Symposium: The Status of Non-Community Nationals in Community Law *

Integration into Society and Free Movement of Non-EC Nationals

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I. Introduction

Discrimination against aliens, particularly those who are not nationals of one of the Member States, is a source of concern in the European Community. This concern has repeatedly been expressed by the Council, the Commission and the European Parliament.[1] What is more, this topical and highly sensitive issue is one of extreme political and legal complexity. While there is a growing awareness that integrated measures are needed at Community level, the traditional view is that the treatment of aliens remains an area which belongs to state sovereignty. This view is apparently difficult to reconcile with the requirements of the internal market. This is evidenced by a debate about the powers of the Community and the possible transfer of the authority of the Member States to the Community.

Both in material and formal terms, the position of non-EC nationals who are resident in the Community gives rise to tension, for the people themselves and also for EC

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1 For an outline of Community action since 1986 see European Parliament, Report drawn up on behalf of the Committee of Inquiry into Racism and Xenophobia (Ford Report) (1991) 97-98.

nationals. Among the material factors causing this tension are government attempts to put a stop to continuing immigration, the poor schooling and high unemployment of immigrants in the Community, and racism and xenophobia. Traditional solutions that have been suggested by governments are a radical restriction of immigration by exercising more vigilant control at the outer borders, harmonization of visa and admission policies, and the promotion of integration. Formal factors which impede effective action at a Community level are the supposed lack of competence of the Commission and the Council, the traditional view that the Member States should hold sovereignty in respect of immigration law, and the vast differences between the economies of the Member States.

If this tension is not alleviated, Community principles will be corrupted and there will be a huge waste of social and human resources. It may be possible to find solutions for the formal problems by granting powers to the European institutions, or by making use of intergovernmental conventions to harmonize provisions relating, *inter alia*, to the law relating to aliens, such as the Schengen Conventions[2] and the Dublin Asylum Convention.[3] The Member States have shown a preference for the latter path, though this has not, in the Commission's view, produced significant results.[4] Moreover, following the intergovernmental path has other disadvantages, namely that the European Parliament and the Court of Justice are shut out. Thus, for example, the measures which are being prepared by the *ad hoc* immigration group (an informal working party which is, among other things, drafting the Convention on the crossing of the external borders of the Member States of the European Community) lack the necessary exposure to scrutiny and have little or no democratic legitimation. As immigration matters, in particular the free movement of persons, have been expressly declared as matters of common interests in the Treaty on European Union (done at Maastricht 7 February 1992),[5] these matters will in principle be settled by intergovernmental conventions. Thus they still are excluded from the scope of the EEC Treaty and their legitimacy is not as a rule subject to review by the Court of Justice. It is therefore doubtful whether uniform implementation of the regulations and legal protection against their application can be assured. Nonetheless the Treaty on European Union contains the possibility of establishing

2 Agreement between the Kingdom of the Netherlands, the Kingdom of Belgium, the Federal Republic of Germany, the French Republic and the Grand Duchy of Luxembourg on the Gradual Abolition of Checks at the Common Borders, done at Schengen 14 June 1985, Trb. [Dutch Treaties Series] 1985, 102 and the Convention applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 30 ILM (1991) 68.

3 Convention determining the State responsible for examining application for asylum lodged in one of the Member States of the European Communities, done at Dublin 15 June 1990, 30 ILM (1991) 425.

4 Commission of the European Communities, Commission opinion of 21 October 1990 on the proposal for amendment of the Treaty establishing the European Economic Community with a view to Political Union, COM(90) final, 12.

5 Article K1 of the Treaty on European Union.

the Court's jurisdiction to interpret provisions of intergovernmental conventions in the field of *inter alia* conditions of entry and movement by nationals of third countries on the territory of Member States, and their conditions of residence including family reunion and access to employment.[6]

A formal solution which can be tried out is the granting of nationality to nationals of non-member countries, who are then also allowed to retain their original nationality.

II. The Issue

The position of permanently resident, legal immigrants to the Community, which is both formally and materially weak and unequal, is reflected in the debate on whether or not the free movement of persons pursuant to the EEC Treaty[7] can, or indeed should, be granted to them. This matter is, rightly, often linked to the question of their integration in the host society. After all, integration is primarily a means of removing gross inequalities between various population groups. Not allowing the free movement of persons is a structural factor confirming inequality. The issue here discussed is whether depriving, legally and permanently,[8] resident nationals of third states of free movement within the Community accords with the fundamental principles of the Community on the one hand, and with the idea of justice which can be distilled from the Community's principles and policies on the other.

With a view to the changes the internal market will bring, it is reasonable to ask whether withholding free movement is compatible with the logic of the internal market, because the internal market has been responsible for renewed interest in the concept of European citizenship. If this notion were to leave the realm of European rhetoric and, according to the Treaty on European Union[9] be transformed into a legal status, it would emphasize the fact that there are two sorts of persons living within the territory of the EEC: EC citizens on the one hand and persons who can be regarded as second-class

6 Article K3(2)(c) of the Treaty on European Union.

7 See for a review of the Court's case-law, Willy Alexander, 'Free Movement of Non-EC Nationals', *EJIL* (1992) 53.

8 It is not strictly necessary to adopt a yardstick in terms of a minimum number of years, as is done by the Council of Europe; see Council of Europe, Parliamentary Assembly, Report on the right of permanent residence for migrant workers and members of their families, Doc. 5904; for example, it would also be possible to adopt the period imposed by the various national rules in respect of permanent residence.

9 See Article 8 in which the Citizenship of the Union is established; see also Commission of the European Communities, 'First Contributions of the Commission to the Intergovernmental Conferences on Political Union' SEC(91) 500, as partly reproduced in Migration News Sheet No. 98/1991-05 (May 1991) 8.

residents on the other.[10] In other words, the grim picture the Commission painted as far back as 1976 would have become reality.[11]

III. The Logic of the Internal Market and the Position of Non-EC Nationals

The persons I refer to as 'non-EC nationals' are asylum-seekers, stateless persons, Gypsies, and legal migrant workers. The legal position of these groups differ, particularly in respect of admission, but once they have been admitted their relationship to the Community and to the Member States is comparable. For practical reasons I shall restrict myself to legally resident migrant workers and their families. They form the largest group. But my remarks can be regarded *mutatis mutandis* as being equally relevant to the other groups. From a legal point of view, the position of illegal immigrants is so different from that of legal immigrants that it would not be fruitful to compare their position to that of EC nationals.

The Community principles which will be adopted as a yardstick for assessing the position of legally resident aliens here are the ones which pervade the Community's whole legal system: free movement of persons, equal treatment and social justice. The aspects of EC law relating to aliens that will be discussed here are the right to *free movement of persons* and the related right to equality of treatment. The right to free movement of persons encompasses the right to reside in another Member State in order to work there, despite the person in question not being a national of that state. In accordance with prevailing Community legislation, Member States are obliged to admit to their territory those persons to whom the right of free movement applies. All that is required is that a valid identity document or valid passport be shown.[12] The states are thus entitled to request that these documents are shown at their borders and to refuse entry to persons who are unable to meet this requirement. The right to free movement may be regarded as fundamental in the context of the Community.[13]

In addition to the right to free movement of persons in order to work, it is possible to distinguish a *right of residence*, which has applied to citizens of the Benelux within

10 Advisory Council for Ethnic Minorities, *Memorandum A Social Europe for One and All* (1989) 17 and 21.

11 Commission of the European Communities, Action programme in favour of migrant workers and their families, *Bull.EC Suppl.* 3/76.

12 Article 3(1) of EEC Directive 68/360, JO (1968) L 251/13; Article 3(1) of EEC Directive 73/148, OJ (1973) L 172/14, also Court of Justice in Case 321/87, *Commission* v. *Belgium*, [1989] ECR 997 and Case C-68/89, *Commission* v. *The Netherlands*, decision of 30 May 1991 (*Hoffmann* case), not yet reported.

13 Court of Justice in Case 152/73, *Sotgiu* v. *Deutsche Bundespost*, [1974] ECR 153; see further, among others, R.O. Plender, 'The Right to Free Movement in the European Communities', in J.W. Bridge *et al.*, (eds), *Fundamental Rights* (1973) 306-317; *id.*, 'La libre circulation des personnes en droit européen', in M. Flory and R. Higgins (eds), *Liberté de circulation des personnes en droit international* (1988) 55-75; see also the preamble to EEC Regulation 1612/68.

the Benelux area for some time, and has recently been extended throughout the Community by Council Directives relating to students and persons who are no longer employed.[14] Finally, there is the *right to travel freely* or the *right of circulation*, which applies to citizens of third countries in certain areas, including the Benelux area, and will apply within the Schengen area after the 1990 Schengen Convention has been ratified.[15] The right to travel freely may be distinguished from the other forms of mobility in that it only permits persons to stay on the territory of a state which is party to the agreement for a very limited period of time, namely three months, whereas the right to free movement and the right of establishment also give citizens of EC Member States or of the Benelux the right to take up residence elsewhere in the Community or the Benelux respectively, under certain conditions.

The significance of the rights to free movement of persons and to equal treatment (Articles 3(c) and 48-66 of the EEC Treaty) is clear. They are intended to enable the residents of the Community to look for work in another Member State. Exercising this right is seen as a means of realizing the common market. Pursuant to Community law, the right to equality of treatment – or rather, the prohibition on discrimination based on nationality – and the right to free movement can be invoked by EC citizens in many fields, ranging from working conditions to social security. According to the EEC Treaty, EC citizens enjoy the right to free movement of persons. Under Articles 7 and 48(2) of the Treaty, they may not be subjected to discrimination on grounds of nationality.

Article 2 of the EEC Treaty sets out its general aims and objectives. The Community has as its task the approximation of the economic policies of Member States by establishing common markets, to promote *inter alia* the raising of the standard of living. One of the means of achieving this is the abolition of obstacles to freedom of movement for persons. In this context, the present Article 8A[16] of the EEC Treaty is especially significant. The relevant part of the Article states:

> The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31st December 1992.

The internal market is defined in paragraph two of the Article as:

> ... an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.

14 See on the right of residence under EEC Directives: Council Directive of 28 June 1990 on the right of residence, OJ L 180/26; Council Directive on the right of residence for employees and self-employed persons who have ceased their occupational activity, OJ L 180/28; Directive of the Council of 28 June 1990 on the right of residence for students, OJ L 180/30.

15 See for the right to travel freely or the right of circulation: Article 8 of the Convention on the transfer of control of persons to the external borders of the Benelux area and Article 21 of the 1990 Schengen Convention.

16 By virtue of the provisions of the Treaty on European Union, Article 8A EEC Treaty shall become Article 7A.

Non-EC nationals represent a considerable market potential. At present the working population consists of approximately four million people. Including their families, this means there will probably be more than ten million of these people distributed throughout the twelve Member States in 1993.[17] They are active on both the labour and consumer markets. Restricting their presence in twelve markets, which are sheltered from one another in this respect, is contrary to the principle of a common employment and consumer market which is set out as an objective in Article 2 of the EEC Treaty. Furthermore, any such restriction can easily lead to unfair competition, and is at cross purposes with the goals of the internal market. Or, in the words of Böhning and Werquin:

> In any labour market, statutorily imposed restrictions on economically active persons introduce rigidities and inefficiencies; that is to say, the market-clearing mechanism cannot work as well as it would in the absence of such restrictions. Inefficiencies incur lower output and lower employment. As the establishment of the Single Market is, in essence, an attempt to render the Member States' economies more efficient and competitive, the maintenance of twelve national policies that have the effect of confining a considerable part of the EC's labour force – some 2.5 to 3 million persons – to twelve segregated territories, conflicts with the very goals of the Single European Market.[18]

In other words, the authors feel that the logic of the internal market opposes non-EC nationals being excluded from the free movement of persons.[19] I would put it more forcefully. This restriction frustrates one of the primary objectives of Community law, raising the standard of living. This objective, which according to the preamble of the Treaty is to be achieved by the abolition of the barriers dividing Europe (a matter on which the Single European Act places the primary emphasis[20]) simply cannot be served by such a restriction. It therefore corrupts Community principles.

17 In 1989 – in other words, before the operations regularizing the status of illegal immigrants in Italy and Spain – the Commission estimated their number at 8,179,000, or 2.55 per cent of the total population. See Commission of the European Communities, The social integration of third country migrants residing on a permanent and lawful basis in the Member States, SEC(89) 924 final, table 1.

18 W.R. Böhning and J. Werquin, 'Some Economic, Social and Human Rights Considerations Concerning the Future Status of Third-Country Nationals in the Single European Market', *ILO-Working Paper* (1990) 9; see also C.W.A. Timmermans, 'Why Do It the Intergovernmental Way? Free Movement of Persons and the Division of Powers Between the Community and its Member States', paper presented at the conference on 'Free Movement of Persons in Europe: Legal Problems and Experiences' organized by the TMC Asser Institute on 12 and 13 September 1991 in The Hague, The Netherlands, at 6.

19 See also the Marinaro Report (1985), PE Doc. 95.676/def., at 14.

20 See also P.J.G. Kapteyn and P. VerLoren van Themaat, in L.W. Gormley (ed.), *Introduction to the Law of the European Communities* (2d ed., 1989) 75.

IV. The Logic of the Internal Market and the Necessity of Integration of Non-EC Nationals

National labour market restrictions will result in a greater need for freedom of movement and nothing indicates that this need will be limited to nationals of the Community. In the view of the Economic and Social Committee this means that the Community should pursue without delay a dual aim: national legislation and administrative practices must be harmonized, and the conditions for implementing the free movement of immigrants from third countries must be laid down on the same footing as for EC nationals.[21]

However, the internal market is not only an economic concept. The reference to European citizenship already suggests that this market-oriented approach can be supplemented by a line of reasoning focusing on the material differences between nationals of non-member countries and those of the Member States. To put it briefly, the difference is that, in general, non-EC nationals who belong to certain ethnic groups have proportionately less access to social institutions such as work, housing and education. According to a Commission report they belong to:

> the most disadvantaged economic categories of the host country's society from which many are unable to break free owing to the living, education and working conditions inherent in that situation.[22]

Attempts to improve these conditions were relatively slow to start. The host societies were initially only interested in the work and not in the workers. Policies of the Member States and the Community that were aimed at integration came too late, if at all. The northern Member States realized too late that the workers they had imported from Turkey and North Africa in the sixties and early seventies did not come only to work and then allow themselves be sent back home afterwards. They came as 'guest workers' and became immigrants. The Member States also realized too late that their societies' capacity to absorb these people was limited if they did too little to encourage integration. The result is: vulnerable groups of immigrants, uncertain about their future, dreaming of returning to their country of origin but knowing that they and their children no longer have a future there. Often, too, living with the bleak prospect of lack of work and in poverty.

The official view of the Member States is that integration can only succeed if immigration is limited. The logic of the internal market implies that the internal frontiers will be abolished and border checks removed to the outer frontiers. The officially propagated Community policies on integration are based on the need to restrict

21 Economic and Social Committee, Own-initiative Opinion on the Status of Migrant Workers from Third Countries (91/159/05) OJ C 159/12 of 17 June 1991.

22 Commission of the European Communities, The Social Integration of Third-country Migrants Residing on a Permanent and Lawful Basis in the Member States, SEC(89) 924 final, 22.

immigration by harmonization of visa regulations and stricter border controls.[23] Immigrant groups will find this policy paradoxical and threatening, and this in turn may prove counterproductive in terms of integration. The situation is aggravated because immigration will certainly continue, despite its official banning. In a draft communication from the Commission to the Council, two of the possible reasons for this are said to be the Member States' humanitarian obligations to allow families to reunite, and to admit persons seeking asylum.[24] Apart from the flow of immigrants from the traditional emigration countries, it is expected there will be an influx, albeit temporary and limited, from the East European countries. Because immigration is going to continue, the question is not so much how best to integrate the existing migrant populations, but rather what a social and legal system that is directed towards integration should be like. Here integration should not be taken to mean a unilateral attempt to teach newcomers the norms and values of West European society, but equally the endeavour to reinforce the values of hospitality and equality of treatment in West European society.

Where does the logic of the internal market stand in relation to this kind of attempt to achieve integration? If the internal market were regarded merely as a form of economic cooperation in the narrow sense of the word, it would be difficult to justify a common attempt to achieve integration. But the rules which govern the internal market are expressly concerned with more far-reaching interests than purely economic ones. This is evidenced not only in the preamble of the EEC Treaty, but also in that of the Single European Act. This refers to the decision of the Twelve to promote democracy, based on the fundamental rights that are acknowledged in the Member States, in the European Convention on the Protection of Human Rights and Fundamental Freedoms, and in the European Social Charter, especially those of freedom, equality and social justice.

Community law, to the extent it is laid down in the Single European Act, claims to be based on social justice, and, what is more, social justice as a fundamental right.[25] In the legal culture of Western Europe, social justice is a name which is given to efforts to create equal rights and distribute scarce goods equitably. In the above characterization, what counts is that non-EC nationals are given proportionate access to social institutions. The Economic and Social Committee warns that, if the two paths sketched above, the harmonization of regulations promoting integration and the laying down of conditions for the free movement of persons, are not followed, this will not only jeopardize the proper working of the internal market but also clear the way for further discrimination.[26]

23 See Commission of the European Communities, Policies on Immigration and the Social Integration of Migrants in the European Community; Experts' Report drawn up on behalf of the Commission of the European Communities, SEC(90) 1813 final, 17; similarly: Economic and Social Committee, *supra* note 21, at 14.

24 SEC(91) 1855/3, see *Migration News Sheet* No. 99/1991-06 (June 1991) 1.

25 The terminology of the preamble is not clear. Views on social justice constitute the starting point from which the creation of rights ought to follow, social justice cannot in itself be seen as a right.

26 Economic and Social Committee, l.c.

This would mean an infringement of one of the dominant legal norms in both the Community and the Member States: the prohibition of discrimination.

V. The Logic of the Internal Market and the Powers of the Community[27]

The intractability of the free movement for non-EC nationals is particularly evident in what I should like to call the battle for the powers of the Community. This battle is being waged at various levels. The first controversy is about the interpretation of provisions in the EEC Treaty governing the free movement of persons. It has been argued that the Community also has powers in respect of the free movement of non-EC nationals, on the basis of which this free movement could be regulated in a similar manner to that contained in the regulations that have been devised for nationals of the Community. There are convincing arguments in favour of this, because the Treaty does not restrict free movement and equality of treatment to EC nationals. Article 3(c) expressly refers to the free movement of *persons*, without limiting it to EC nationals, and Article 7, which contains the prohibition on discrimination, and Article 48, which lays down the free movement of workers, do not reserve these norms for citizens who are nationals of one of the Member States.[28]

This has led several authors to state that the draftsmen of the Treaty wished to leave open the possibility that non-EC nationals might indeed fall under these favourable provisions. One also frequently comes across a different opinion.[29] But the Treaty in no way compels one to take the view that the free movement of workers from third countries cannot be included within the scope of Articles 3(c), 7, 8A and 42-51, or that the organs of the Community are not competent to regulate the free movement of non-EC nationals.

The free movement of these residents is indeed also the subject of secondary legislation. In Article 10 of EEC Regulation 1612/68, concerning the free movement of workers within the Community,[30] it is provided that the spouse of a worker who is a

27 Timmermans, *supra* note 18, at 11 et seq.

28 Unlike Treaty provisions on the right of establishment and freedom to provide services which are expressly limited to the nationals of Member States). See Article 52 of the EEC Treaty.

29 See in support of the view that the regulation of the legal position of citizens from third countries does not fall outside the scope of the Treaty, for example, Kapteyn, VerLoren van Themaat and Gormley, *supra* note 20, at 415-416 and R. Plender, *International Migration Law* (1988) 197-198; see also for a recent summary H. Verschueren, 'Het arrest Rush Portuguesa. Een nieuwe wending aan het vrij verkeer van werknemers in het Europese gemeenschapsrecht' [The Rush Portuguesa Decision. A New Turn in the Free Movement of Workers in European Community Law], *Migrantenrecht* (1990) 188 and 191; see for the opposite view Verschueren, ibid., at 188 and 191 and B. Sundberg-Weitman, *Discrimination on Grounds of Nationality; Free Movement of Workers and Freedom of Establishment under the EEC-Treaty* (1977) 100-101; see further P. Oliver, 'Non-Community Nationals and the Treaty of Rome', 5 *YEL* (1985) 59-60.

30 JO (1968) L 257/2.

national of a Member State and is employed in the territory of another Member State and his children below the age of 21 or who are dependent on him, as well as the dependent ascendent relatives of the worker and his spouse, *in all cases irrespective of their nationality*, may take up residence with the worker in question. According to Article 11 of this regulation, the spouse and children under 21 or dependent on him may accept employment on the territory of the Member State where the worker is working. This is conditional on the worker himself making use of the right of free movement. If this is not the case, these rights cannot be exercised by the spouse or relatives referred to in the regulation.[31] Article 4 of Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community[32] contains a similar favourable provision. These regulations are intended to avoid the nationality of the spouse and relatives referred to in them forming an obstacle to free movement.

On the other hand, Regulation 1408/71 shows that the Community institutions derive their regulatory power in respect of workers from third countries from the Treaty, in particular Article 48. In Articles 1 and 2, *stateless persons and admitted refugees and their relatives* are expressly referred to as beneficiaries. True, the Council used its regulatory power practically only in favour of Community nationals and their relatives, but it can be argued that the wording of Article 48 does not force to that conclusion.

In the *Meade* case the Court of Justice, albeit incidentally and in an obscure passage, seems to have taken the view that Article 48 of the Treaty only ensures free movement for 'workers of Member States', possibly with the intention of demonstrating that the provision relates solely to workers who are nationals of one of the Member States. But the Court did not put it so explicitly:

> By virtue of Article 2(1), Regulation No. 1408/71 is to 'apply to workers ... who are nationals of one of the Member States ... as also to the members of their families'. Similarly, Article 48 guarantees free movement of persons only to workers of the Member States. As is clear from the documents before the Court, the national court raised its question in the context of the case of a child whose father is a national of a non-member country and whose mother is not an employed person. Under those conditions, Regulation No. 1408/71 does not apply to this case.[33]

Nevertheless, we cannot be certain of the view taken by the Court, as it did not explicitly define the term 'workers' in Article 48 as being 'workers who are nationals of one of the Member States'. It is also unlikely that the Court would have denied competence to

31 Court of Justice in Joined Cases 35 & 36/82, *Morson and Jhanjan* v. *the Netherlands*, [1982] ECR 3723 and the decision of in Joined Cases C-297/89 and C-197/89, *Massam Dzodzi* v. *Belgium*, [1990] ECR 3783.

32 JO (1971) L 149/2.

33 Court of Justice in Case 238/83, *Meade*, [1984] ECR, 2631 consideration 7; see particularly on the limiting view this decision is thought to contain C. Greenwood, Nationality and the Limits of the Free Movement of Persons in Community Law, 8 *YEL* (1988) 205-207.

the Council acting upon the basis of Article 49 EEC Treaty granting certain rights related to free movement to non-EC workers.

This is relevant in the light of recent developments reflected in the Treaty on European Union. As has already been noted, Article K1 of this Treaty indicates as a matter of common interest conditions of residence by nationals of third countries including family reunion and access to employment. The assumption of the Union Treaty seems to be that cooperation between the Member States will lead to the conclusion of intergovernmental conventions. However, the competence of the Council pursuant to the Treaty to use its Community power remains unaffected.[34] Thus, according to Article 49 of the EEC Treaty, the Council acting by a qualified majority, still has the power to issue directives or to make regulations setting out the measures required to bring freedom of movement for workers as defined in Article 48.

Those who advocate a restricted view of Articles 3(c), 8A, 7 and 48-51 of the EEC Treaty base their opinions primarily on case-law dealing with secondary legislation, in which the significance of these provisions for the free movement and equality of treatment of citizens from third countries was not the main issue.

Where workers from third countries are involved who have been recruited by a person to provide services in one of the Member States, other than that of the person for whom the services are intended (see Articles 59 and 60 of the Treaty), the Court has made its position clear. The authorities of the country where the services are provided may not take any restrictive measures in respect of the employees as long as the service continues. This supports a limited right of free movement, namely to the Member State where the services are to be provided and for as long as the service lasts.[35]

This demonstrates that the EEC Treaty does not limit free movement to persons or workers who are nationals of one of the Member States. Secondary legislation however does put in place such restrictions, as rights are expressly granted to nationals of third countries. This view is also taken by the Member States and the Council.[36] In its White Paper on Completing the Internal Market, the Commission implicitly adopts the stance that the Community does have powers in this respect, as it suggests adopting a directive on the harmonization of the regulations concerning the status of non-EC nationals.[37] However, due to difficulties in achieving a consensus in Council,[38] the Commission has decided not to propose legislation for the time being.

34 See Article K1, opening words.

35 Court of Justice, decision of 27 March 1990, Case C-113/89, *Rush Portuguesa*, [1990] ECR 1439; see also Verschueren, *supra* note 29, at 188.

36 See for the Council's view: Council Resolution of 27 June 1980 on guidelines for a Community labour market policy, OJ C 168/1 of 8 July 1980.

37 COM(85) 310, final, para. 48.

38 See Article 100A(2) of the EEC Treaty.

One thing the Community certainly does have the power to do is the promotion of close cooperation between the Member States in the social field. The Commission is charged with this mission by Article 118 of the EEC Treaty. It has used these powers twice in respect of non-EC nationals. The first time was in 1985, to adopt a decision setting out a procedure for prior communication and consultation on migration policies in relation to non-member countries.[39] West Germany, France, the Netherlands, Denmark and the United Kingdom (probably not by chance the richer Member States with more or less highly developed social security systems) felt that the decision impinged on their sovereignty in the field of immigrants and immigration rules, and thus they appealed to the Court of Justice. Broadly their contention was that migration policies in respect of non-member countries either did not fall within the social field within the meaning of Article 118 or only partly within such field. The most far-reaching contention was put forward by the French Republic: the whole of immigration law, being law that relates to national public policy and public security, was outside the competence of the Community.

This decision can be seen as the first regulatory attempt to intervene in the policies of the Member States in respect of non-EC nationals. Its aim was, *inter alia*, to harmonize national legislation in the field of immigration law. The Court had to decide two separate issues; namely whether the cooperation between the Member States in the social field covered by Article 118 included migration policies in respect of non-member countries, and secondly, whether the task of arranging consultation, which is entrusted to the Commission in that provision, implies that this institution is empowered to adopt binding decisions.

The Court held that the contention that migration policies in respect of third states fall completely outside the social issues for which Article 118 provides cooperation between the Member States cannot be accepted. In answer to the second question the Court held that social integration did fall within the scope of Article 118, because these matters are directly connected with problems in the fields of employment and working conditions. But though the cultural integration of immigrant communities from non-member countries is in some respects related to the consequences of migration policies, it applies to these communities as a whole, without distinction between migrant workers and other aliens, and its relationship to employment and working conditions is thus extremely tenuous. The Court held that migration policies can only pertain to the social field within the meaning of Article 118 to the extent that they relate to the situation of workers from non-member countries in connection with these workers' impact on the Community labour market and working conditions. With respect to the Commission's power to implement a consultation procedure, the applicant Member States argued that the decision was not limited to arranging a consultation procedure, but by laying down the aim of the consultations (i.e. the harmonization of the national regulations) it also

39 Commission Decision No. 85/381/EEC of 8 July 1985, setting up a prior communication and consultation procedure on migration policies, OJ L 217/25.

sought to determine the outcome of these consultations; it was therefore argued that this exceeded the Commission's procedural powers. On this point the Court held that, where the Commission is only competent to set up a consultation procedure, it cannot lay down what the outcome of those consultations should be and cannot prevent the Member States from applying draft treaties, agreements or provisions which it feels are not in accordance with the policies and actions of the Community.[40]

The decision was declared void to the extent that the Commission was not empowered in Article 1 to extend the communication and consultation procedure to areas connected with the cultural integration of workers/nationals of non-member countries and their families, or to make the securing of conformity between draft national measures and the policies and actions of the Community an objective of consultation.[41]

The second time the Commission used its powers under Article 118 was in 1988, when a decision appeared which was almost identical to that of 1985, but which met the Court's objections.[42]

The Commission does have various means of taking non-EC nationals into account within the context of social or development action programmes, especially when these programmes contribute to education and training. There are also ways to admit non-EC nationals who have been born and bred in a Member State, and are legally resident there, to the Community's exchange and cooperation programmes (for students, young workers and schoolchildren). In view of the Court of Justice's ruling, the Commission is also empowered to promote close cooperation between the Member States in respect of employment for non-EC nationals. This is why it can promote the creation of a right of access to labour, even if it is not in the Member State where the non-EC national in question has been admitted. According to a draft communication to the Council, the Commission does indeed have this in mind. Opportunities for cross-border labour, which in fact amount to the free movement of persons, could be sought for certain categories of non-EC nationals who are permanent residents in one of the Member States, such as treaty refugees or non-EC nationals who are employed as guest workers.[43]

40 Apart from this, the Court noted that the competence of the Commission should remain restricted to the organization of a procedure for communication and consultation, *'for in the present state of community law'* (my italics), the fields in which that communication and consultation are prescribed belong to the competence of the Member States. See [1987] ECR 3254. Thus it cannot be ruled out that community law will develop in such a way that the Commission will acquire competence in these fields. This might be possible within the context of the internal market after 1992.

41 Court of Justice in Cases 281, 283-285 and 287/85, *Germany and others* v. *Commission*, [1987] ECR, 3254; the application of the Netherlands was declared inadmissible as being out of time.

42 Commission Decision No. 88/384/EEC of 8 June 1988, setting up a prior communication and consultation procedure on migration policies in relation to non-member countries, OJ L 183/35.

43 See *supra* note 24, SEC(91) 1855/3, 23.

The Treaty on European Union introduced Community competence in the area of immigration matters concerning third country nationals. Although emphasis is still laid on intergovernmental cooperation in the spheres of justice and home affairs,[44] some new provisions inserted into the EEC Treaty give Community institutions at least some competence in the field of free movement of non-EC nationals. Thus according to a new Article 100c, the Council may, until 1 January 1996,[45] acting by unanimity on a proposal from the Commission and after consulting the European Parliament, determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States.[46] As granting visas has to be considered as one of the cornerstones of aliens law, being in itself an utterance of national sovereignty in the classical sense of this term, this empowerment means an important shifting of competency from the national to the Community level. According to Article K9, the Community can also intervene in some of the fields covered by cooperation in the field of Justice and Home Affairs, such as asylum policy, immigration policy and policy regarding nationals of third countries, including their conditions of residence, family reunion and access to employment. Although Title VI of the Treaty on European Union has confirmed the Member States' primacy in this area, the Council may according to Article K3, act either by way of a convention between the Member States or by adopting Community legislation.

VI. The Logic of the Internal Market and the Upholding of the Sovereignty of the Member States

A complicating factor for the Community when taking measures is the attitude the Member States adopt towards their sovereignty. The above proceedings in *Germany and others* v. *Commission* before the Court of Justice clearly demonstrate this. A further, express reservation of sovereignty was made in an annex to the Single European Act. In a general declaration accompanying Articles 13 (which incorporated the present Article 8A into the Treaty) to 19, the contracting parties laid down the following:

> Nothing in these provisions shall affect the right of the Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries, and to combat terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques.

44 See Title IV of the Treaty on European Union.

45 From the 1 January 1996, the Council may act by a qualified majority, see the new Article 100c para. 3.

46 According to paragraph 2 of this provision the Council may in the event of an emergency situation in a third country posing a threat of a sudden inflow of nationals from a third country into the Community, acting by a qualified majority even introduce a visa requirement for nationals of the third country in question for six months.

From the conventional international law view of competence, the clause on measures in respect of immigration is not surprising. It becomes so when read in combination with the political declaration by the governments of the Member States on the free movement of persons, which was also made in the Single European Act. This declaration reads as follows:

> In order to promote the free movement of persons, the Member States shall cooperate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries. They shall also cooperate in the combating of terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques.

Taking both of these declarations together, it can be deduced that on the one hand the Member States wish to retain their power to control immigration into their territories, but that on the other they acknowledge the powers of the Community in the fields of entry, movement and residence of non-EC nationals concerning the crossing of the internal borders. Although it is true that the mentioned declarations do not have the force of treaty provisions,[47] they can be utilized in the interpretation of treaty provisions, and are certainly politically significant.[48] These declarations go to show that, unlike its power in the field of the free movement of EC nationals, the Community's power in this respect is not regarded as exclusive. From the point of view of a clear demarcation of competence between the Community and the Member States, this is open to considerable objections. These objections have not been removed by the Treaty on European Union. On the contrary, as shown above, the Treaty in fact constitutes the confirmation of the intergovernmental method followed by the Member States. Even now a disputable system without a clear basis for Community action has remained. In the field of immigration and granting rights to non-EC nationals, the Member States are supposed to establish collaboration on the areas of common interest. But pursuant to Article K1 of the Treaty, again they will do so without prejudice to the powers of the Community. Nevertheless the Community will have the opportunity to enter the sphere of immigration legislation.

Paradoxically, the traditional view of sovereignty as regards the Community may also contribute to nationals of third countries actually being granted free movement. Although it is by no means ruled out that nationality may give rise to rights under

47 See A.G. Toth, 'The Legal Status of the Declarations Annexed to the Single European Act, *CML Rev.* (1986) 803-812 and G.M. Borchardt and K.C. Wellens, 'Soft law in het gemeenschapsrecht' (Soft Law in Community Law, 14 *ELR* (1989) 267), *Sociaal-economische Wetgeving* (1987) 688-695; also E. Grabitz (ed.), *Kommentar zum EWG-Vertrag*, comm. at Article 100A, margin No. 11-13 and J. Pipkorn in H. von der Groeben *et al.*, (eds), *Kommentar zum EWG-Vertrag*, comm. at Article 8A margin No. 43-57.

48 Grabitz, *supra* note 47, margin No. 12; an illustration of the political significance is the debate in the Dutch Lower House on the signing of the 1990 Schengen Convention. The Foreign State Secretary justified the intergovernmental path, which was not well received in the House, by referring to the political declaration; see the Proceedings of the Lower House, [Handelingen TK] 1989-1990, at 77/4253.

Community law,[49] it is up to the Member States to determine who their nationals are. Giving a person the nationality of a Member State may give him the benefits of the EEC Treaty. This is the path that the Netherlands seems to favour.[50] Those people who do not object to dual nationality may thus be given the opportunity to acquire Dutch nationality by means of a flexible naturalization procedure. In any case this is the consequence of a systematic policy of integration that has been followed for years.

VII. The Logic of the Internal Market and the Control of Non-EC Nationals Crossing the Borders

Finally, the position of non-EC nationals must be considered, where they wish to cross the internal frontiers of the Community. Under the present Article 8A of the EEC Treaty, the internal market is an area without internal frontiers. This is an area in which the controls have been moved to the outer borders of the Community. Examples of this are the Benelux and Schengen areas. The topics which have been regulated in the Schengen agreements will also have to be worked out in the context of the internal market. In fact, the Schengen agreements are seen as precursors – or to use the jargon of the builders of Europe: a testing ground, a laboratory[51] – of the internal market. This means that the movement of aliens, as regulated in the 1990 Schengen Convention, will serve as a model for the regulation contained in any treaty which is drawn up between the Twelve. According to Article 21 of this Convention, aliens who are legally resident in one of the Schengen countries may avail themselves of a right to move freely within the territory of the other Schengen countries for a period of up to three months. It is reasonable to suppose that it is not intended that these aliens should be able to stay three months in each of the Schengen countries, one after the other.[52] Article 22 of the 1990 Schengen Convention provides for another, very important, restriction. Nationals of third countries who enter another Schengen country are to report to the appropriate authorities on, or

49 See Court of Justice Case 36/75, *Rutili* v. *Ministre de l'Intérieur*, [1975] ECR 1753.

50 See the Netherlands Government's memorandum 'Rechtspositie en sociale integratie' (Legal Position and Social Integration], announced and summarized in Stcrt. 1991, 94; Dutch Lower House, 1990-1991, 22 138, No. 2.

51 See, for example, the statement by the Commission, reproduced in Agence Europe, 30 November 1989, No. 5142 (n.s.) and that of the Netherlands government in 1988-1989, 19 326, No. 10, 6. The Commission even calls the *'pilot function'* of the 1990 Schengen Convention its *'raison d'être'* (my italics), see Agence Europe, 16 December 1989, No. 5142 (n.s.); see also the answer of the Commission to written question No. 413/89, OJ (1990) C 90/11.

52 This implies a restriction in comparison with the present situation. At the moment it is still the case, according to the Netherlands government, that aliens who visit the Benelux, France and Germany in succession within a period of six months may stay in each of the three areas without a residence permit (although they may require three visas), as long as they do not stay in each of the areas longer than three months, and may in principle take up permanent residence within the territory of the three. TK 1988-1989, 19 326, No. 13, 19-20.

within three days of, entry into that country.[53] This means that border controls, even the borders themselves, will remain in existence. It is difficult to maintain that this is in accordance with the logic of the internal market. Though it will actually be possible to cross the internal frontiers without being subject to checks, because the border controls are to be abolished, this may in fact lead to more refined and effective domestic control. There is thus the real danger that the domestic freedom of EC nationals will be subject to more restrictions than is currently the case. Free movement of persons may therefore mean more control being exercised in respect of certain groups of residents. Freedom thus generates lack of freedom. This too may lead to a corruption of the Community principles of freedom of movement.

VIII. Conclusion

The internal market has not yet resulted in equality for non-EC nationals. On a number of points this is contrary to the logic of the internal market, in so far as can be distilled from Article 8A of the EEC Treaty and the principles which underlie the free movement of persons within the Community. This potential breach could be removed by explicitly granting non-EC nationals who are permanently resident in the Community the free movement of Article 3(c) and Articles 48-66 of the Treaty, on the same footing as EC nationals and based on the same secondary legislation as applies to EC nationals.

53 It is true that some form of duty to report does exist in the Benelux countries, but its maintenance has been eroded with the passage of time. Aliens who propose to stay longer than eight days in one of the Benelux countries, otherwise than in hotels, are obliged to report to the appropriate authorities in that country. See Article 1 of the Decision of the working group for the movement of persons on the reporting of aliens, m/p (60) 4, of 20 June 1960.