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# Who Has the Right to Intra-European Social Security? From Market Citizens to European Citizens and Beyond

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## A. Introduction

This article traces out the process of how the personal scope of Regulation 1408/71,<sup>1</sup> coordinating social security rights across European borders, has been defined and extended over time. The article examines the legal–political dialogue, cultivating a process, which for more than four decades has questioned and settled the scope of “who has a right to intra-European social security.” This process departed from the notion of Community worker “*stricto sensu*,” i.e. the market citizen<sup>2</sup> and has recently been substantively reformed and extended to encompass all European citizens with the adoption of Regulation 883/2004.<sup>3</sup> Furthermore, third-country nationals have recently been included in the personal scope.<sup>4</sup> This evolution, thus apparently decouples the right to coordinated social security from a communitarian conception of welfare.

The Council adopted Regulation 1408/71 in 1971 as a Community instrument to realize the aim of the free movement of workers.<sup>5</sup> The regulation was approved using the legal basis of the Rome Treaty’s (hereinafter Treaty) article 51 (now article 42), which required unanimity. Unanimity has been maintained as the procedural rule, which indeed has conditioned the incremental development of the regulation. The history of the regulation, however, dates back long before 1971 to one of the Community’s first major legislative pieces, Regulation no. 3/58,<sup>6</sup> and before that to bilateral agreements between present

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- 1 Council Regulation 1408/71 of 14 June 1971 The Application of Social Security Schemes to Employed Persons and their Families Moving within the Community, 1997 O.J. (L 323) (TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11) [hereinafter EEC TREATY].
- 2 The concept of ‘market citizen,’ as it is used here, refers to the one exercising economic activity. Among others, a market citizen is the worker ‘*stricto sensu*,’ i.e. the one with a contract of employment. The European market citizen is one production factor among three others; goods, services and capital, whose free movement is one of the constituting pillars of the internal market. In the following analysis, ‘market citizen’ is used as a contrast to ‘European citizen.’ The former refers to a status where market participation releases rights. As a contrast, the latter has rights without necessarily being an active market participant. See M. EVERSON, THE LEGACY OF THE MARKET CITIZEN, IN NEW LEGAL DYNAMICS OF EUROPEAN UNION 72, 84 (J. Shaw & G. More eds., 1995).
- 3 Council Regulation 883/2004 of 29 Apr. 2004 The Coordination of Social Security Systems, 2004 O.J. (L 166) 1–123 (TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3 (1997) [hereinafter EC TREATY].
- 4 Third-country nationals are covered by Council Regulation 859/2003 of 14 May 2003, 2003 O.J. (L 124) (EC TREATY).
- 5 Since the coming into force of the Agreement on the European Economic Area of 1 January 1994, the regulation applies to the nationals from Norway, Iceland and Liechtenstein. This paper will, however, not distinguish between European Union (EU) and EEA nationals, but simply refer to the rights of EU or European citizens.
- 6 Council Regulation 3/58 of 25 September 1958, 1958 O.J. (146).

member states.<sup>7</sup> Regulation 1408/71, in addition to inheriting certain principles and coordinating methods, also inherited a broad interpretation of ‘worker’ as well as a most extensive material scope.<sup>8</sup> Since then, principles and substance have been extended on the basis of Regulation 1408’s own premises and its Treaty base. The coordination system institutionalized by Regulation 1408 has been viewed as the most advanced social policy achievement of the EU, and as the most comprehensive system of access to cross-border health care in international social law.<sup>9</sup> The regulation prescribes that migrants included in the personal scope have equal social security rights within the material scope of the regulation when settling in another member state as the nationals of that state, as they have a right to export defined social security rights if deciding to reside in another member state. The regulation thus prohibits national legislation, which discriminates against migrants from other member states, as it partly prohibits territorial principles formulated in national social security legislation.

The following examination of the extension of Regulation 1408’s personal scope demonstrates how an inter-institutional dynamic of supranational and intergovernmental actions and reactions integrates the ‘less likely’ policy field of social security.<sup>10</sup> Within a general discussion on European integration, the case of social security arguably represents a “less likely case” of integration, since decisions on the content and scope of social security policies have traditionally been regarded as a national prerogative, carried out by the national welfare state. By coordinating social security rights, the Community has conditioned the member states’ autonomy to define to whom social security rights shall be granted as well as where.

The article is divided into three parts, focusing individually on the institutional actors of Court, Commission and Council, whose actions and reactions nonetheless overlap, intertwined as they are. In fact, regarding the recurring discussion in political science and law-in-context,<sup>11</sup> a specific analysis of the question ‘who has the right to intra European social security’ demonstrates that the Court, the Commission and the Council of Ministers participate in a dialogue, which compromises the autonomy and position of each

7 J. HOLLOWAY, SOCIAL POLICY HARMONISATION IN THE EUROPEAN COMMUNITY (1981).

8 Council Regulation 883/2004 of 29 April 2004 On the Coordination of the Social Security Systems, 2004 O.J. (L 166), has extended the material scope so that it currently covers (a) sickness benefits; (b) maternity and equivalent paternity benefits; (c) invalidity benefits; (d) old-age benefits; (e) survivors benefits; (f) benefits in respect of accident at work and occupational diseases; (g) death grants; (h) unemployment benefits; (i) pre-retirement benefits; (j) family benefits.

9 E. EICHENHOFE, SOZIALRECHT DER EUROPÄISCHEN UNION 227 (2001); IMPLICATIONS OF RECENT JURISPRUDENCE ON THE COORDINATION OF HEALTH CARE PROTECTIONS SYSTEMS (W. Palm et al., 2000) (Summary Report produced for the European Commission Directorate-General for Employment and Social Affairs).

10 See H. Eckstein, *Case Study and Theory in Political Science*, in STRATEGIES OF INQUIRY 79 (Greenstein & Polsby eds., 1975), for a discussion of the strategic-theoretical purpose of choosing between a “most likely” and a “least likely” case.

11 See K. Alter, *Who are the “Masters of the Treaty?” European Governments and the European Court of Justice*, 52 INT’L. ORG. 121 (1998); A.-M. Burley & W. Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT’L. ORG. 41 (1993); G. Garrett et al., *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 INT’L. ORG. 149 (1998); A. Moravcsik, *Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach*, 4 J. OF COMMON MKT. STUD. 473, 31 (1993); M. POLLACK, THE ENGINES OF EUROPEAN INTEGRATION: DELEGATION, AGENCY, AND AGENDA SETTING IN THE EU (2003); A. Stone Sweet & T.L. Brunell, *Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community*, 92 AM. POLI. SCI. REV. 63 (1998); J. Weiler, *Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration*, 31 J. OF COMMON MKT. STUD. 417 (1993); J. Weiler, *A Quiet Revolution – The European Court of Justice and Its Interlocutors*, 26 COMP. POLI. STUD. 510 (1994), among many others.

of them. This dialogue reflects changes in preferences over time, as well as transformations in the reading of the Community's objectives and competences.

The first section focuses on the role of the *Court* and its historical definitions for 'employed persons.' It also considers the purpose of the Regulation's predecessor and its Treaty base. The second section analyses the agenda set by the *Commission*, which, by continuously linking intra-European social security to the free movement of persons and Union citizenship, as well as to the stated political commitment to treat non-Community nationals equally, argued that the Regulation should be extended to all persons, irrespective of economic activity and nationality. The third section turns to the reactions by the *Council* and individual member states and analyzes how the negotiations on a generalized personal scope evolve, and how the Court's ruling – by what appears as political choice rather than judicial conviction – finally settles the matter and paves the way for a political compromise, formally entitling legally residing third-country nationals to intra European social security, and extending rights to all European citizens.

The integration of social security rights in Europe has been one of small subtle steps. However, aggregated over time, the individual steps towards 'more Europe' constitute a historical move from rights granted to market citizens, narrowly defined, to a European citizenship right and beyond. Alongside that process, the political and judicial perception of Community objectives and competences has gradually changed.

## B. The Historical Setting of a Personal Scope

The personal scope of Regulation 1408 has been extended incrementally through judicial interpretations by the Court, Commission proposals and the Council's codification thereof. The current personal scope has been under definition since the adoption of Regulation 1408's predecessor, Regulation no. 3, in 1958 and has been incrementally expanded to the point where, by April 2004, the Regulation has been extended to *all European citizens*.

In this first section, the article examines how an independent social security conceptualization of employed person developed from the judicial activism of the Court, and how Regulation 1408 inherited the personal scope from its predecessor Regulation No. 3, but subsequently extended it far beyond that. First, the article briefly sketches the current personal scope of Regulation 883/2004. Second, it analyzes the historical definition of 'employed person' based on Regulation No. 3. In the third part, the article presents a discussion of the inclusion of self-employed persons in early case law, while part four analyses the later Council codification thereof.

### I. Who Is Included in the Personal Scope?

April 2004 marks the perhaps most remarkable extension of Regulation 1408/71's personal scope, and thus temporarily closes the long-running history of defining those with a right to cross border social security. With the adoption of Regulation 883/2004, the right to coordinated social security has been extended to *all nationals* of member states covered by the social security legislation of a member state. This means, that not only employed workers, self-employed workers, civil servants, students and pensioners but also *non-active persons* are to be protected from the coordination rules. Furthermore, as of 1 June 2003, *nationals from third countries* as well as their family members and survivors, if they are legal residents in the territory of a Member State and if they have moved between member states, are covered by the Regulation. Although, on its face the inclusion of third-country

nationals marks another, significant, step towards a generalized personal scope irrespective of nationality, the practical rights of third-country nationals are much more restricted, since they lack the underlying right of free movement.

By extending the personal scope to *European citizens*, the regulation has definitively broken its established link with the exercise of an economic activity. Over the years, the litigation of the Court of Justice has, however, compromised the link between work activity and rights according to the regulation, among other cases by extending the rights of family members;<sup>12</sup> by denying that employment status depends on the hours spent on the work-activity<sup>13</sup> and by declaring that the migrant's family has an individual right to equal treatment.<sup>14</sup> The successive case law of the Court has thus taken the personal scope far beyond its original meaning.

## II. The Historical Definition of "Employed Person"

The distinctiveness of the concept of worker in Regulation 1408 was established through clusters of case law, and subsequently codified by the Council. The historical process establishing the Community's social security meaning of worker, started from the same place as the 'worker' in Regulation 1612<sup>15</sup> and in the Treaty's article 48 (now article 39), with a more traditional understanding of 'wage-earner'.<sup>16</sup> The concept, however, gradually developed its own meaning and scope through case law and the Council's codification of it.

In one of the first social security cases *Hoekstra*,<sup>17</sup> the Court interpreted the personal scope in Regulation No. 3 quite broadly, presumably applying it far beyond what the authors of the regulation could have imagined.<sup>18</sup> In the *Hoekstra* case, the Court emphasized that since Regulation No. 3 was adopted on the basis of article 51 of the Treaty, the meaning of 'wage-earner' depended on the scope of this Treaty provision. Included in the Treaty's chapter on workers and placed in Title III on free movement of persons, services, and capital, situated in part two of the Treaty, describing its foundations, the Court interpreted the aim of article 51 to be

"The establishment of as *complete a freedom of movement of workers as possible* [emphasis added], which thus forms part of the "foundations" of the community, therefore constitutes the principal objective of article 51 and thereby conditions the interpretation of the regulations adopted in implementation of that article."<sup>19</sup>

12 Case 7/75, *Mr. and Mrs. Fracas v. Belgian State*, 1975 E.C.R. 679.

13 Case C-2/89, *Bestuur van de Sociale Verzekeringsbank v. G.J. Kits van Heijningen*, 1990 E.C.R. I-1755.

14 Case C-308/93, *Bestuur van de Sociale Verzekeringsbank v. J.M. Cabanis-Issarte*, 1996 E.C.R. I-2097.

15 Council Reg. 1612/68 of 15 October 1968 on Freedom of Movement of Workers within the Community, O.J. (L 257) 2 (EC TREATY).

16 See, e.g., *Persons with a contract of employment*.

17 See Case 75/63, *Mrs. Hoekstra (née Unger) v. Bestuur der Cont. Bedrijfsvereniging voor Detailhandel en Ambachten*, 1964 E.C.R. 177 (where Mrs. Hoekstra (born Hungarian) was residing in the Netherlands and had been compulsorily insured against sickness as a person with a contract of employment. When she stopped working, she remained voluntarily insured. While visiting her parents in Germany, Mrs Hoekstra fell ill, and after her return to the Netherlands, she applied for her medical treatment costs to be reimbursed. She was however, denied reimbursement with reference to a provision in the Dutch law, according to which the voluntarily insured could not have the costs of medical treatment reimbursed when treated outside the borders of the Netherlands).

18 S. Van Raepenbusch, *Persons Covered by Regulation No. 1408/71 (EEC) and European Citizenship: From Migrant Worker to European Citizen*, in 25 YEARS OF REGULATION NO. 1408/71 (EEC) ON SOCIAL SECURITY FOR MIGRANT WORKERS – PAST EXPERIENCES, PRESENT PROBLEMS AND FUTURE PERSPECTIVES 71 (1997).

19 Case 75/63, *Mrs. Hoekstra née Unger) v. Bestuur der Cont. Bedrijfsvereniging voor Detailhandel en Ambachten*, 1964 E.C.R. 177 (summary of the judgment).

The objective to establish “as complete a freedom of movement of workers as possible” meant that the term ‘wage-earner’ could not be defined by national legislation alone. The objectives of the Treaty would not be achieved if the concept was, “unilaterally fixed and modified by national law.”<sup>20</sup> The preliminary questions of the case furthermore addressed the question whether the term ‘wage-earner’ covered a person such as Mrs. Hoekstra, who was no longer in active employment, but still covered by the social security scheme for employed persons, and whose movement was motivated by leisure. The Court answered that the concept ‘wage-earner or assimilated workers’ referred to “all those who, as such and under whatever description, are covered by the different national systems of social security.”<sup>21</sup> The Court thus clarified that it was the attachment to a social security scheme for wage earners that linked a person to the Community regulation. This conception even covered those who no longer held active employment, but continued to be voluntarily insured in a social security scheme for wage earners.<sup>22</sup> Thus, the concept did not restrict protection to those in active employment. Also, the motives of the movement were treated as irrelevant, since Regulation No. 3 did not only cover movements for work reasons, but also for leisure, such as Mrs. Hoekstra desire to stay with her parents in Germany.

Since one of its first social security cases, the Court has stretched the personal scope through a teleological interpretation, where the aim and spirit of the Treaty have been decisive for the conceptual borders of ‘wage-earner.’ Subsequent case law repeated that the reasons motivating movements were irrelevant as long as the person moving was covered by a social security scheme for wage earners.<sup>23</sup>

### III. Judicial Anticipation – Bringing in the Self-Employed

The case law on the scope of Regulation No. 3 developed a broad definition of worker, clarifying that the actual nature of the work was irrelevant.<sup>24</sup> The definition went far beyond the written text of the regulation, extending the personal scope to practically everyone insured under a social security scheme for wage earners.<sup>25</sup> When adopting Regulation 1408, the same extended scope was codified in Article 1 (a), defining a worker merely by his attachment to a relevant social security scheme.

Two years after Regulation 1408 was approved, the United Kingdom, Ireland, and Denmark joined the Community, and with this first enlargement, the *acquis communautaire* was to be applied to the residence-based social security models of the new members. The application was by no means straightforward, one reason being that the residence-based model did not have distinct schemes for workers on the one hand and other categories of persons on the other. The problem with applying institutionalized rules to different social security traditions became evident in the European Court of Justice Case *Brack*, on which both the United Kingdom and Denmark submitted observations.<sup>26</sup>

In the *Brack* case, the Court was asked whether a British national who had been an employed person 17 years previous, but was self-employed at the time of the actual inci-

20 *Id.*

21 *Id.*

22 See Holloway, *supra* note 7, at 168.

23 See Case 44/65, *Hessische Knappschaft v. Maison Singer et Fils*, 1965 E.C.R. 1191.

24 R. Cornelissen, *25 Years of Regulation No. 1408/71 (EEC) – Its Achievements and its Limits*, in *25 YEARS OF REGULATION NO. 1408/71 (EEC) ON SOCIAL SECURITY FOR MIGRANT WORKERS – PAST EXPERIENCES, PRESENT PROBLEMS AND FUTURE PERSPECTIVES* 27, 42 (1997).

25 See Van Rapenbusch, *supra* note 18, at 75.

26 Case 17/76, *M. L. E. Brack, Widow of R. J. Brack v. Insurance Officer*, 1976 E.C.R. 1429.

dent, had a right to cash sickness benefits for a period of illness in France.<sup>27</sup> Mr Brack had been insured under the British national insurance scheme both as an employed and as a self-employed person. The observation submitted by the British government provided a description of the development of its social security legislation, which initially covered only narrowly defined classes of workers, but gradually had been extended to other classes. The general scheme did not draw a distinction between those regarded as wage-earning workers and those belonging to other categories.

In the Danish observation, the government drew attention to the fact that the legislation of the three new member states differed on important aspects, covering either all persons resident in the territory of the competent state or the entire national population irrespective of employment. The Danish government found it unacceptable that the regulation should also apply to self-employed persons who had formerly been workers. Such an extension of the personal scope would according to the Danish government, "... bring about an unreasonable extension of the area of application of the regulation in that *most nationals of the Member States have been workers at one time or another*" (emphasis added).<sup>28</sup>

In this specific case, the Court did not consider the institutional objections put forward in the observations submitted by the United Kingdom and Denmark, but referred instead to the historical logic of Regulation 1408/71. In the same way as Regulation No. 3, Regulation 1408/71 must be interpreted in light of the spirit and the objectives of the Treaty. With reference to the historical case-law on Regulation No. 3, the Court stressed that the evolution of the Community rules on social security reflected the development in the social law of member states, where more personal categories have been covered by social security schemes:

... it must be borne in mind that, as the Court has previously held, the Community rules on social security "follow a general tendency of the social law of Member States to extend the benefits of social security in favour of new categories of persons by reasons of identical risks."<sup>29</sup>

Since Mr. Brack was still insured under the social security scheme for employed persons, the Court found that he enjoyed the rights to sickness cash benefits despite falling ill outside of British territory. Though Brack had been self-employed for most of his working life, and was so when he fell ill in France, he retained the full rights provided for in Regulation 1408/71.

In the *Brack* case, the European Court of Justice granted intra-European social security rights to the self-employed, five years before the Council adopted the amended Regulation 1390/81, which definitively included this category.

27 *See id.* (Where Mr Brack, a British national, is residing in Britain and insured under the British national insurance scheme 9 years as an employed person, and thereafter 17 years as a self-employed person. In September 1974, Brack went on holiday in France where he fell ill and received immediate treatment. By the end of October 1974, he returned to the United Kingdom and claimed cash sickness benefits for the period when he was ill in France. The claim was refused by the British insurance officer due to the relevant national Act, according to which "a person shall be disqualified for receiving any benefit ... for any period during which that person ... is absent from Great Britain ..." (Section 49 (1) of the British National Insurance Act of 1965)).

28 Case 17/76, M.L.E. Brack, Widow of R.J. Brack v. Insurance Officer, 1976 E.C.R. 1429.

29 *See id.* at para. 20 (Where the Court referenced Case 19/68, Giovanni de Cicco v. Landesversicherungsanstalt Schwaben, 1968 E.C.R. 473 and Case 23/71, Michel Janssen v. Landsbond der christelijke mutualiteiten, 1971 E.C.R. 864).

#### IV. Council Codification and Further Interpretation

A key feature throughout the historical development of co-ordinated social security has been continuous work to amend the regulation. The high number of proposed amendments suggests that from the Commission's point of view, co-ordinated social security was never really sufficient or up-to-date.

When the Commission began its revision of Regulation No. 3 in 1964, it initially envisioned that the self-employed would be included in the personal scope.<sup>30</sup> However, the proposal was later withdrawn on the argument that including the self-employed would add too much technical complexity to the regulation.<sup>31</sup>

In light of the case law interpretations of the personal scope, the Commission proposed in December 1977 that the self-employed should be included.<sup>32</sup> The proposal was subsequently amended and re-proposed to the Council in October 1978.<sup>33</sup> At the same time, the "Administrative Commission"<sup>34</sup> suggested extending the applicable scope to include all persons covered by a social security scheme of a member state, regardless of their employment status.<sup>35</sup> However, the latter idea remained pending until the beginning of the 1990's when it was re-vitalized in light of the three residence directives.<sup>36</sup>

Envisioned as early as 1964, the self-employed and their family members were finally included in the personal scope by amended Regulation 1390/81, adopted in May 1981.<sup>37</sup> In the explanatory memorandum, the extension of the scope of application was justified by the fact that free movement of persons is not confined to employed persons, and in the framework of the freedom of establishment and the freedom to supply services, Regulation 1408 should include the self-employed as well. The explanatory memorandum further reasoned that since Regulation 1408 already covered certain categories of self-employed persons, it should for the sake of equity be extended to all self-employed persons.

Whereas the inclusion of the self-employed in the co-ordinating framework was deemed necessary for attaining one of the Community objectives, the Treaty did not provide a specific legal basis for this purpose. Since the Treaty's article 51 could not be used as a legal basis for any extension of social security rules beyond workers, the self-employed were brought within the regulatory scope on the legal basis of article 235 (now article 308). The

30 See Van Rapenbusch, *supra* note 18, at 71.

31 See Holloway, *supra* note 7, at 296.

32 Proposed to Council, 31 December 1977 Question No. 2 De M. Klepsch a la Commission: Relations Commerciales Avec les Pays de l'este, 1978 O.J. (C 14) 9.

33 Proposed to Council, 28 September 1987, 1987 O.J. (C 246) 2.

34 The Administrative Commission on Social Security for Migrant Workers is attached to the Commission and consists of a government representative from each member state and a representative from the Commission. The tasks of the Administrative Commission are, among others, to deal with administrative and interpretive questions regarding the regulation, to develop cooperation between the member states in social security matters and to submit suggestions for amendments to the Commission on the basis of the more practical insight of its members.

35 D. Pieters, *Towards a Radical Simplification of the Social Security Co-ordination*, in PROSPECTS OF SOCIAL SECURITY CO-ORDINATION 117, 205 (P. Schoukens ed., 1997).

36 See Van Rapenbusch, *supra* note 18, at 80. The three Residence Directives are: Council Directive 90/364 of 28 June 1990 on The Right of Residence, 1990 O.J. (L 180) 26 (EEC TREATY); 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, 1990 O.J. (L 180) (EEC TREATY) 28; and also Council Directive 90/366 of 28 June 1990 on The Right of Residence for Students, 1990 O.J. (L 180) (EEC TREATY). The Court did however, not accept Article 235 as a Treaty basis for students and annulled the Directive in 1992. The Directive was subsequently amended to Council Directive 93/96 of 29 October 1993, O.J. (L 317) 59 (EEC TREATY).

37 Council Regulation 1390/81 of 12 May 1981 The Application of Social Security Schemes to Employed Persons and their Families Moving within the Community, 1981 O.J. (L 143) (extending to self-employed persons and members of their families Council Reg. No. 1408/71) (EC TREATY).



Council hereby agreed that the Community objectives went beyond the strict meaning of article 51. The total Treaty basis for the inclusion of self-employed thus consisted of articles 2, 7, 51 and 235.

Despite its inclusion, the meaning of 'self-employed' was not immediately elaborated on, and had to be clarified through another legal dispute. In the *van Roosmalen* case, the Court was asked whether a Roman Catholic priest fell within the definition of self-employed.<sup>38</sup> In its judgment, the Court emphasized that Regulation 1390 was adopted to achieve the same objectives as Regulation 1408, and therefore self-employed were entitled to the same level of protection as employed persons. The term 'self-employed' had a wide meaning as well.<sup>39</sup> Despite a somewhat non-standard kind of self-employment, a person engaged in work such as van Roosmalen's fell within the personal scope of the regulation, because like "employed person" "self-employed" was to be interpreted according to the objective of the Treaty's article 51,

With regard to the interpretation of the expression "self-employed person", it must first be pointed out that initially the provisions of Regulation no 1408/71, adopted for the implementation of Article 51 of the Treaty, applied only to those who were covered by the term "employed person". According to the established case law of the court, "employed person" is a term of Community law rather than national law and must be interpreted broadly, having regard to the objective of Article 51, which is to contribute towards the establishment of the greatest possible freedom of movement for migrant workers, an objective which is one of the foundations of the Community.<sup>40</sup>

The Court reasoned its interpretation, by referring to previous case law, and the logic of the argument closely resembled that used in the early judgments on Regulation No. 3. The teleological interpretation of the Court defined the concept of self-employed broadly.

#### *V. In the Light of the Treaty Spirit – Dynamic Aims and Means*

The personal scope of both Regulation No. 3 and its descendant Regulation 1408 extended incrementally due to a teleological interpretation by the Court and the Council's acceptance and codification of it. The Court cultivated a distinct social security notion of 'worker,' which from its earliest interpretations covered more than just those in active employment, such as individuals moving for leisure. The first cases justified the broad interpretation on the basis of Article 51 of the Treaty itself. The principal objective of Article 51 was not simply to guarantee migrant workers social security, but also to

38 See Case 300/84, *A.J.M. van Roosmalen v. Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen*, 1986 E.C.R. 3097 (where Van Roosmalen was a priest of Dutch nationality who always worked outside of the geographical borders of the Community. Already at the age of 22, he moved to Belgium to continue his studies. After becoming a priest, he was sent to Belgian Congo (Zaire), where he remained for 25 years, only interrupted by three years on leave, which he spent with his parents in the Netherlands. During his stay in Zaire, he was supported by his parishioners, but was at the same time voluntarily insured in the Netherlands. However, he did not pay income tax to the Dutch state while residing in Zaire. In January 1981, he became work incapable and returned to Europe. He settled temporarily in the Netherlands and received invalidity benefit here. In June 1982, he established himself in Belgium, and since he no longer fulfilled the residence requirement in the Dutch law, the competent institution decided to suspend his benefit. The preliminary reference to the European Court of Justice questioned whether van Roosmalen fell within the personal scope of the regulation and whether the residence requirement in national law was compatible with Community law).

39 R. Cornelissen, *The Principle of Territoriality and the Community Regulations on Social Security (Regulations 1408/71 and 574/72)*, 33 COMMON MKT. L. R. 439, 443 (1996).

40 See Case 300/84, *A.J.M. van Roosmalen v. Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen*, 1986 E.C.R. 3097 at para. 18.

promote the greatest possible freedom of movement for workers. Interpretations followed the guiding light of the Treaty spirit. After the adoption of Regulation 1408, the Court anticipated the imminent inclusion of the self-employed, once again justified as being in keeping with the spirit of the Treaty. Five years later, the Council adopted the regulation amendment, which finally covered the self-employed. However, no matter how broadly the aims of the Treaty's article 51 were constructed, it could not be used as the legal basis of any extension beyond workers. Adopting Regulation 1390/81 required article 235 (now article 308) as the other Treaty basis. In this way, the member states accepted that the purpose of Regulation 1408 was beyond promoting the free movement of *workers*. The adoption illustrates that the Community objective with Regulation 1408 and the Treaty's article 51 in conjunction with articles 235, 2 and 7 was by no means a given, but was still open to further interpretation. With self-employed persons included under the umbrella, the Court continued its broad definition of the personal scope, whereby the line of reasoning in previous case-law served as grounds for new conclusions. Since 'employed persons' was understood broadly, 'self-employed' had to be as well.

The development of the personal scope from Regulation No. 3 through the first two decades of Regulation 1408's institutional existence left only students, non-active persons, and third-country nationals without co-ordinated social security rights. These excluded groups were subsequently incorporated into new proposals formulated by the Commission and considered by the Council.

### C. Proposing a Generalized Personal Scope

Until the 1990s, the personal scope of Regulation 1408 was extended mainly through the jurisprudence of the Court and the Council's 1981 adoption of the extension to the self-employed. The 1990's were the decade when the Commission re-challenged the status quo of the regulation, and initiated a dialogue with member states on the future personal scope of the regulation through proposals and recommendations. According to the Commission, a personal scope restricted to the market citizen would be inadequate. Instead, it should include all European citizens as well as legally residing third-country nationals. By putting the latter on the agenda, the Commission went beyond a communitarian conception of social protection.

This section focuses on the Commission's position as initiator, and it analyses the way in which it managed, through proposals and recommendations, to set an agenda that proved the insufficiency of Regulation 1408's personal scope. As later negotiations demonstrate, the Commission pursued its agenda by coupling key issues. European citizenship and the free movement of persons were invoked as strong arguments for extending co-ordination of social security rights to all Community nationals. The moral obligation and the political commitment to improve the legal status of third-country nationals became arguments for including persons who were not member states nationals. Below, the analysis first illustrates how a 'People's Europe' developed into a citizenship argument, and how Commission recommendations were used as a means to substantiate the need to extend Regulation 1408. Second, it explains how the Commission initiated its dialogue with the member states concerning the extension of the regulatory scope beyond European citizens, and also how the Commission initially interpreted the scope and limits of the Treaty basis so as to justify an extension to third-country nationals.

### *I. A People's Europe – Proposing New Value to European Citizenship*

The adoption of the three residence directives in 1990 revived the idea dating back to the late seventies that Regulation 1408 should be extended to all member states' citizens. In December 1991, the Commission presented a proposal to extend the regulation to all Community citizens insured in a member state.<sup>41</sup> The proposal was reasoned according to the new general right of residence, and found "indispensable in the context of the social dimension of the internal market and a People's Europe."<sup>42</sup>

However, it soon became clear that the member states were far from prepared to grant any such radical extension of the personal scope. The Commission therefore had a long way to go to gain support for its proposal. The soft-law tool of recommendations was used to emphasize how 'the peoples of Europe' merited equal rights. European citizenship was brought in as a new dimension of European integration.<sup>43</sup> In the Communication, *Modernizing and Improving Social Protection in the European Union*<sup>44</sup> the Commission argued: "The original dimension of European integration, i.e. a common market allowing and fostering free movement of workers, has been enriched by a new *concept*, namely that of *European citizenship*. The personal scope of Regulation 1408/71 should be adapted accordingly."<sup>45</sup>

Soft-law communications on the free movement of persons continued in 1997, and also dealt with the instrument of Regulation 1408. By Commission mandate, a high-level panel on the free movement of persons was set up to identify the "obstacles which confront European citizens seeking to exercise their rights to move freely and to work within the Union."<sup>46</sup> The report was motivated by the Commission's recognition that of the four fundamental freedoms of the single market, the least progress had been made on the free movement of persons. The Commission argued that even though free movement was an institutionalized right, it was not yet a practicable fact for the European people. The report confirmed the Commission's line of reasoning according to which exercise of free movement was argued to constitute an essential means leading to other Union objectives,

The effectiveness of the right to move freely would contribute not only to attaining the objectives of the single market but also bringing the Community closer to the goal of an "*ever closer union among the peoples of Europe*" envisaged in the original treaties, which gave form to the Communities and, subsequently, to the European Union.<sup>47</sup>

The high-level panel pointed out the incompleteness of Regulation 1408 as one of the obstacles to free movement. Its personal scope was held to be inadequate, given the many changes that had occurred since its adoption, particularly the adoption of the three residence directives. The panel found it both logical and essential to extend the scope to cover all persons entitled to move freely within the Union.

41 Proposal to Extend the Regulation to all Community Citizens Insured in a Member State: Proposal from the Commission to the European Union, COM (91) 528 final at 1 (presented by the Commission on 13 Dec., 1991).

42 *See id.* at 3.

43 *See* Cornelissen, *supra* note 39, at 30.

44 *Modernizing and Improving Social Protection in the European Union: Communication of 12 March 1997 from the Commission to the European Union, COM (97) 102 final at 1 [hereinafter Improving Social Protection in the European Union].*

45 *Improving Social Protection in the European Union, COM (97) 102 final at 16 (emphasis added).*

46 *See* Commission Report, Report of The High Level Panel on the Free Movement of Persons 91, Mar. 18, 1997, available at [http://europa.eu.int/comm/internal\\_market/citizens/index\\_en.htm](http://europa.eu.int/comm/internal_market/citizens/index_en.htm).

47 *See id.* at 94 (emphasis added).

The panel's recommendations were later followed up in *An Action Plan on the Free Movement of Workers*. In this document, the Commission stressed that free movement had to be seen in a new perspective. The Commission expected that due to demographic changes and the changed nature of working life, free movement would become much more important over the next 10–20 years than it had been for the last 30 years.<sup>48</sup> Although the *acquis communautaire* was identified as the starting point for reinforcing free movement, it contained “serious flaws and lacunae.”<sup>49</sup> Once again, the Commission identified the right of free movement as a substantial part of European citizenship,

Moreover, following the report of the High Level Panel, which also concerns free movement of persons who are not exercising an economic activity, the Commission has already announced its intention to present in 1998 proposals to simplify and enhance the existing secondary legislation with a view to drawing all consequences in order to *give full value to citizenship of the Union*.<sup>50</sup>

## II. Proposals, Recommendations and a Partial Adoption

The proposals and recommendations set forth by the Commission in the 1990s introduced and reinforced new perspectives on the co-ordination of social security rights. Whereas the institutional aim in the 1970s and 1980s had been to more efficiently allocate production factors, by the 1990s, the goal of cultural integration among the ‘peoples of Europe’ had been added among the economic objectives of the single market.

However, the proposal of a generalized personal scope made no headway until the late 1990s. During the Austrian presidency in the autumn of 1998, a compromise was formulated that proposed a separate extension of the personal scope to students. The strategy of the Commission and the Austrian presidency was to isolate the more controversial part of COM (91) 528 on the extension to non-active persons and special schemes for civil servants, and thereby accelerate the Council's approval of the inclusion of students.<sup>51</sup> Furthermore, the compromise was made possible by proposing a separate material scope for students. The proposal held students outside of the regulation's provision on social pension, and the material impact of the extended personal scope was thus reduced.<sup>52</sup> Since students had already been granted the right to medical treatment outside of their home country,<sup>53</sup> the inclusion only meant access to cross-border family benefits. On this background, the Council adopted Regulation 307/99 in February 1999.<sup>54</sup>

## III. Beyond European Citizenship – Preparing for the Extension to Third-country Nationals

At the same time “European citizenship” was introduced as the new justification for an extension of Regulation 1408's personal scope, the Commission also suggested that the

48 *An Action Plan on the Free Movement of Workers: Presentation by the Commission of 13 Nov., 1997*, COM (97) 586 final at 8 [hereinafter *Plan on Free Movement of Workers*].

49 *Id.* at 5.

50 *Id.* at 9 (emphasis added).

51 Informative Note from the Danish Ministry of Labour to the European Committee of the Danish Parliament, Supp. 47, 15 (Oct. 19 1998).

52 Interview with Employment and Social Affairs, Danish Government (Sept. 12 2001).

53 See Council Regulation 3095/95, 1995 O.J. (L 335), (EC TREATY) (where the right to cross-border medical treatment had been granted to all insured member state citizens, thus including students).

54 Council Regulation 307/1999, 1999 O.J. (L 80), (EC TREATY) *amending* Council Reg. 1408/71 (EEC TREATY).

regulation be extended to legally residing third-country nationals. It thus presented a notion of European citizenship independent of the exclusion of a third part and hereby challenged a traditional communitarian perception of co-ordinated social security rights with rights assigned exclusively to nationals of the Community. By placing the rights of third-country nationals on the agenda, the Commission introduced an amplified comprehension of Regulation 1408's purpose, arguing that although non-Community nationals do not enjoy any rights of free movement under Community law, they should still enjoy the social protection of Regulation 1408. The questions of whether and how to ensure the co-ordination of social security rights for third-country nationals launched a long drawn out legal and political dispute, in which legal questions became political and vice versa. Indeed, this dispute exemplifies the degree to which law and politics may become intertwined.

The background behind the Commission's initiative was the fact that even though third-country nationals are not entitled to free movement under Community law, they may, due to international law or bilateral agreements, enjoy the right to move between member states.<sup>55</sup> Due to their exclusion from Regulation 1408/71, they risked losing any social security entitlements they had accrued via regular contributions to a member state's social security scheme, if they left that member state for another.<sup>56</sup>

On these grounds, the Commission opened the discussion in 1993, questioning whether it was still justifiable to exclude third-country nationals from the protection offered by Regulation 1408.<sup>57</sup> The Belgian chair posed the question to member state representatives at an informal Council in Charleroi in November 1993. However, the meeting did not mobilize sufficient support for a general extension of Regulation 1408 beyond Community citizens. The meeting nevertheless suggested that a limited extension granting third-country nationals a right to intra European health care, as regulated under Article 22 of Regulation 1408/71, might be supported.<sup>58</sup> On this basis, the Commission announced its intention to extend Article 22 to third-country nationals as a first step.<sup>59</sup> Furthermore, at the Portuguese colloquium in November 1994, the Commission presented its long-term intentions to extend the whole scope of Regulation 1408 to non-Community nationals legally residing in the Union. The member states' delegates attending were told that such an extension would not only satisfy a moral obligation, but that it would also introduce a legal and administrative simplification.<sup>60</sup> Even though granting third-country nationals a right to health care benefits would only be an initial and very limited extension of Regulation 1408, the proposal was vetoed by the United Kingdom when finally presented to the Council in November 1995. As part of the same negotiations, the Council adopted Regulation 3095/95, which extended Regulation 1408/71's Article 22 to all member states' nationals insured in a social security scheme.

This initial Council refusal did not however discourage the Commission from proceeding with its long-term intention. In the recommendation that suggested free movement and Regulation 1408 be brought in line with European citizenship, the Commission also insisted that Regulation 1408 overall should be extended to third-country nationals.<sup>61</sup> The Commission obliged itself to present a separate proposal in 1997 concerning

55 Interview with Employment and Social Affairs, Danish Government, in [location] (Sept. 13 2001).

56 S. Roberts, "Our view has not changed" the UK's response to the proposal to extend the co-ordination of social security to third country nationals, 2 EURO. J. OF SOC. SECURITY 189, 190 (2000).

57 Options for the Union: Green Paper from the Commission, COM (93) 551.

58 See Roberts, *supra* note 56 at 192.

59 A Way Forward for the Union: White Paper from the Commission, COM (94) 333.

60 See Roberts, *supra* note 56 at 192.

61 See Modernizing and Improving Social Protection in the European Union, *supra* note 44, at 17.

Regulation 1408's extension to non-Community nationals with legal residence in the Union.<sup>62</sup>

#### IV. *The First Separate Proposal on Third-country Nationals*

Within the normative framework of the *European Year Against Racism* in 1997, the Commission came up with its announced separate proposal on an extension of Regulation 1408 to third-country nationals, legally residing and insured in one of the member states.<sup>63</sup> The rather extensive explanatory memorandum of COM (97) 561, amounting to no less than eight pages, indicates that the proposal might have been controversial on several points.

The Commission pointed out that third-country nationals suffered from a "muddled legal situation," where rights were by no means uniform and each individual case could be considered through a "multiplicity of protection levels."<sup>64</sup> Some might be covered by Regulation 1408 as refugees or stateless persons, some as family members, others through an agreement between the Community and a specific third country, and yet others by individual bilateral or multilateral agreements. A remaining group of third-country nationals might not benefit from any social security protection at all, if they move within the Community. This complexity was identified as harmful to individuals and the source of administrative difficulties when deciding specific rights. The Commission noted that third-country nationals contribute to the social security systems of member states, just as Community nationals do.

The Commission did not find that Regulation 1408's requirement to be "nationals of one of the Member States" precluded an extension of the regulation to third-country nationals. It emphasized that the nationality requirement was not an absolute, and indeed was set aside in the cases of family members and survivors, refugees and stateless persons, and persons from the EEA member countries.<sup>65</sup>

#### V. *The Scope and Limits of the Treaty – the Reach of Community Competence?*

The issue of nationality underlies the long argumentation in proposal COM (97) 561 on its Treaty basis. Traditionally, Regulation 1408 had been formulated as an instrument to promote the free movement of workers, and according to article 48 (now article 39) of the Treaty, only Community workers enjoy the right to free movement. A key point in the long-running dispute on the potential inclusion of non-communitarian nationals in Regulation 1408 was the question of whether article 51 (now article 42) of the Treaty was inextricably bound to article 48, and thus dependant on the nationality requirement of the latter. According to the Commission, this was not the case. Article 51 and Regulation 1408 had gained instrumental value, not solely as a means of promoting free movement, but also as instruments of social protection,

Regulation (EEC) No Regulation 1408/71 is not just geared to the free movement of workers *but also constitutes an instrument of social protection*. For applying the Regulation, the crucial element is *not* exercise of the right to freedom of movement *but the fact that the person concerned is insured under a social security scheme*. The *purpose* is to maintain social protection for persons

62 See An Action Plan on the Free Movement of Workers, *supra* note 48, at 12.

63 Extension of Regulation 1048 to Third Country Nationals, Legally Residing and Insured in One of the Member States: Commission Proposal of 12 Nov., 1997, COM (97) 561 final at 5.

64 See *id.* at 5.

65 See *id.* at 4.

moving within the Community for whatever reason. In line with the task devolving on the Community under Article 2 of the EC Treaty, the *aim is to provide a high level of social protection*.<sup>66</sup>

To support its interpretation, the Commission pointed out that Regulation 1408 also regulated cases where the person concerned might not have exercised his right to free movement for workers, but where a problem of social security arose due to a cross-border situation.<sup>67</sup> Furthermore, it substantiated its viewpoint with the historical fact that Regulation No. 3 was adopted on the basis of article 51 ten years before the right to free movement for workers actually came into force in 1968 with Regulation 1612/68 and Council Directive 68/360.

Referring to the extension of the regulation to the self-employed, the Commission suggested that in so far as article 51 was not a sufficient legal basis on which to include third-country nationals, article 235 could be added with the objective of attaining 'a high level of social protection' stated as a Community task in the Treaty's article 2.

Despite the various arguments listed by the Commission, member states remained deadlocked on the issue, and it was left unresolved for years. One political concern put forward by the United Kingdom was that although the proposal emphasized that third-country nationals were not granted any right of free movement under Community law,<sup>68</sup> it still remained unclear whether non-community nationals would be entitled to the social protection of the regulation without having moved between member states. Regulation 1408's article 3, stating equal treatment, in conjunction with Article 2 of COM (97) 561 could be understood as if the regulation covered non-Community nationals moving from a third country directly into a member state, and who had only been subject to the legislation of one member state.<sup>69</sup> The UK thus feared that Community law could oblige member states to treat third-country nationals equally to their own nationals on the basis of Regulation 1408/71, without their having moved across Community borders.

Directly or indirectly, the major disagreement hampering negotiations in the Council was the question of the appropriate Treaty basis and the scope and limits of Community competences. On the one hand, the Commission held that Regulation 1408 had become an instrument of social policy even when free movement had not been exercised. It did not find that the use of Articles 42 and 308 as based on the Treaty required the personal category addressed to also allow the right to free movement. On the other hand, a minority of member governments, i.e. the UK, Denmark and Ireland, maintained that Articles 42 and 308 did not together constitute an appropriate Treaty basis.<sup>70</sup> Behind these reservations was a political conviction that since the Treaty conferred free movement on Community citizens only, the task formulated in the Treaty's Article 2, to promote a high level of social protection equally, applied only to citizens of the Community. These member governments thus found that the primary law of the Community did not contain any competence to extend the personal scope of Regulation 1408/71 beyond Community nationals. Such

66 *See id.* at 8 (emphasis added).

67 The Commission emphasized that Article 10 of the Regulation makes it possible for a person to export benefits to a member state in which he may never have worked, that Article 22 enables persons temporarily staying in another member state to receive health care, and that Article 73 ensures family benefits to family members who reside in another member state.

68 *See* Extension of Regulation 1048 to Third Country Nationals, *supra* note 63, COM (97) 561 final at 7.

69 *See* Roberts, *supra*, note 56, at 194.

70 Proposal for a European Parliament and Council Regulation on the Extension to Third Country Nationals of Regulation (EEC) No. 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, Council Doc. 12831/99 (Nov. 12 1999) (European Council Documents referenced in this piece are available by request at: [http://ue.eu.int/cms3\\_fo/showPage.asp?id=854&lang=en&mode=g](http://ue.eu.int/cms3_fo/showPage.asp?id=854&lang=en&mode=g)).

an extension would fundamentally extend the Community's objectives and thus require a Treaty amendment.<sup>71</sup>

### *VI. Proposing New Borders of a Personal Scope*

In the 1990s, the Commission formulated its agenda for the future personal scope of Regulation 1408. The Commission found Regulation 1408 outdated and incongruous with the Union's development from economic community to political union with rights granted on citizenship. The argument so far seemed to replicate traditional communitarian reasoning for granting rights, where social rights strengthen the link between the political centre and its citizens. However, the Commission's agenda went beyond such limitations and aimed at including all persons with legal residence in the geographical territory of the Community, independent of the exercise of economic activity and nationality.

The Commission did not find that it would be beyond the scope of the Treaty, and thus the competence of the Community, to extend Regulation 1408's personal scope to third-country nationals legally residing in a member state. This viewpoint was widely supported, although opposed by the minority of the United Kingdom, Ireland and Denmark. Although the Amsterdam Treaty and the Tampere conclusions gave new momentum to ease rigid positions, the disagreement on Community competences and the appropriate Treaty basis continued until case law of the Court in 2001 came to settle the matter, as shall be demonstrated below.

### **D. Negotiating a Generalized Personal Scope**

The following analysis will be presented in four stages and concerns the negotiations on the personal scope. First, this article examines the reform proposed by the Commission to simplify and modernize Regulation 1408, and how that proposal was initially negotiated in the Council. Second, the article discusses how the political question of inclusion of third-country nationals turned into a legal search for the correct Treaty basis. Third, it describes the case law solution that emerged out of that legal search. Finally, in the fourth part, the article analyzes how the *Khalil* judgment brought about a breakthrough in negotiations, and how the original Commission proposal was split in two whereby negotiations on the rights of European citizens were held separate from those of third-country nationals. After a decade of negotiations and political-judicial dispute, legally residing third-country nationals have finally been granted a right to intra-European social security in 14 member states, with Denmark as the exception. However, without the right of free movement, the extension is primarily of an abstract and symbolic value rather than enforceable in practical terms, as will be argued below. Furthermore, intra-European social security has finally become a substantial right attached to European citizenship.

#### *I. Modernisation and Simplification Proposed and Negotiated*

With no appreciable progress on the separate proposal concerning third-country nationals, the Commission presented its long announced proposal to simplify and modernize Regulation 1408 by late December 1998, as had been politically mandated at the Edinburgh

<sup>71</sup> See Roberts, *supra*, note 56, at 195.



Council in 1992.<sup>72</sup> The six years between mandate and proposal had been used for detailed discussions in the “Administrative Commission” as well as seminars held in each individual member state, followed by careful drafting.<sup>73</sup> The aim of the proposal was twofold; to *simplify* and *modernize* Regulation 1408.

The Edinburgh Council recognized the need to simplify the regulation at the highest political level. The Commission in its various communications, arguing that, over the years, the instrumental value of the regulation had decreased by its overwhelming complexity, followed up the political mandate. The requirement of unanimity had repeatedly hindered major reforms, and the consensus procedure had established a practice whereby a strong political pressure in favour of an exception to the main rule was met by adding an annex.<sup>74</sup> However, the practice of adding exceptions had created a situation where very important aspects of the regulation were found in annexes and not the main text.<sup>75</sup> Within this procedural context the regulation’s complexity had gradually been fortified by;<sup>76</sup> 1) the many exceptions from the main rules formulated in the annexes; 2) the case law interpretations on how to read the regulatory text, distancing the literal text from the correct interpretation; and 3) the lack of memoranda explaining the rationale of the individual provisions, whereby administrative institutions and the Court of Justice of the European Communities had to continuously interpret the actual content of the article. The result was that rights and obligations could not be read directly from the text, but had to be ‘translated’ on the basis of detailed knowledge of the extensive annexed text and established case law as well as national administrative practices.

With simplification as one ambitious purpose, the proposal furthermore aimed at modernizing Regulation 1408. The negotiations on modernisation highlighted several sensitive political issues. Among other issues, modernisation meant an amended personal scope. As originally proposed, the regulation was meant to “apply to all persons who are or have been covered by the social security legislation of any of the Member States.”<sup>77</sup> This formulation meant that ‘persons’ would be covered irrespective of their economic status *and* of their nationality. Hereby Regulation 1408 would come to include non-active persons, students with no separate substantive scope, and third-country nationals. By including non-active persons and non-community nationals, the original proposal addressed the two main controversial aspects of the previous proposals COM (91) 528 and (97) 561.

In the explanatory memorandum, the former aim of the regulation – to promote free movement of *workers* – had now been replaced by the aim of giving “real and tangible value” to the free movement of *persons*,

Community legislation on social security is a *sine qua non* for exercising the right to *free movement of persons*. Only by ensuring that persons moving within the Community do not suffer disadvantages in their social security rights will this freedom guaranteed by the Treaty be of real and tangible value.<sup>78</sup>

From the outset, the Council in principle agreed to simplify the regulation.<sup>79</sup> Negotiations, initiated during the German presidency in the first half of 1999 continued during the

72 Proposal for a Council Regulation on Coordination of Social Security Systems of 21 Dec. 1998, COM (1998) 779 final at 1 (EC TREATY).

73 Interview with German Federal Ministry of Labour and Social Affairs (Sept. 19, 2001).

74 Interview with Danish Government Employment and Social Affairs (Sept. 12, 2001).

75 Interview with Danish Ministry of Social Affairs (Nov. 8, 2002).

76 P. Pennings, *The European Commission Proposal to Simplify Regulation 1408/71*, 3 EURO. J. OF SOC. SECURITY 45–47 (2001).

77 See Proposal for a Council Regulation on Coordination of Social Security Systems, *supra* note 72, at 4.

78 See *id.* at 1 (emphasis added).

79 Interview with Danish Government Employment and Social Affairs (Sept. 13, 2001).

Finnish, Portuguese and French presidencies, but without noticeable result.<sup>80</sup> The real crux of the matter appeared to be the politically sensitive parts of the proposal.<sup>81</sup> The inclusion of third-country nationals was controversial from the beginning, Denmark and the United Kingdom held strong reservations about such a policy.<sup>82</sup> In addition, the inclusion of non-active persons caused some trouble, and, furthermore, the extension of the material scope delayed negotiations.<sup>83</sup>

## II. Searching for a Legal Basis – Third-country Nationals Readdressed

The Treaty of Amsterdam had introduced important changes in the primary law premises for negotiating modernisation and simplification. The Amsterdam Treaty amendments made Title IV on *Visas, Asylum, Immigration and other Policies related to the Free Movement of Persons* and article 63 a possible Treaty basis upon which to extend Regulation 1408 to non-Community nationals. Furthermore, the Treaty of Amsterdam had amended article 42, still requiring unanimity, but granting the European Parliament co-decision. The future negotiations on modernisation and simplifications thus counted an extra veto-player.

In addition to this, the European Council of Tampere of October 15 and 16, 1999 subjected the status of third-country nationals to renewed political attention, and the member states politically committed themselves to work for a treatment more equal to that of Community nationals. Based on the Tampere conclusions, the Commission's proposal to include non-Community nationals in the personal scope of Regulation 1408 should have gained sufficient momentum for progress. Despite the fact that the Tampere conclusions mandated the Commission and the Finnish presidency to proceed with the work, the dispute on the legal basis continued to block any progress. Whereas the qualified majority of 12 member states were in favour of adopting the proposal on the basis of articles 42 and 308, as suggested by the Commission, the United Kingdom and Ireland were not, and instead argued that after the Amsterdam Treaty came into force in May 1999, the appropriate legal basis was the new article 63(4). Denmark announced that it would accept neither article 42 in conjunction with 308 nor 63(4) as legal bases for extending Regulation 1408 beyond community nationals, and repeated its political problem with the extension as such.<sup>84</sup>

Denmark, the United Kingdom and Ireland opposed the use of the legal base that had traditionally, been used for extensions of Regulation 1408. Relying on Article 63(4) as a legal base, however, meant that all three member states could stay outside the extension of Regulation 1408. Under the Protocol on the position of the United Kingdom and Ireland, the two member states must opt in to participate in Title IV of the Treaty. Furthermore, the Protocol on the Danish position excludes Denmark from participating in Title IV. Examining the positions of the three states, it becomes clear that their reservations were motivated differently. Both the United Kingdom and Ireland saw article 42 as limited to

80 Interview with Danish Permanent Representation (Dec. 18, 2002).

81 See Pennings, *supra* note 76, at 45.

82 See Roberts, *supra* note 56; Proposal for a Council Regulation on the extension to third-country nationals of Regulation (EEC) No 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, Council Doc. 8807/99 (June 1, 1999).

83 Interview with Danish Government Employment and Social Affairs (Sept. 12, 2001).

84 Proposal for a European Parliament and Council Regulation on the Extension to Third Country Nationals of Regulation (EEC) No. 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, Council Doc. 12831/99 (Nov. 12, 1999).

European Union nationals. Despite this reservation, Ireland emphasized, as early as November 1999, that it was a question of the appropriate legal basis and that it would choose to “opt in” on the basis of article 63.4. In addition, the United Kingdom stressed that its problem was purely a legal one, and that, politically, it supported the extension.<sup>85</sup>

From the outset, Denmark refused the traditional legal basis as well as the new one, and politically opposed any extension of Regulation 1408 to third-country nationals.<sup>86</sup> However, a few months after the coming into force of the Amsterdam Treaty, Article 63(4) was examined and rendered a sufficient legal basis by the Council’s legal service.<sup>87</sup> On this background, Denmark consented to examine the use of 63(4), and two years later finally accepted it.<sup>88</sup> The Danish position changed as negotiations proceeded. Denmark finally decided to change its foot-dragging and isolated position. However, due to the Danish opt-out, such a change of position was politically free of charge.

Together, the Amsterdam Treaty and the Tampere conclusions offered a legal alternative and a political mandate. Regardless of the momentum this supposedly gave to the negotiations on the inclusion of third-country nationals in Regulation 1408, the negotiations did not progress in the Council for the next two years. During that time, the Commission initiated improvements on the general status of non-community nationals, for example by proposing a partial free movement for long-term residents, mandated by the Tampere conclusions.<sup>89</sup>

Among other issues, the question of third-country nationals had pushed proposal COM (1998) 779 into a deadlock of political and legal reservations. Facing the improbability of a political break-through, the Commission and the Council awaited a legal clarification of the dispute, which they assumed would occur with the *Khalil* case.<sup>90</sup>

### III. The Case Law Solution of a Political Problem

On October 11, 2001, the Court decided in the Joined Cases C-95/99 to C-98/99 and C-180/99 (*Khalil* and others).<sup>91</sup> The concrete cases concerned whether Community law, as

<sup>85</sup> *Id.*

<sup>86</sup> Proposal for a European Parliament and Council Regulation on the extension to third-country nationals of Regulation (EEC) No. 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, Council Doc. No. 12830/99 (Sept. 11, 1999).

<sup>87</sup> Proposal for a Council Regulation on the extension to third-country nationals of Regulation (EEC) No. 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, Council Doc. No. 11043/99 (Sept. 17, 1999).

<sup>88</sup> Proposal for a European Parliament and Council Regulation on the extension to third-country nationals of Regulation (EEC) No. 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, Council Doc. No. 13186/99 (Nov. 22, 1999); Proposal for a Regulation of the European Parliament and of the Council on the coordination of social security systems – Parameters with a view to modernizing Regulation (EEC) No 1408/71 Council Doc. No. 13027/01 (Oct. 23, 2001).

<sup>89</sup> Proposal for a Council Directive Concerning the Status of Third Country Nationals who are Long Term Residents of March 13, 2001, COM (2001) 127.

<sup>90</sup> Interview with Danish Government Employment and Social Affairs (Sept. 13, 2001); Proposal for a Regulation of the European Parliament and of the Council on the coordination of social security systems – Parameters with a view to modernizing Regulation (EEC) No1408/71, Council Doc. No. 12296/01 (Sept. 28, 2001).

<sup>91</sup> See Joined Cases, Case C-95/99 *Mervet Khalil*, 2001 E.C.R. I-7413 (2001); Case C-98/99 *Issa Chaaban*, 2001 E.C.R. I-7413 (2001); Case C-97/99 *Hassan Osseilli v. Bundesanstalt für Arbeit*, 2001 E.C.R. I-7413 (2001); Case C-98/99 *Mohamad Nasser v. Landeshauptstadt Stuttgart*, 2001 E.C.R. I-7413 (2001); Case C-180/99 *Meriem Addou v. Land Nordrhein-Westfalen*, 2001 E.C.R. I-7413 (2001) (where all cases concerned third-country nationals regarded as stateless persons under German law. In four of the cases, child benefit had been stopped, because only foreigners possessing a residence permit are entitled to child benefit under the new ver-

stated in Regulation 1408/71, entitled stateless persons to the German child benefit and child raising allowance. German law<sup>92</sup> made foreigners' entitlement to family benefits dependent on their possession of a residence permit. Although not asked directly, the Court laid the preliminary reference out as if to examine whether it was valid to include stateless persons, refugees and their family members in the personal scope of Regulation 1408/71 on the Treaty basis of article 42, although they were not Community nationals. In this examination, the case became relevant to the question of whether article 42 could be used as the legal base for the extension of Regulation 1408 to third-country nationals, or whether the article was limited to granting rights to European Union nationals, since only they are entitled to free movement under Community law. The Court found that the inclusion of stateless persons and refugees had to be considered in its historical context. The original inclusion of stateless persons and refugees took place in a historical context of international and European agreements, signed by the six original member states, in which the Geneva Convention, the European interim agreements and the New York Convention formulated the norm to grant equal treatment to these groups of persons. The European convention on social security of 1957,<sup>93</sup> which to a large extent was replicated in Regulation no. 3, was prepared in this context and granted the principle of equal treatment not only to the nationals of the contracting parties but to stateless persons and refugees as well.<sup>94</sup> Regulation 1408 later inherited both the personal scope of Regulation No. 3 and its embedded norm. On the basis of these historical considerations, the Court answered, on the first question, that its examination had not pointed to any factors making Regulation 1408's inclusion of stateless persons and refugees invalid.<sup>95</sup>

The second question put forward by the referring German Court asked the Court whether stateless persons and refugees could rely on the rights granted by Regulation 1408 if they had moved to a member state directly from a third country, i.e. if they might rely on the protection of Regulation 1408 without having moved within the Community. The Court's answer to the second question was fairly short. The ECJ referred to established case law under which it had concluded that article 42 of the Treaty and the equal treatment provision of Regulation 1408 did not apply to situations, which happen only within the same member state.<sup>96</sup> For the same reason, the Court concluded that stateless persons and refugees could not rely on Regulation 1408 if all aspects of their situations referred to one and the same member state.<sup>97</sup> The Court thereby affirmed that the regulation could only be invoked when a Community cross-border movement had taken place.

sion ((entered into force on 1 January 1994)) on the Federal Law on Child Benefit. The family has not been granted asylum. In the fifth case, child raising allowance had been refused, since Mrs Addou did not possess any residence permit, which is a requirement under the Federal Law on Child-Raising Allowance).

92 *Bundeskindergeldgesetz* (BKGg) [Basic Law on Child Benefit], v. 11.10. 1995 (BGBl. I S.1995, 1250, 1378, (1996, 714)); *Bundeserziehungsgeldgesetz* (BERzGG) [Basic law on Child-Raising Allowance], v. 7.12.2001 (BGBl. I S. 3358).

93 The European Convention on Social Security was signed by the six member states of the European Coal and Steel Community on Dec. 9, 1957. The convention was however, never ratified.

94 See Joined Cases C-95/99-98/99; C-180/99, 2001 E.C.R. I-7413, Judgment of the Full Court at 39 paras. 50, 51 (Oct. 11 2001).

95 *Id.* Para. 58

96 See Joined Cases, Case C-95/99 Mervet Khalil, 2001 E.C.R. I-7413 (2001); Case C-98/99 Issa Chaaban, 2001 E.C.R. I-7413 (2001); Case C-97/99 Hassan Osseilli v. Bundesanstalt für Arbeit, 2001 E.C.R. I-7413 (2001); Case C-98/99 Mohamad Nasser v. Landeshauptstadt Stuttgart, 2001 E.C.R. I-7413 (2001); Case C-180/99 Meriem Addou v. Land Nordrhein-Westfalen, 2001 E.C.R. I-7413 (2001) (where among other cases, the Court referred to Case C-153/91, Camille Petit v. Office National des Pensions (ONP), 1992 E.C.R. I-4973).

97 See Joined Cases, Case C-95/99 Mervet Khalil, 2001 E.C.R. I-7413 (2001); Case C-98/99 Issa Chaaban, 2001 E.C.R. I-7413 (2001); Case C-97/99 Hassan Osseilli v. Bundesanstalt für Arbeit, 2001 E.C.R. I-7413 (2001); Case C-98/99 Mohamad Nasser v. Landeshauptstadt Stuttgart, 2001 E.C.R. I-7413 (2001); Case C-180/99 Meriem Addou v. Land Nordrhein-Westfalen, 2001 E.C.R. I-7413 (2001); Judgment para. 72.

#### IV. Proposal Split in Two

On the basis of the *Khalil* judgment, the Council resumed its discussions on the appropriate legal base for including non-Community nationals in Regulation 1408. Compared with previous considerations on the legal matter, its quick decision on the matter after *Khalil* stands out remarkably. At the Employment and Social Policy Council, December 3, 2001, the Council stated that in light of the *Khalil* judgment, article 42 did not appear to be the appropriate legal basis for extending Regulation 1408 to third-country nationals. At the same meeting, the Council instead agreed on the possibility of using article 63(4) as an alternative legal basis.<sup>98</sup> The case law decision had thus transformed a 12–15 majority in favour of the traditional legal basis of Regulation 1408/71 to a unanimous rejection of that same basis and an agreement on the new article 63(4).

Furthermore, at the same meeting the Council adopted a text subdividing proposal COM (1998) 779 into 12 parameters, each dealing with individual modernisation and simplification topics that had been mandated at the Stockholm European Council in March the same year.<sup>99</sup>

The second parameter dealt with the personal scope. It stated that the personal scope should be extended to all European nationals and pointed out that,

The application of coordination to all insured *persons* also meets the need to adapt it [Regulation 1408/71] to the development of free movement within the Union, which has changed from a right in favour of *workers only to a right and a reality for all European citizens*.<sup>100</sup>

At the same time, the parameter on the personal scope concluded that the negotiations on third-country nationals should be carried out independently. Hereby the original proposal COM (1998) 779 had been split in two.

By its quick actions, the Commission seemed to have left out all doubts about article 63 as the correct Treaty base for the inclusion of third-country nationals. Only 2 months after the decisive Council meeting, the Commission presented its second separate proposal on third-country nationals, COM (2002) 59,<sup>101</sup> with the sole purpose of extending Regulation 1408 to cover non-community nationals as well. However, the argumentation in the explanatory memorandum had changed. The fact that the Commission viewed social protection as the other objective of Regulation 1408 had been omitted, and instead it was stressed that, in light of the Amsterdam Treaty and the recent case law of *Khalil*, the question of the Treaty basis had been re-examined with the conclusion that article 63(4) appeared to be the appropriate one.

By submitting to the new Treaty basis, the Commission clearly compromised its original intentions, which was to clarify a “muddled legal situation” for third-country nationals. As part of the Treaty’s Title IV, the UK and Ireland had to ‘opt in’ to participate, whereas Denmark remained outside of the Community cooperation on visas, asylum and immigration policies. The proposal therefore accepted a continuation of “multiple protection levels” by allowing variable consent.

98 Proposal for a Regulation of the European Parliament and of the Council on the coordination of social security systems Extension of Regulation (EEC) No 1408/71 to third-country nationals = Council conclusions on the legal basis, Council Doc. No. 15056/01 (Dec. 6, 2001).

99 Stockholm Presidency Conclusions of March 23–24, 2001 at § V, point 33 available at [http://www.eu2001.se/static/pdf/conclusions/conclusions\\_eng.PDF](http://www.eu2001.se/static/pdf/conclusions/conclusions_eng.PDF)

100 Proposal for a Regulation of the European Parliament and of the Council on the coordination of social security systems – Parameters for the modernisation of Regulation (EEC) No 1408/71, Council Doc. No. 15045/01 (Dec. 6, 2001) (emphasis added).

101 Proposal for a Council Regulation extending the provisions of Regulation 1408/71 (EEC TREATY) to nationals of third countries who are not already covered by these provisions solely on the ground of their nationality: Commission Proposal of 6 February 2002, COM (2002) 59.

The threat of vast complexity with three member states not coordinating social security rights for third-country nationals was, however, reduced, when the United Kingdom and Ireland in May 2002 announced their 'opt in' on the adoption and application of proposal COM (2002) 59.<sup>102</sup> The UK, which had opposed the extension of Regulation 1408 to third-country nationals from the first proposal on, had finally changed its position.<sup>103</sup>

Even though the *Khalil* judgment apparently silenced all disagreements between member states and the Commission on the legal basis, the European Parliament did not immediately accept this sudden conciliation. In the Parliament's report on proposal COM (2002) 59, it noted that it fully supported the original proposal, which had now been "withdrawn by the Commission under pressure from the Council," and that it, "... is not convinced by the argument the Commission is now using, to the effect that it is compelled by the *Khalil* and others judgment (case C-95/99) to use a different legal basis."<sup>104</sup>

However, even though the proposal based on article 63(4) reduced the Parliament's competence from co-decision to mere consultation, the Parliament chose to behave pragmatically and allow the Council to "strike while the iron is hot." The Parliament reporter recommended that the proposal be accepted by the Parliament and thus prioritized political results over "legal hair-splitting." The Parliament should,

not indulge in legal hair-splitting which might impede the rapid resolution of the matter at issue. Particularly since agreement now seems to have been reached in the Council on this proposal, the proverb 'strike while the iron is hot' seems to apply more than ever.<sup>105</sup>

Proposal COM (2002) 59 was finally adopted by the Council on May 15, 2003.<sup>106</sup> Having been on the agenda as far back as 1993, legally residing third-country nationals were finally included within the personal scope of Regulation 1408/71.

About one year after, and precisely two days before enlargement, the Council adopted Regulation 883/2004, which definitively extended the right to intra-European social security to all, "nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors." The reformed Regulation confirms that European citizenship has a material and social dimension.

### *V. Negotiating the Borders of a Personal Scope*

The process of extending social security across European borders has been shaped through judicial activism, the persistence of the Commission and through political reluctance and compromise. This extension to all European citizens marks a historical move from a privilege held only by market citizens to a right reflecting Union citizenship.

All the same, before generalizing Regulation 1408's personal scope to Community nationals, the Council adopted its extension to third-country nationals. At first sight, the adoption of Regulation 859/2003 seems to be a radical move towards a more egalitarian

102 Proposal for a Council Regulation extending the provisions of Regulation (EEC) No 1408/71 to nationals of third countries who are not already covered by these provisions solely on the ground of their nationality, Council Doc. No. 8482/02 (May 2, 2002).

103 See Roberts, *supra* note 56, for a detailed description of the traditional position of the UK.

104 Report from the European Parliament Committee on Employment and Social Affairs of 5 Nov. 2002, EUR. PARL. DOC. NO. A5-0369 (Nov. 21, 2002).

105 *Id.*

106 See Council Regulation 859/2003 of 14 May 2003, 2003 O.J. (L 124) (EC TREATY) (extending provisions of Council Reg. 1408/71 (EEC Treaty); Council Reg. 574/72 (EEC TREATY) to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality).

clarification of “who has a right to intra-European social security,” disregarding a communitarian conception of welfare.

However, there are decisive objections, which mean that the adoption is not a straightforward application of equal treatment between Community and non-Community nationals. In fact, these objections mean that equal treatment of third-country nationals in cross border social security matters remains merely an idea rather than a fact of life.

Legally residing third-country nationals do not enjoy the right to free movement according to Community law. On the contrary, Regulation 859/2003 emphasizes that the application of Regulation 1408/71 does not give third-country nationals, “any entitlement to enter, to stay or to reside in a Member State or to have access to its labour market.” Furthermore, the regulation sets out explicitly that Regulation 1408/71 is, “not applicable in a situation which is confined in all respects within a single Member State.” Only the significantly reduced number of Non-Community nationals who, due to international law or bilateral agreements, move between member states will, therefore, be able to practice their newly granted rights. Thus the right to intra-European social security appears rather meaningless, since third-country nationals lack the underlying right of free movement.<sup>107</sup> That will, however, be partly changed when the member states finally implement the Directive granting a partial free movement for long-term residents from third countries.<sup>108</sup>

Furthermore, as noted by the European Parliament, it is not entirely clear how the *Khalil* judgment came to settle the dispute on the Treaty basis. In fact, the settlement of the matter appears to be based on the need to mask a pragmatic and rather dubious political choice by the neutrality of law. The *Khalil* judgment did not say that article 42 is inextricably bound to article 39 of the Treaty and thus to its nationality requirement. The answer to the second question, that Regulation 1408/71 cannot be invoked if no movement between member states has taken place, could be argued to simply be an affirmation of precedent and not a statement tying the Treaty’s article 42 to the right to exercise free movement. The Court did not conclude Community nationality to be an absolute premise for inclusion in the personal scope of Regulation 1408/71 on the basis of the Treaty’s article 42. On the contrary, it made a contextual analysis, referring to international law, and concluded that the context and political commitment at the time when Regulation No. 3 was formulated and adopted made it a natural choice to include refugees and stateless persons in Regulation 1408’s personal scope. The question is whether a similar contextual argument, referring to the European Convention of Human Rights, the Charter of Fundamental Rights of the European Union and the Tampere conclusions, would not in the year 2003 be of sufficient validity to justify the inclusion of legally residing third-country nationals in the personal scope of Regulation 1408/71 on the basis of the Treaty’s articles 42 and 308. However, in the end that seems to have depended on the existence of a contemporaneous political commitment.

## E. Concluding Remarks

The personal scope of “who has the right to intra-European social security” has been under debate and negotiation for more than four decades. With worker “*stricto sensu*” as the point

107 S. Peers, *Joined Cases C-95/99 to 98/99, Mervett Khalil and others v. Bundesanstalt für Arbeit and Landeshaupthstadt Stuttgart and Case C-180/99, Meriem Addou v. Land Nordrhein-Westfalen, Judgment of the Full Court of 11 October 2001 [2001] E.C.R. I-7413*, 39 COMMON MKT. L. R. 1395 (2002).

108 European Council Directive 2003/109 of 25 Nov. 2003 on The Status of Third Country Nationals who are Long-Term Residents, 2004 O.J. (L 016) 44–53 (EC TREATY) (the date of transposition is set for Jan. 23, 2006).

of departure for a generalized personal scope including the non-active European citizen as well as legally residing third-country nationals, a specific integration story is depicted in which intra European rights are extended on the basis of flexible concepts and a dynamic perception of the Community's objectives and competences.

It is the interaction between the Court, the Commission and the Council, which moves the process. This study demonstrates that the inter-institutional relation modifies individual positions and preferences as time unfolds.

From the outset, the judicial activism of the Court amplified the meaning of 'employed persons' and interpreted the aim of the legal basis in the most extensive way. When the Council later brought in the self-employed, it merely codified what the Court, had already ruled, and the member states unanimously agreed that the aim of Regulation 1408 went even further than what could be based on the most extensive reading of the Treaty's article 51. The Treaty's article 235 (now article 308) became the additional legal basis to achieve new policy aims. The agenda-setting capacity of the Commission once more assured that the collective perception of aims and means did not stagnate. European citizenship became the next key concept, substantiating new need for reform and further energizing the process. Proposing the generalisation of the personal scope of Regulation 1408 to all European citizens was not a departure from established reasoning, since Community nationals enjoy the underlying right of free movement. That was, however, not the case with third-country nationals. By proposing that non-Community nationals be included in Regulation 1408's personal scope, the Commission attempted to introduce a path-breaking understanding of the regulatory aim, where the decisive factor was no longer to exercise the right of free movement but to be insured under a social security scheme. The full consequences of such a break remain speculative, but were hypothesized by the government of the United Kingdom and vetoed against this background. The intense dispute concerning the appropriate legal basis for including third-country nationals can be interpreted as both a Commission defeat and as an example of successful mediation. On the one hand, the Commission and the large majority of member states were finally forced to accept the Treaty's article 63(4) legal basis. The final choice of legal basis shows that under the unanimity rule, the minority prevails. On the other hand, the Commission managed by compromising its own and twelve member states' initial preferences to put an end to a long-lasting controversy and achieve the desired political result. In the end, such an outcome transcends a negotiating process characterized by political and legal reluctance. The practical effect of the political result depends on the future inter-institutional actions and reactions, and whether new and subtle steps of integration gradually grant free movement right to third-country nationals. For European citizens, on the other hand, intra European social security and free movement have been launched as integral parts of European citizenship – a conception which departed as a mere symbol without substantial meaning.