the Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom).

5. *See* Riding, *A Stronger New Profile for the European 12*, N.Y. Times, Nov. 4, 1990, at E3 (reporting that in October 1990, all member states of the EEC except Great Britain committed themselves to achieving a single European currency and a common European foreign policy).

tegrative mechanism of the Treaty—freedom of movement for workers—continues to propel the Court to the forefront of EEC integration issues.

Part I of this article examines four key issues surrounding workers' freedom of movement in the context of the case law of the European Court of Justice: (1) who is a "worker"; (2) social security; (3) freedom of establishment; and (4) exceptions to freedom of movement. Part II analyzes the continuing evolution of the European Court of Justice in light of the challenges of the Single European Act.[6] Part II also examines the commitment of the EEC member states to the principle of free movement as tested by burgeoning populations of migrant workers. The article concludes that to realize a true common market, free movement must extend to all workers in EEC countries, including nationals of non-EEC countries. Such a broad application of free movement principles, however, may well stretch the boundaries of the European Court's narrow mandate. As the political process rightfully assumes the forefront in promoting European integration, the European Court could find its role somewhat diminished.[7]

I. WORKERS' FREEDOM OF MOVEMENT

The fundamental principles of the European Economic Community's social policy promote free movement for workers and seek to abolish discrimination against workers from other EEC countries based on nationality.[8] Articles 48-51 of the Treaty of Rome provide for the free movement of workers[9] and implement Article 7's general prohibition

6. Single European Act, 30 O.J. EUR. COMM. (No. L 169) 92 (June 29, 1987), [1987] 49 Comm. Mkt. L.R. 741. *See infra* notes 130-154 and accompanying text (discussing the goals and effects of the Single European Act).

7. One judge of the European Court has hypothesized on the future role of the Court as follows:

> The Court tries, more than it did, to identify areas in which a judicial approach may be helpful, and it then applies strict minimum standards to matters like discrimination on grounds of nationality or of sex, the treatment of aliens, or technical requirements for commodities. If this trend exists, and if it continues, it will make life more difficult for the Community's political institutions, particularly the Commission. In the past, the Commission often thought it could rely on the Court's help when its case was likely to strengthen European integration. In the future, perhaps it will only be able to do so when it can show a solid legal basis, as the Court's willingness to construct such a basis on its own initiative may diminish.

Koopmans, *The Role of Law in the Next Stage of European Integration*, 35 INT'L & COMP. L.Q. 925, 931 (1986).

8. Slynn, *Aspects of the Law of the European Economic Community*, 18 CORNELL INT'L L.J. 1, 22 (1985).

9. Treaty of Rome, *supra* note 1, arts. 48-51, 298 U.N.T.S. at 36-37.

against discrimination based on nationality.[10] Article 48 grants workers the right to move freely in order to accept offers of employment and the right to remain in any member state to continue employment.[11] Aside from offering economic advantages,[12] the provisions concerning free movement of workers also improve the overall standard of living by reducing unemployment,[13] securing a personal right for workers,[14] and fostering the political integration of European states.[15]

Under Article 49, the Council of Ministers can enact directives or regulations to promote the free movement of workers.[16] In 1968, pursuant to this authority, the Council enacted Regulation 1612/68,[17] one of the most influential and important statutes of the European Community. The Regulation ended the transitional period for the achievement of free movement of workers mentioned in Article 48(1).[18] Regulation 1612/68 enforces the principles of nondiscrimination and free movement articulated in Articles 7 and 48 by expanding the obligations imposed on member states.

The Court declared that Article 48 has direct effects in the legal systems of member states.[19] As a result, Article 48 confers rights on individuals that the individual can enforce in national courts. Because many of the cases involving free movement of workers are brought in national courts, Article 177[20] is the principal route through which these questions arrive at the European Court of Justice.[21] Under the procedures delineated in Article 177, the Court has jurisdiction to issue pre-

10. *Id.* art. 7, 298 U.N.T.S. at 17.

11. *Id.* art. 48, 298 U.N.T.S. at 36.

12. *See* Comment, *Political Integration through Jurisprudence: An Analysis of the European Court of Justice's Rulings on Freedom of Movement for Workers*, 6 B.C. INT'L & COMP. L. REV. 273, 275 (1983) [hereinafter *Political Integration*] (describing how the creation of an international market for labor will allow supply and demand forces to achieve better labor utilization).

13. *Id.* at 276.

14. *See id.* at 276-77 (explaining that workers and their families have a fundamental right of mobility between EEC member states).

15. *See id.* at 277 (stating that removing barriers to freedom of movement facilitates obtaining EEC citizenship).

16. Treaty of Rome, *supra* note 1, art. 49, 298 U.N.T.S. at 36.

17. 11 J.O. COMM. EUR. (No. L 257) 2 (1968), *reprinted in* B. RUDDEN & D. WYATT, BASIC COMMUNITY LAWS 187-89 (2d ed. 1980).

18. *Id.* arts. 55-73, at 187-89.

19. *See* Van Duyn v. Home Office, 1975 E. Comm. Ct. J. Rep. 1337, 1348, [1975] 15 Comm. Mkt. L.R. 1, 19 (stating that Article 48 of the Treaty of Rome creates rights for individuals which national courts must protect).

20. Treaty of Rome, *supra* note 1, art. 177, 298 U.N.T.S. at 76-77.

21. *See* Stuart, *The Court of Justice of the European Communities: The Scope of its Jurisdiction and the Evolution of its Case Law under the EEC Treaty*, 3 NW. J. INT'L L. & BUS. 415, 422 (1981) (stating that most issues concerning EEC law are initially raised in member state tribunals). Article 177 is the procedural tool used to

liminary rulings on questions of Treaty interpretation from the national courts of member states.[22] Article 177 provides a mechanism for ensuring uniform interpretation of EEC law among national courts.[23]

A. WHO IS A "WORKER"?

Although Article 48 speaks of free movement of workers in general, Article 48(2)[24] narrows the Article's application to workers who are citizens of EEC member states. Regulation 1612/68 favors confining Article 48 rights to nationals of member states.[25] Most EEC countries easily developed definitions for their nationals. Germany, for example, declared that only citizens of the Federal Republic of Germany were nationals under the Treaty.[26] Great Britain issued a similar declaration stating that nationals were citizens of the United Kingdom or Gibraltar.[27]

The definition of "worker" is derived from EEC law because entire categories of persons could be excluded from Article 48 protection if member states could formulate their own definitions.[28] Likewise, a restrictive interpretation of the term "worker" by the Court would inhibit the effectiveness of the free movement provisions.[29] Thus, the Court is obliged to interpret "worker" as broadly as possible in order to effectuate the fundamental principle of free movement.[30] The Court's statement in 1986 that "[a]ll that is required for the application of Article 48 is that the activity should be in the nature of work performed for remuneration, irrespective of the sphere in which it is carried out"[31] provides little guidance. In another attempt to formulate a definition

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achieve adherence to Community law by the member states, and a mode of cooperation between member state tribunals and the European Court of Justice. *Id.*

22. *Id.*

23. *See* Stoelting, *The Jurisdictional Framework of the European Court of Justice*, 29 COLUMBIA J. TRANSNAT'L L. 201 (1991) (analyzing the European Court's jurisdiction, including the importance of the Article 177 procedure).

24. Treaty of Rome, *supra* note 1, art. 48(2), 298 U.N.T.S. at 36.

25. *See* Greenwood, *Nationality and the Limits of the Free Movement of Persons in Community Law*, 7 Y.B. EUR. L. 185, 187-90 (1988) (suggesting that member states have used the definition of "national" to limit free movement of workers).

26. F. BURROWS, FREE MOVEMENT IN EUROPEAN COMMUNITY LAW 124-25 (1987). This provision has no doubt been repealed in light of the Federal Republic of Germany's unification with the German Democratic Republic in November 1990.

27. *Id.* at 125 (citing the British Nationality Act, 1981, c. 61).

28. Unger v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten, 1964 E. Comm. Ct. J. Rep. 177, 185, [1964] 3 Comm. Mkt. L.R. 319, 331.

29. *Id.*

30. *See* Lawrie-Blum v. Land Baden-Württemberg, 1986 E. Comm. Ct. J. Rep. 2121, 2144, [1987] 50 Comm. Mkt. L.R. 389, 414 (finding that courts must define broadly the concept of "worker").

31. *Id.* at 2145, [1987] 3 Comm. Mkt. L.R. at 415.

for the concept of a worker within the meaning of Article 48 and EEC Regulation 1612/68, the Court stated that a worker "[is] any person who pursues an activity which is effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary."[32]

Turkey's recent efforts to gain free movement for Turkish workers in EEC countries reveals the Court's ability to set Community standards for free movement of workers. The 1964 Association Agreement[33] between the EEC and Turkey sought to achieve free movement of workers by 1986. Germany, home to nearly two million Turkish workers and dependents, opposed a subsequent proposal by the Commission to liberalize workers' movement between member states and Turkey.[34] In response to a preliminary ruling on Article 177 from a German administrative court, the Court held that the EEC-Turkey Association Agreement had no direct effects in member states.[35] Consequently, Turkish workers did not have an enforceable right to free movement in the EEC. The ruling reinforces the authority of the Court to interpret association agreements with non-EEC countries and to define who is a worker under the Treaty.[36]

The Turkish migrant worker case also displays the Court's reticence to expand the rights of non-European workers who reside in the EEC.[37] The Court may be hesitant to act in an area with such political implications. It is clear that the assimilation of non-European workers into the EEC cannot be effected by the European Court of Justice without the support of member states. For example, the European Parliament recommended that immigrants be given voting rights after five years residence in the EEC.[38] In November 1990, however, Germany's high

32. Brown v. Secretary of State for Scotland, 1988 E. Comm. Ct. J. Rep. 3205, 3232, [1988] 53 Comm. Mkt. L.R. 403, 422.

33. Agreement of Sept. 12, 1963, Establishing an Association between the European Economic Community and Turkey, 16 O.J. EUR. COMM. (No. C 113) 1 (1973).

34. *Turkish Workers Not Entitled to Free Movement on Basis of EEC-Turkey Association Pact*, [1985-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,933, at 12,243 (Oct. 22, 1987) [hereinafter *Turkish Workers Not Entitled to Free Movement*]. Germany led the campaign against free movement for Turkish workers in the EEC. Today, nearly two million immigrant workers from Algeria, Morocco, and Tunisia reside in Western Europe, along with an estimated 600,000 illegal immigrants. *Maghreb Migration*, Wall St. J., Apr. 18, 1990, at A18.

35. *Turkish Workers Not Entitled to Free Movement*, *supra* note 34, at 12,242.

36. *Id.* at 12,244.

37. *See* Peel, *EC Curbs Movement of Turkish Labour*, Financial Times, Oct. 1, 1987, at 2.

38. Melloan, *Can Europe Keep Them down on the Maghreb?*, Wall St. J., Nov. 5, 1990, at A17.

court struck down a municipal law granting immigrants such voting rights.[39]

B. SOCIAL SECURITY

Guarantees of free movement for workers would have little value if workers exercising their right to mobility risked losing the social security benefits conferred on them by their native countries. Social security measures that provide unequal treatment for migrant workers from other member states represent a potential obstacle that could significantly impede workers' freedom of movement. The goal of the Treaty of Rome and its implementing regulations is to eliminate legislative obstacles which could handicap migrant workers and to avoid placing them in an unfavorable legal position, particularly with regard to social security.[40]

An ideal system would be one in which workers would make contributions to a Community-based system that would then apply a uniform scale in apportioning benefits.[41] As a result, workers of all member states would receive identical benefits regardless of movement within the Community.[42] Rather than an exclusive Community system, however, the Treaty of Rome contemplates a system in which member states retain authority over their own social security systems subject to EEC standards.[43]

Article 51 of the Treaty,[44] the only provision directly dealing with social security, does not mandate a comprehensive integration of the social security systems of member states.[45] Instead, Article 51 allows national systems to continue under two broad conditions. First, migrant workers must be credited with past contributions made from any member state.[46] Second, workers who live within the borders of a member state must receive benefits.[47]

The secondary legislation giving effect to the principles articulated in Article 51 is Council Regulation 1408/71 on the Application of Social

39. *Id.*
40. *See* Moebs v. Bestuur der Sociale Verzekeringsbank, 1964 E. Comm. Ct. J. Rep. 281, 288, [1964] 3 Comm. Mkt. L.R. 338, 347 (holding that member states may confer social security benefits on workers who are employed outside the member state).
41. F. BURROWS, *supra* note 26, at 155.
42. *Id.*
43. *Id.* at 156.
44. Treaty of Rome, *supra* note 1, art. 51, 298 U.N.T.S. at 37.
45. Forde, *The Vertical Conflict of Social Security Laws in the European Court*, 1 LEGAL ISSUES EUR. INTEGRATION 23, 30 (1980).
46. *Id.*
47. *Id.*

Security Schemes to Employed Persons to Self-employed Persons and to Members of Their Families Moving within the Community.[48] Rather than seeking to harmonize member states' social security systems, Regulation 1408/71 strives to coordinate implementation by ensuring that workers' contributions in different member states are aggregated and that persons who are entitled to benefits collect them. The Regulation's purpose is to abolish territorial limits in the application of member states' social security systems.[49]

For example, according to Regulation 1408/71's accrual principle, if a worker pays contributions in Germany for one year, and then moves to Italy and makes contributions there for one more year before filing a claim, the worker's claim is based on two years of contributions, regardless of any contravening national law.[50] Workers are not entitled to benefits from two member states.[51] If, however, one member state's system entitles a worker to greater benefits, that system must apply.[52] To avoid overlapping benefits payments, Regulation 1408/71 could suspend the payment of benefits in one member state, but the worker would still be entitled to receive the excess payments to which he or she would be entitled in the other member state.[53]

Regulation 1408/71 contains over 100 articles and has been amended several times. The Regulation applies to both employed and self-employed workers "under a social security scheme."[54] Regulation 1408/71's provisions contain rules for administering sickness and maternity benefits,[55] old age and death pensions,[56] and unemployment.[57]

Bilateral treaties between member states, many of which predate adoption of the Treaty, also continue to play a role in determining the extent of workers' social security rights, particularly when national standards are more beneficial than Community standards.[58] In most re-

48. 14 O.J. EUR. COMM. (No. L 149) 2 (Eng. Special ed.) (1971) [hereinafter Council Regulation 1408/71], *reprinted in* B. RUDDEN & D. WYATT, BASIC COMMUNITY LAWS 208-30 (2d ed. 1980).

49. J. STEINER, *supra* note 2, at 190-91.

50. F. BURROWS, *supra* note 26, at 157; Council Regulation 1408/71, art. 3, *supra* note 48, at 270.

51. Council Regulation 1408/71, art. 3, *supra* note 48, at 270.

52. *Id.*

53. Pinna v. Caisse d'Allocations Familiales de la Savoie, 1986 E. Comm. Ct. J. Rep. 1, 9, [1988] 51 Comm. Mkt. L.R. 350, 361.

54. Council Regulation 1408/71, art. 1, *supra* note 48, at 266.

55. *Id.* at 276-80.

56. *Id.* at 280-87.

57. *Id.* at 287-90.

58. A. ARNULL, THE GENERAL PRINCIPLES OF EEC LAW AND THE INDIVIDUAL (1990). The European Court has stated that the EEC Treaty allows the Council to substitute a single social security system in place of bilateral or multilateral social se-

spects, however, Regulation 1408/71 supersedes national regulations or bilateral treaties. As a French appeals court recognized in 1964, EEC social security regulations are absolutely compulsory, apply directly in all member states, and replace all bilateral agreements completed between member states.[59]

The European Court of Justice stated in 1981 that Article 51 empowers the Council to impose a single system to harmonize the various social security systems of member states.[60] The Court looked at the intent behind various nondiscrimination provisions in the Treaty, and reasoned that most bilateral agreements did not foster free movement of workers because they operated by reference to the nationality of the covered persons. In addition, the Court found that it would be too complex to require member states to consider migrant workers' rights under national law, Community law, and bilateral agreements.[61]

Due to the interaction between national and Community law, social security issues have generated a substantial body of case law. The vast majority of these cases come to the Court through an Article 177 request from a national court for a preliminary ruling. The Court has exercised its jurisdiction under Article 177 to ensure that both Community and national standards enhance free movement of workers.

In *Pinna v. Caisse d'Allocations Familiales de la Savoie*,[62] the Court considered the validity of Article 73(2) of Regulation 1408/71, which permitted France to deny benefits to workers with family members living outside of France. Both the Council and the Commission argued that Article 73(2) was not discriminatory because Article 51 only coordinates member states' social security systems in order to eliminate free movement obstacles.[63] The Court recognized that differences among member states' social security systems are not per se affected by Article 51; it emphasized, however, that free movement is encouraged only if social security rules are as similar as possible.[64]

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curity treaties. *Id.* at 169. This approach is preferable for two reasons. First, a bilateral treaty which hinges on nationality would "maintain in many cases discrimination of the type prohibited by Article 7 of the Treaty." *Id.* at 170. Second, chaos would result if the social security rights of every worker had to be determined under both bilateral treaties and Community law. *Id.* (discussing the *Galinsky* case).

59. Nani v. Caisse d'Assurance Vieillesse, [1964] 3 Comm. Mkt. L.R. 334, 335 (Cour d'Appel de Paris).

60. Galinsky v. Insurance Officer, 1981 E. Comm. Ct. J. Rep. 941, 951, [1981] 32 Comm. Mkt. L.R. 361, 371.

61. *Id.*

62. Pinna v. Caisse d'Allocations Familiales de la Savoie, 1986 E. Comm. Ct. J. Rep. 1, [1988] 51 Comm. Mkt. L.R. 350.

63. *Id.* at 23, [1988] 51 Comm. Mkt. L.R. at 373.

64. *Id.* at 25, [1988] 51 Comm. Mkt. L.R. at 375.

Thus, the Court invalidated Article 73(2) because it created two different social security systems for migrant workers depending on whether they were subject to French legislation or to the legislation of another member state.[65]

The EEC's social security rules provide a graphic illustration of the interaction between Community law and national law. By stressing the free movement of workers in the social security context, the Court strengthened the EEC's federal structure. This approach may potentially be applied to other areas of the law where movement across borders creates dilemmas for member states, such as criminal law or fiscal matters.[66]

C. Freedom of Establishment

The guarantees of freedom of establishment contained in Articles 52-59 of the Treaty extend free movement to self-employed individuals, professionals, and corporations.[67] Because the EEC is organized primarily as an economic union, Article 52 encourages an efficient allocation of Community-wide capital and labor. Thus, freedom of establishment is of fundamental importance to the EEC.[68] The freedom of establishment provisions have direct effects because they create individual rights that national courts are bound to enforce.[69]

Freedom of establishment stems from Article 7's requirement of nondiscrimination. The essential obligation imposed on member states is to abolish all national legislation that applies only to non-nationals. The purpose of Article 7 is to ensure that citizens of one member state may practice their professions in another member state on the same basis as nationals of that state.[70]

The freedom of establishment in Article 52 encompasses the right of firms situated within the Community to establish branch offices and

65. *Id.* at 27, [1988] 51 Comm. Mkt. L.R. at 376.

66. P.J.G. Kapteyn & P. Verloren van Themaat, Introduction to the Law of the European Communities: After the Coming into Force of the Single European Act 426-27 (2d ed. 1989).

67. Treaty of Rome, *supra* note 1, arts. 52-59, 298 U.N.T.S. at 37-40.

68. P.J.G. Kapteyn & P. Verloren van Themaat, *supra* note 66, at 427-28.

69. Costa v. ENEL, 1964 E. Comm. Ct. J. Rep. 585, 593, [1964] 3 Comm. Mkt. L.R. 425, 458.

70. J.P. de Crayencour, The Professions in the European Community: Towards Freedom of Movement and Mutual Recognition of Qualifications 35 (1981). Restrictions taking three forms hinder Community citizens practicing their professions: (1) those applicable to all occupations, like a requirement for work permits; (2) those common to groups of occupations, such as a requirement to hold a trader's license; and (3) nationality or residence requirements specific to a particular occupation. *Id.*

subsidiary businesses in other member states on the same basis as nationals.[71] As a result, the link between a company and a member state needed to qualify under Article 52 could be tenuous, as in the case of a non-EEC company with a European subsidiary.[72] In such a case, the non-EEC company could use its subsidiary to invoke the benefits of freedom of establishment in all EEC countries, creating potential losses for member states in terms of taxes and employment.[73] Member states must therefore closely regulate the establishment of subsidiaries by non-member states through agreements with third countries.[74]

Movement of professionals within the EEC poses a problem because member states retain the right to establish qualifications. While a member state may not impose additional formalities on a person already holding a driver's license from another member state,[75] the requirements to establish a legal or medical practice fall into a different category.[76] The Council has attempted to loosen establishment restrictions with the enactment of a directive in 1978 providing for the mutual recognition of certain diplomas and certificates evidencing formal qualifications, including skills in veterinary medicine.[77]

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71. General Programme for the Abolition of Restrictions on Freedom of Establishment, *reprinted in* B. RUDDEN & D. WYATT, BASIC COMMUNITY LAWS 247 (2d ed. 1980). In order to enjoy the right to freedom of establishment under the Treaty, a company only needs to maintain a "registered office, central management or main establishment within the Community." Treaty of Rome, *supra* note 1, art. 52, 298 U.N.T.S. at 37.

72. *See* Cath, *Freedom of Establishment of Companies: A New Step Towards Completion of the Internal Market*, 6 Y.B. EUR. L. 247, 261 (1987) (stating that "once a company (literally) meets the criteria of Article 58, it may rely upon this Treaty provision.").

73. B. SUNDBERG-WEITMAN, DISCRIMINATION ON GROUNDS OF NATIONALITY: FREE MOVEMENT OF WORKERS AND FREEDOM OF ESTABLISHMENT UNDER THE EEC TREATY 192-93 (1977) (commenting that "[i]t seems somewhat doubtful whether the condition of a real and continuous link is likely to achieve its purpose of preventing the companies of third states from enjoying the benefit of freedom of establishment."). If such a company has a subsidiary within the Community, this subsidiary is entitled to set up agencies, branches, and subsidiaries anywhere within the Community. *Id.*

74. P.J.G. KAPTEYN & P. VERLOREN VAN THEMATT, *supra* note 66, at 443.

75. Procureur du Roi à Bruges v. Pieter de Quant, [1979] 32 Comm. Mkt. L.R. 609, 611 (Belgian Cour de Cassation).

76. *See* D. LASOK, THE PROFESSIONS AND SERVICES IN THE EUROPEAN ECONOMIC COMMUNITY 151-70 (1986) (discussing Community measures relating to the mutual recognition of doctors and lawyers among member states).

77. *Council Directive Concerning the Mutual Recognition of Diplomas, Certificates and Other Evidence of Formal Qualifications in Veterinary Medicine, Including Measures to Facilitate the Effective Exercise of the Right of Establishment and Freedom to Provide Services*, 21 O.J. EUR. COMM. (No. l 362) 1 (1978).

In *Auer v. Ministère Public*,[78] the Court recognized that this directive has "direct effects"[79] in member states. A provision of the Treaty deemed by the Court to have direct effects creates rights which must be protected by the courts of the member states. For example, a veterinarian trained in Italy, who subsequently practiced in France, could maintain an action in a French court under EEC law to have his or her name inscribed on the rolls of French veterinarians.[80] In another case demonstrating Article 52's direct effects, a German lawyer brought suit in a French court under Article 52 after being denied admission to the Paris bar.[81] Although he met all the qualifications for admittance, the Court denied the application because of a rule forbidding lawyers from maintaining more than one office.[82] In the context of an Article 177 reference from a national court, the European Court held that Article 52 prevents a member state from denying a national of another member state the right to practice law because he or she practices simultaneously in another member state.[83]

The Council Directive to Facilitate the Effective Exercise by Lawyers of Freedom of Movement to Provide Services[84] states that lawyers practicing in a member state must meet "the conditions laid down for lawyers established in that State."[85] In *Gullung v. Conseil de l'Ordre des Avocats du Barreau*,[86] the Court established that member states may fix conditions for admission to a national bar as long as admission is open to the nationals of all member states without discrimination. In this case, a national of both France and Germany worked as a *notaire* (notary) in France before resigning after disciplinary proceedings were instituted against him.[87] Due to questions regarding his character, the lawyer was denied admission as a *conseil juridique* (legal counsel) and

78. 1983 E. Comm. Ct. J. Rep. 2727, 2752, [1985] 42 Comm. Mkt. L.R. 123, 148. In 1989, the Council attempted to standardize recognition of professional and vocational qualifications among the member states. Draft Directive on Recognition of Education and Training, [1989] 56 Comm. Mkt. L.R. 627-41.

79. *Auer*, 1983 E. Comm. Ct. J. Rep. at 2736, [1985] 42 Comm. Mkt. L.R. at 137.

80. *Id.* at 2753, [1985] 42 Comm. Mkt. L.R. 123, 143. Dr. Auer established a practice in France after completing his studies in Italy and was subsequently charged on several occasions in France with the unauthorized practice of medicine. *Id.* at 2730, [1985] 42 Comm. Mkt. L.R. at 138.

81. Barreau de Paris v. Klopp, 1984 E. Comm. Ct. J. Rep. 2971, 2985, [1985] 42 Comm. Mkt. L.R. 99, 110.

82. *Id.*

83. *Id.* at 2986, [1985] 1 Comm. Mkt. L.R. at 111.

84. 20 O.J. EUR. COMM. (No. L 78) 17 (1977), *reprinted in* B. RUDDEN & D. WYATT, BASIC COMMUNITY LAWS 263 (2d ed. 1980).

85. *Id.* art. 4.1.

86. 1988 E. Comm. Ct. J. Rep. 111, 140, [1988] 52 Comm. Mkt. L.R. 57, 75.

87. *Id.* at 113, [1988] 52 Comm. Mkt. L.R. at 59.

as an *avocat* (barrister). Eventually, he was admitted in Germany as a *Rechtsanwalt* (lawyer) and then attempted again to be admitted in France as a *jurisconsulte* (legal consultant). Unfortunately, the Court's judgment failed to address the right of establishment vis-à-vis the different professional levels of lawyers because of the manner in which the referring French court phrased the Article 177 inquiry.[88] *Gullung*'s narrow holding states that under Article 52 a member state that requires *avocats* who are its citizens to be licensed by the State may require the same for *avocats* from another member state.[89]

A narrow reading of *Gullung* would confine its holding to the situation where an *avocat* wishes to practice the law of another member state in its forum.[90] The Court's holding leaves other questions unresolved, such as, whether an English solicitor becomes a member of the French bar if he or she wishes to practice in France solely as an English solicitor and not as a French lawyer. Few English solicitors are familiar enough with French law to establish a practice in France that competes with French lawyers. Usually, non-national lawyers specialize in Community law, general private international law, or the law of his or her country of origin. As long as professional rules of the country of origin are binding on Community lawyers, the need for separate procedures for migrating lawyers seems less compelling.[91] As European law firms expand in size and internationalize their practices,[92] the need for transnational professional standards to deal with the new breed of lawyer increases proportionately.[93]

D. EXCEPTIONS TO FREEDOM OF MOVEMENT

Article 48 guarantees free movement of workers subject to exceptions based on "public order, public safety, and public health."[94] Under Article 56(1), these exceptions also apply to rights of establishment of the self-employed.[95] Article 48(4) contains a further restriction stating

88. *Id.* at 141, [1988] 52 Comm. Mkt. L.R. at 76.
89. *Id.*
90. *See* Lonbay, *Free Movement of Persons, Recognition of Qualifications, and Working Conditions*, 38 INT'L & COMP. L.Q. 208, 214 (1989) [hereinafter Lonbay, *Free Movement of Persons*] (interpreting the *Gullung* case as holding that lawyers from the other member states may not be required to have their host state recognize their credentials, unless they wish to practice the law of the host state).
91. *See* Lonbay, *Free Movement for Professionals*, 13 EUR. L.R. 275, 278-79 (1988) (analyzing the *Gullung* decision and advocating the liberal interpretation).
92. *See* Dillon, *Can They Skaddenize Europe?*, 12 AM. LAW. 40 (1989) (describing rapid growth and expanding practice at Britain's largest law firm).
93. Lonbay, *Free Movement of Persons*, *supra* note 90, at 279.
94. Treaty of Rome, *supra* note 1, art. 48(3), 298 U.N.T.S. at 36.
95. *Id.* art. 56(1), 298 U.N.T.S. at 38.

that free movement guarantees "shall not apply to employment in the public administration."[96]

In Directive 64/221,[97] the European Council implemented the free movement exceptions. The Directive serves two purposes. First, it articulates the principles under which a member state may refuse entry to a national of another member state. Second, it provides procedural safeguards for the exceptions.[98] The Directive's principal provisions regarding public policy and public security state that restrictions may be based only on an individual's personal conduct.[99] In addition, expulsion shall not be justified solely on the basis of a previous criminal conviction, or on the basis of the expiration of an identity card or passport.[100] The Directive also prohibits invocation of the public policy exception for economic reasons,[101] which prevents expulsion in times of recession.

Restrictions on free movement of workers imposed by member states enhance member state autonomy while inhibiting political and economic integration.[102] Individual member state governments are obligated to their own national constituencies, and therefore are not inclined to relinquish control over an area which combines elements of immigration policy, criminal law, and control over the national bureaucracy.[103] To realize the goal of free movement, however, member states must develop Community-based standards for restriction, and the discretion of national authorities to impose limits must be curtailed.[104]

The European Court of Justice occupied a key role in formulating standards regarding free movement restrictions.[105] In the first of a se-

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96. *Id.* art. 48(4), 298 U.N.T.S. at 36.

97. *See* Council Directive of 25 February 1964, 56 O.J. EUR. COMM. (No. L 221) 850 (1964) (describing the steps taken to coordinate the movement of foreign nationals on public policy, security, and health grounds), *reprinted in* B. RUDDEN & D. WYATT, BASIC COMMUNITY LAWS 204 (2d ed. 1980) [hereinafter Council Directive Concerning Movement and Residence of Foreign Nationals].

98. *Id.*

99. *Id.* art. 3.1, at 243.

100. *Id.* arts. 3.2 & 3.3, at 243. The member states have agreed to replace national passports with Euro-passports, but implementation has been slow. *Commissioner Calls Obstacles to Euro-Passport Scandalous*, Reuters North European Service, Apr. 24, 1985.

101. Council Directive Concerning Movement and Residence of Foreign Nationals, art. 2, *supra* note 97, at 243.

102. *See Political Integration*, *supra* note 12, at 302-03 (discussing the European Court of Justice's interpretation of the freedom of movement clauses in the Treaty).

103. *Id.* at 305-06.

104. *Id.*

105. Van Duyn v. Home Office, 1974 E. Comm. Ct. J. Rep. 1337, [1975] 15 Comm. Mkt. L.R. 1. The Commission has been criticized for its inadequate legislative response in this area. *See* Commission v. Belgium, 1980 E. Comm. Ct. J. Rep. 2621, 2629, [1981] 31 Comm. Mkt. L.R. 413, 422 (quoting Advocate General Mayras, who

ries of cases addressing free movement limitations, the Court addressed the validity of restrictions applicable only to non-nationals. In *Van Duyn v. Home Office*,[106] the British government refused entry to a Dutch woman who wished to enter Britain to work for the Church of Scientology. Although the British placed no restrictions on its citizens who practiced Scientology, the Court held that Article 48 and Directive 64/221 allowed the British government to prohibit Community nationals from "coming to swell the cohort of Scientology adepts on its territory."[107]

It is difficult to reconcile *Van Duyn* with later Court decisions. The "socially harmful" standard which the Court set forth in *Van Duyn* allows the member states great latitude in restricting free movement.[108] Under such a broad standard, a member state could bar Scientologists, freemasons, or anarchists, for example.[109] The more important holding of *Van Duyn* is that both Article 48 and Directive 64/221 directly confer rights on individuals that are enforceable in the courts of a member state.[110]

Another public policy exception case, *Rutili v. Minister of the Interior*,[111] involved an Italian trade unionist and political activist who lived in France and had participated in the May 1968 disturbances. Instead of deporting the activist, the French government restricted where he could live. In response to the Article 177 reference, the Court first held that Article 48 and Directive 64/221 apply not only to legislation, but also to victims of discriminatory applications of that legislation.[112] In addition, the Court invalidated free movement restrictions on a national of any member state in absence of a threat to public policy.[113] In conclusion, the Court held that free movement under the Treaty refers to the entire territory of a member state, and that limiting free movement to only a portion of a member state cannot be done unless the free movement of nationals is also limited.[114]

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indicated that the Commission should play a more active role in proposing legislation to define the scope of the public service exception).

106. 1974 E. Comm. Ct. J. Rep. 1337, [1975] 15 Comm. Mkt. L.R. 1.

107. *Id.* at 1352, [1975] 15 Comm. Mkt. L.R. at 16.

108. *Id.* at 1349-52, [1975] 15 Comm. Mkt. L.R. at 17.

109. *See* A. ARNULL, *supra* note 58, at 96 (concluding that the Court no longer utilizes the *Van Duyn* test).

110. *Van Duyn*, 1974 E. Comm. Ct. J. Rep. at 1352, [1975] 15 Comm. Mkt. L.R. at 16.

111. 1975 E. Comm. Ct. J. Rep. 1219, 1221, [1976] 17 Comm. Mkt. L.R. 140.

112. *Id.* at 1236, [1976] 17 Comm. Mkt. L.R. at 148.

113. *Id.* at 1236, [1976] 17 Comm. Mkt. L.R. at 155.

114. *Id.* at 1237, [1976] 17 Comm. Mkt. L.R. at 159.

In *State v. Royer*,[115] Belgian authorities sought to expel a French national who failed to comply with certain administrative requirements of entry and had a record of criminal offenses in France. The Court stated that failure to meet formalities relating to entry and movement of aliens is not conduct threatening the *ordre public* (public order).[116] In addition, the Court held that an expulsion order cannot be effectuated until the individual has exhausted all the procedural remedies provided for in Directive 64/221.[117]

The conflict between Community and national standards centers around this vague conception of the *ordre public*. Although the Court has struggled for a long time to provide a definition, it is at the same time compelled to recognize that circumstances justifying restrictions on free movement may vary from country to country.[118] For example, the Court's case law may implicitly recognize that member states must retain some discretion to deal with security threats.[119]

The Court has had better success in articulating standards for the public service exception in Article 48(4).[120] Member states tried to use Article 48(4) to exclude non-nationals from publicly-funded positions not directly related to the administration of government. For example, Belgium required Belgian citizenship to qualify for certain unskilled positions with the Belgian national railroad.[121] The Commission contended that this restriction violated the Treaty of Rome.[122] Belgium, supported by interventions from Great Britain, Germany, and France,

115. 1976 E. Comm. Ct. J. Rep. 497, [1976] 18 Comm. Mkt. L.R. 619.

116. *Id.* at 512, [1976] 18 Comm. Mkt. L.R. at 631. Article 8 of Directive 64/221, 56 O.J. EUR. COMM. (No. L 221) 850 (1964), states that "[t]he person concerned shall have the same legal remedies . . . as are available to nationals of the State concerned in respect to acts of the administration."

117. *Id.* at 517, [1976] 18 Comm. Mkt. L.R. at 633-34.

118. Regina v. Bouchereau, 1977 E. Comm. Ct. J. Rep. 1999, 2023, [1977] 20 Comm. Mkt. L.R. 800, 824. A French national working in the United Kingdom was convicted for drug possession. *Id.* at 824-25. The British authorities tried to deport the Frenchman. *Id.* On an Article 177 reference, the European Court of Justice instructed the British courts to interpret the public order restriction strictly. *Id.* A British magistrate later found that the defendant's presence in Great Britain was not a sufficiently serious threat to public order justifying deportation. *Id. See also* Barav & Thomson, *Deportation of EEC Nationals from the United Kingdom in the Light of the Bouchereau Case*, 2 LEGAL ISSUES EUR. INTEGRATION 1, 37 (1976) (stating that the possession of a small amount of drugs on Bouchereau was not a genuine and sufficiently serious threat to public policy affecting the essential interests of society).

119. *See* D. LASOK, *supra* note 76, at 53-54 (noting that the concept of *ordre public* is not well defined, and there is no uniform concept of public policy).

120. Treaty of Rome, *supra* note 1, art. 48(4), 298 U.N.T.S. at 36.

121. Commission v. Belgium, 1980 E. Comm. Ct. J. Rep. 3881, 3884, [1981] 31 Comm. Mkt. L.R. at 413, 415.

122. *Id.* at 3899, [1981] 31 Comm. Mkt. L.R. at 415.

cited Article 48(4) in support of its restriction on free movement of workers.[123] The Court stated that Article 48(4) directly applies to powers formally exercised by state officials such as ministers, as well as governmental bodies and municipal administrations.[124] The Court emphasized, however, that Article 48(4) does not apply to commercial, industrial, or financial undertakings, or private institutions engaged in operating public services.[125] The Court stated that while Article 48(4)

> takes account of the legitimate interest which the member-States have in reserving to their own nationals a range of posts connected with the exercise of powers conferred by public law and with the protection of general interests, at the same time it is necessary to ensure that the effectiveness and scope of the provisions of the Treaty on freedom of movement of workers and equality of treatment of nationals of all member-States shall not be restricted by interpretations of the concept of public service which are based on domestic law alone and which would obstruct the application of Community rules.[126]

In subsequent cases, the European Court has excluded teacher trainees,[127] nurses in public hospitals,[128] and researchers at a national scientific institute[129] from the public service exception.

II. CHANGING EUROPE AND THE EUROPEAN COURT OF JUSTICE

The European Court of Justice has been the most visible advocate for workers' free movement within the member states. Increasingly, however, free movement issues are framed in terms of free movement for workers in countries surrounding the EEC. As conditions deteriorate in the EEC's neighboring states, the issue of which workers shall enjoy free movement assumes added importance. The political and economic questions raised, which are worsened by the xenophobic fear of an immigrant invasion, may well be beyond the scope of the limited jurisdiction of the European Court of Justice. Inevitably, the Court will be called upon to address these issues as the sweeping provisions of the Single European Act (the Act)[130] are implemented.

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123. *Id.* at 3899-3904, [1981] 31 Comm. Mkt. L.R. at 416.
124. *Id.* at 3917, [1981] 31 Comm. Mkt. L.R. at 424.
125. *Id.*
126. *Id.* [1981] 31 Comm. Mkt. L.R. at 435-36.
127. Lawrie-Blum v. Land Baden-Württemberg, 1986 E. Comm. Ct. J. Rep. 2121, [1987] 50 Comm. Mkt. L.R. 389.
128. E.C. Comm'n v. France, 1986 E. Comm. Ct. J. Rep. 1725, [1987] 50 Comm. Mkt. L.R. 555.
129. E.C. Comm'n v. Italy, 1987 E. Comm. Ct. J. Rep. 2625, [1988] 53 Comm. Mkt. L.R. 635.
130. Single European Act, 30 O.J. EUR. COMM. (No. L 169) 92 (June 29, 1987), [1987] 49 Comm. Mkt. L.R. 741.

A. THE SINGLE EUROPEAN ACT

Ratified by the heads of state in December 1985 and entered into force in January 1987, the Single European Act is the most radical revision of the Treaty of Rome ever undertaken.[131] Although somewhat less ambitious than the initial proposal put forward by the European Parliament, which called for the implementation of a European Union,[132] the Act's nearly 300 revisions significantly affect the roles of EEC institutions.

Since the European Parliament provided the initial impetus for the Single European Act, it is appropriate that the Parliament is a significant beneficiary. Indeed, strengthening the role of the European Parliament was the dominant political concern throughout the adoption process.[133] The Act specifies situations in which the Council must consult the Parliament before enacting legislation. For example, the Treaty of Rome gives the Parliament no role whatsoever in selecting new member states to the EEC.[134] The Act, however, effectively gives the Parliament veto power over the admission of new members.[135]

The Act also gives the Parliament a more prominent role in the passage of legislation beyond its advisory role in the original Treaty. The Act allows the Council to pass legislation with less than a unanimous vote if it has the support of Parliament.[136] Since the Act entered into force, the new procedures resulted in the passage of legislation in such

131. Jones, *Putting 1992 in Perspective*, 9 NW. J. INT'L L. & BUS. 463, 472 (1989).

132. Glaesner, *The Single European Act*, 6 Y.B. EUR. L. 283, 283-85 (1986) (recounting the history leading to adoption of the Act).

133. *Id.* at 291. In December 1990, the European Parliament issued a resolution asking its 12 member governments to give it the power to approve all European Community legislation, and to initiate some legislation. *World Wire*, Wall St. J., Dec. 13, 1990, at A7. A consensus does not exist that an expansion of the European Parliament's powers is desirable. *See It's Cold in Cloud-Cuckoo-Land*, ECONOMIST, Nov. 10, 1990, at 55 (describing the competing interests of the leaders of EC member countries and the leaders of the European Commission). Members of the Council of Ministers have criticized the parliament for moving too slowly on proposed legislation. *Id.* The Council of Ministers would likely lose much of its own law-making power if the powers of the European Parliament increased. *Id.*

134. *See* Treaty of Rome, *supra* note 1, art. 237, 298 U.N.T.S. at 92 (stating that a country that wishes to become a member of the Community must apply to the Council, and the Council will vote after hearing the opinion of the Commission).

135. Single European Act, art. 8 (mandating the assent of the European Parliament to new membership).

136. *Id.* art. 7. This provision replaces Article 149 of the Treaty, which required a unanimous vote of the Council.

areas as products liability and customs.[137] The Community may also promulgate additional health and safety legislation because the Single European Act provides a legal basis for binding measures in the health and safety area.[138]

The primary objective of the Act is the achievement of an internal market by 1992. The Act states that the internal market will be free of individual domestic frontiers, so that goods and services may be freely exchanged.[139] Member states, however, did not design the Act to supplant existing legislation or the case law of the Court. Instead, the Act's goal is to encourage the Community to promulgate legislation designed to harmonize and liberalize trade among the member states.

A number of proposals have been put forward since the Act entered into force. In January 1988, the Community introduced the Single Administrative Document to simplify export and import procedures.[140] The Community also passed a Directive on the mutual recognition of diplomas in June 1988.[141] Other proposals concern the removal of technical barriers, such as exchange cartels, and the removal of fiscal barriers, such as varying value added taxes which distort purchasing power.[142] In late 1989, the Commission proposed measures leading towards establishing a single aviation market.[143] These initiatives, however, do not assure the success of the internal market.[144]

The Act does not adequately expand the free movement of workers. Member states retain control over issues such as immigration from non-EEC countries, terrorism, drug trafficking, and art thefts.[145] Moreover, Article 100A, supplementing a Treaty provision requiring the

137. *Current Developments: European Community Law*, 38 INT'L & COMP. L.Q. 686-87 (1989); Directive 88/379, 31 O.J. EUR. COMM. (No. L 187) 14 (1988); Regulation 4151, 31 O.J. EUR. COMM. (No. L 367) 1 (1988).

138. P.J.G. KAPTEYN & P. VERLOREN VAN THEMAAT, *supra* note 66, at 631; Single European Act, art. 21.

139. Single European Act, art. 13.

140. *See* THE CCH GUIDE TO 1993: CHANGES IN EEC LAW 4 (1988) [hereinafter CCH GUIDE] (providing an overview of the 1992 programme in its economic context; detailing the new laws in different practice areas; and analyzing the impact of new laws on different business sectors).

141. Directive 77/796, 31 O.J. EUR. COMM. (No. C 167) 5 (1988).

142. *See* CCH GUIDE, *supra* note 140, at 3-11 (describing the barriers to the achievement of a single market).

143. *Proposal for a Council Regulation on Fares for Scheduled Air Services*, 31 O.J. EUR. COMM. (No. C258) 3 (1989). The proposals addressed professional qualifications, fares, access to service routes, and application of the competition rules. *Id* at 3-4.

144. *See* Melloan, *Europeans Would Benefit From More Competition*, Wall St. J., Jan. 22, 1990, at A15 (contending that many internal trade barriers still hinder the promise of free and open competition).

145. Single European Act, General Declaration on Articles 13 to 19. *See also* Palmer, *Why Is Open Europe So Secretive?*, European, Nov. 2-4, 1990, at 8 (noting

Council to issue directives related to establishing and maintaining the internal market, specifically exempts free movement of persons and the rights of workers.[146]

The problem of immigration from non-EEC countries is at the heart of the Act's failure to cope with the free movement issue. To help alleviate the problem, host countries should fully integrate children born to migrant workers in Western Europe. Member state intransigence, however, only aggravates the problem.[147] The European Court of Justice addressed the conflict between member states' national interests and Community standards for immigration from non-EEC countries in *Germany v. European Community Comm'n.*[148] The dispute involved a Commission decision requiring member states to inform the Commission of any proposed legislation regarding the treatment of workers.[149] The Commission designed the decision to encourage member states to promote cultural integration of workers from countries outside the EEC. The Advocate General described the attitude of member states toward any measure relating to non-EEC immigration as one of "coldness, distrust and vigorous defence of national sovereignty."[150] France and the United Kingdom argued that because the link between Community free movement policies and migration from non-member countries did not implicate the Treaty, the Commission Decision lacked a legal basis.[151]

The Court's judgment fell short of a full endorsement of Community authority. First, the Court held that migrant policy does not entirely fall outside the Treaty because the policy may affect the employment of Community workers.[152] Second, the Court annulled the portion of

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that the member states will address issues relating to migrant workers and crime independently).

146. Single European Act, art. 100A(2).

147. *See Turkish Workers Not Entitled to Free Movement*, *supra* note 34 (discussing Germany's campaign against free movement for Turkish workers); Melloan, *supra* note 38 (describing conflict between xenophobic attitudes of many European citizens and the EEC's efforts to extend political rights to North African and Turkish migrants).

148. 1987 E. Comm. Ct. J. Rep. 3203, [1988] 51 Comm. Mkt. L.R. 11.

149. Decision 85/381, 28 O.J. EUR. COMM. (No. L 217) 25 (1985).

150. Germany v. E.C. Comm'n, 1987 E. Comm. Ct. J. Rep. at 3223, [1988] 51 Comm. Mkt. L.R. at 19.

151. *Id.* at 3233, [1988] 51 Comm. Mkt. L.R. at 33. France and the United Kingdom argued that the issue of migration from non-members was "too tenuous and indirect" to have an effect on the application of Treaty provisions. *Id.* The Decision was adopted under Article 118, which authorized the Commission to encourage cooperation among member states, particularly regarding employment and labor. Treaty of Rome, *supra* note 1, art. 118, 298 U.N.T.S. at 61-62.

152. Germany v. E.C. Comm'n, 1987 E. Comm. Ct. J. Rep. at 3253-54, [1988] 51 Comm. Mkt. L.R. at 52.

the Commission's decision that dealt with cultural integration of migrant workers because this subject exceeded the scope of Community social policy.[153]

The Court's judgment fails to recognize the important role that cultural integration must play in full implementation of the internal market.[154] The Court must interpret the Act and implementing legislation broadly, and consider constituencies beyond the EEC.

B. CONCENTRIC CIRCLES

As the pace of European integration quickens with the approach of the internal market, the EEC finds itself at the vortex of shifting national and international loyalties. Considering the events of late 1989 and 1990, the question becomes whether the EEC, and the European Court of Justice in particular, can maintain its momentum.

Jacques Delors, president of the EEC Commission, foresaw many of these shifting loyalties. Fully aware of the international pressures building on the EEC, Delors advocates a European Federation, with a single currency, central banks, and a single EEC government.[155] In addition, Delors has led the push toward a European monetary union and proposed an East-West investment bank governed by the EEC member states, Poland, Hungary, and the USSR.[156] This Federation would maintain close contacts with the European Free Trade Association, which includes Austria, Finland, Iceland, Norway, Sweden, and Switzerland.[157] An "outer circle" of this Federation would contain the former COMECON countries that have adopted free-market economies.[158] The EEC would not accept new member states from these outer circles until the end of the century.[159]

Other proposals involve expanding the EEC to sixteen countries while developing close ties with the Baltic and Balkan states, or allowing all non-EEC countries, including the USSR, into a European

153. *Id.* at 3254-58, [1988] 51 Comm. Mkt. L.R. at 53-56.

154. Bradley, *The European Court and the Legal Basis of Community Legislation*, 13 EUR. L.R. 379, 383-85 (1988).

155. Revzin, *Fast-Changing House of Europe Defies Single Blueprint*, Wall St. J., Feb. 22, 1990, at A10.

156. *Mitterrand and Delors Both Urge Faster Progress to Union*, 643 Common Mkt. Rep. (CCH) 1 (Nov. 2, 1989).

157. Revzin, *supra* note 155. *See also* Whitney, *Neutral Nations, Hurting, Look Wistfully to Europe*, N.Y. Times, Dec. 7, 1990, at A6 (reporting that the nations of the European Free Trade Association may join the European Community).

158. *Id.*

159. *Id.*

free trade area.[160] A removal of United States troops from Western Europe could prompt a renewal of the Western European Union, which includes all EEC countries except Ireland, Greece, and Denmark.[161] The twenty-three nations of the Council of Europe, which admitted Hungary and Czechoslovakia in late 1990, also overlap these configurations.

The pace of pan-European integration is likely to quicken as more countries seek EEC membership. Austria has already applied, and Finland, Switzerland, and Norway are considering the benefits of EEC membership.[162] Sweden, with an eye toward EEC membership, announced in 1987 that it was considering automatic compliance with European Court of Justice rulings on competition law and state aids.[163]

The peaceful revolutions in Eastern Europe have been marked by an unflinching acceptance of free market principles. Thus, the crucial forum for the promotion of worldwide integration may be the thirty-five nation Conference on Security and Cooperation in Europe (CSCE), which includes the United States, Canada, and all European nations except Albania.[164] At a three-week meeting in April 1990, the Eastern bloc countries committed themselves to such measures as protection of private property and the creation of convertible currencies.[165]

A summit meeting of CSCE countries in November 1990 highlighted the crucial role of the EEC in reshaping the new European order. The summit, however, also brought out tensions between the eagerness of Eastern European countries to join the Community, and the EEC inclination to fully integrate itself before significantly expanding its membership.[166] Poland, Czechoslovakia, and Hungary hope that association agreements with the EEC will develop into full member-

160. *Id.* (describing proposals of David Owen, former British foreign secretary, and Lord Cockfield, former EEC Commissioner who helped draft the Single European Act).

161. *Id.*; *see also* Mossberg, *Concept of a 'European Peace Order' Challenges U.S. Efforts to Retain NATO*, Wall St. J., Mar. 12, 1990, at A5 (suggesting that U.S. officials may soon have to recognize that NATO may cease to exist).

162. Whitney, *supra* note 157 (stating that these countries are "nearly falling over themselves to join the European Community in the hope that membership will bring a return to prosperity. . . ").

163. Peel, *Sweden Wants Closer Integration With EC*, Financial Times, Dec. 22, 1987, at 2. In December 1990, the Swedish parliament voted to apply for EEC membership in 1991 in order to become a full member by 1995. *World Wire*, *supra* note 133, at A7.

164. Revzin, *supra* note 155.

165. Aeppel, *East Bloc's Eagerness for Free Market Put on Display at European Conference*, Wall St. J., Apr. 11, 1990, at A11.

166. Gumbel, *East-West Summit Puts Focus on Battle to Rebuild Europe*, Wall St. J., Nov. 21, 1990, at A9.

ship.[167] Thus, the European Court's ruling in the Turkish workers case,[168] finding that workers from countries with EEC association agreements may not invoke the Treaty's free movement provisions, assumes added significance.

This pressure of an influx of workers from outside the EEC presents a dilemma for the European Court of Justice. If the Court were to extend its previously expansive reading of free movement within the Community to encompass workers from outside the EEC, it risks a threat to its legitimacy. Political consensus among member states for an open immigration policy is lacking.[169] The Commission and the Council, rather than the Court of Justice, should take the lead in prodding the member states to resist short-term political considerations and implement a policy of genuine free movement.[170]

The European Court of Justice can facilitate the integration of the EEC with non-EEC countries by incorporating agreements concluded outside the EEC into Community law. Most significantly, the Court has repeatedly adopted standards from the European Convention on Human Rights.[171] The Court could employ the European Social Charter to expand social and economic rights.[172] One European lawyer suggested that the European Social Charter is already a part of Community law because the preamble to the Single European Act incorporates the Charter as a statement of fundamental rights.[173]

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167. *Id.*

168. *See supra* notes 33-39 and accompanying text (discussing the Turkish workers case).

169. Riding, *West Europe Braces for Migrant Wave From East*, N.Y. Times, Dec. 14, 1990, at A6 (describing the "embarrassing quandary" of excluding Eastern European and Soviet Union immigrants after decades of encouraging freer emigration policies in communist countries).

170. *See id.* (quoting a senior EEC official as saying, "[i]mmigration will be the big issue of this decade. There are already signs of a new xenophobia in Western Europe, but it's not just a question of border controls. We can't build a Fortress Europe.").

171. I. FLETCHER, CONFLICT OF LAWS AND EUROPEAN COMMUNITY LAW 96-99 (1982).

172. D. HARRIS, THE EUROPEAN SOCIAL CHARTER 299 (1984) (noting that the Charter's range of subjects is much broader than Community social policy).

173. *See* Riley, *The European Social Charter and Community Law*, 14 EUR. L.R. 80, 80 (1989) (quoting the preamble to the Single European Act). *But see* Gould, *The European Social Charter and Community Law—A Comment*, 14 EUR. L.R. 223 (1989) (arguing that the Charter is not Community law because all member states have not ratified it); Brooks, *Europe Muddles Toward a Freer Market*, Wall St. J., Dec. 14, 1990, at A14 (attacking the Social Charter and noting that the Commission believes that it is being presented in an illegal manner).

CONCLUSION

The future role of the European Court of Justice in European integration will focus on resolving the tension between the Community and member states over the extent of the internal market envisaged by the Single European Act. As the Court has succeeded in establishing the predominance of Community law, the next phase involves shifting the focus beyond the borders of the EEC to the world market. The potential for conflict manifests itself in the millions of non-EEC migrant workers who live in the EEC and remain partially disenfranchised. To realize the promise of the Single European Act, the jurisdiction of the European Court of Justice must be broadened to encompass these migrant workers who emigrate from countries outside the EEC.