

The *Qualified* Right To Free Movement of Workers: How the Big Bang Accession Has Forever Changed A Fundamental EU Freedom

Brian J. Woodruff

I. INTRODUCTION

It has been more than sixty years since Winston Churchill made the speech that has forever changed Europe.¹ Churchill, speaking most directly to France and Germany, urged the continent of Europe to unite. He spoke to the creation of a “United States of Europe.” Churchill’s idea for France and Germany was quite simple; join French and German interests so as to avoid the start of another war that could ravage the continent of Europe that was still in recovery from the destruction of World War II. More than sixty years later, Churchill’s suggestions are being played out in the lives of nearly half a billion people and 27 member states² that make up the European Union. The political landscape of Europe has changed beyond recognition since Churchill’s speech in 1946. Such changes are best exemplified by the creation of the European Union (EU) itself, the rise and fall of Communism on the continent, and most recently the “big bang” expansion of the European Union.

The “big bang” expansion of the European Union resulted in the EU expanding from 15 to 25 member states overnight. The states of Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia became official member states of the EU on May 1, 2004.³ It was a celebratory time for the EU and its citizens, new and old. Parties

1. RALPH H. FOLSOM, *EUROPEAN UNION LAW IN A NUTSHELL* 1 (4th ed. 2004).

2. Key Facts and Figures About Europe and the Europeans 2006, http://www.europa.eu/abc/keyfigures/index_en.htm (last visited Apr. 6, 2007).

3. For purposes of this paper, the 15 EU member states that were members before the accession in 2004 will be referred to as the EU-15. The 10 new member states will be referred to as the accession countries.

were held, fireworks were shot, songs were sung, and speeches declaring success were given.⁴

Considering the EU's beginnings, such celebrations were undoubtedly well deserved.

Unfortunately, regardless of the positive implications of the accession of ten new member states, there was, and to some extent still is, a great deal of concern regarding many of the new member states.

At its core, the EU is an economic union. The EU has been evolving and further integrating since the creation of the European Coal and Steel Community (ECSC) in 1951. The ECSC integrated the production and distribution of coal and steel among its member states.⁵ Eventually, the ECSC gave way to further integration with the creation of the European Economic Community (EEC), courtesy of the Treaty of Rome, in 1957. Over time, membership and popularity of the EEC grew to the point that it became feasible to incorporate political goals into the integration of Europe. The effort to integrate political goals is best exemplified by the Maastricht Treaty of 1992 that created the European Union.⁶

However, despite further political integration in Europe, economic interests within the union remain the most prevalent topics of integration in the European Union today. Considering, the "big bang" accession of ten new member states, including eight states that were formerly under communist control, there was, and continues to be, concern that the EU's expansion was far beyond what is best for the economic interests of the union as a whole, its individual member states, and European citizens.

4. Natalie Shimmel, Article, *Welcome to Europe, But Please Stay Out: Freedom of Movement and the May 2004 Expansion of the European Union*. 24 BERKELEY J. INT'L L. 760, 760 (2006).

5. The ECSC member states were France, Germany, Italy, Belgium, Netherlands, and Luxembourg. The ECSC was a creation of Robert Schuman, however the idea for the community retreats back to Churchill's plan for the integration of French and German interests.

6. FOLSUM, *supra* note 1, at 8.

Undoubtedly, however, the EU has maintained great success as an economic union. The EU has used free trade and free movement to effectuate the success of the common market. Lying at the foundation of the free trade agreement is the European Union's "four freedoms." The freedom of movement of goods, capital, workers, and persons has created a free trade area that is unlike any other in the world.⁷ This paper will focus primarily on the free movement of workers within the EU.⁸ The "big bang" accession has created an interesting dichotomy within the EU. For the most part, the citizens and governments of the ten new member states see this newfound right to seek work and residence in any and all states of the EU⁹ as purely positive. Citizens of the accession countries are surely excited by the new opportunities that the accession has provided them. By contrast, the "big bang" has created mixed feelings among the governments and citizens of the EU-15. While many EU-15 citizens view the accession as a positive, seeing potential for further integration and a stronger marketplace, other "citizens of the old member states worried that their labor markets would be flooded with poor migrants from the

7. The free movement of goods is established in Title I of the Treaty on the European Community. Title III establishes the free movement of persons, workers, and capital in the EU. Specifically, Article 39 enumerates the free movement of workers. Treaty Establishing the European Community art. 39, Dec. 24, 2002, O.J. (C325/51) (as amended) [hereinafter EC Treaty].

88. The free movement of workers is established by Article 39 of the Treaty on the European Union. That article reads: 1. Freedom of movement for workers shall be secured within the Community. 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: (a) to accept offers of employment actually made; (b) to move freely within the territory of Member States for this purpose; (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission. 4. The provisions of this article shall not apply to employment in the public service. EC Treaty, supra note 7, art. 39.

9. This paper will explain how the free movement of worker rights of most of the accession countries were restricted by many of the old EU-15 member states.

East, who would take already scarce jobs away from current EU citizens by their willingness to work for low wages.”¹⁰

This article will discuss the free movement of workers within the EU generally. It will break down the text of Article 39 and how it has been interpreted by the European Court of Justice. Likewise, the article will explain the rights that Article 39 affords citizens of the EU, including, for instance, what rights individuals have, and what rights family members have. On the other hand, this article will address the legitimacy of the fears of the EU-15 regarding accession and migration, the transitional measures taken by the EU-15 to prevent such fears from becoming real and the resulting digression from the freedom of movement status quo, the legal implications of these measures, and the reaction of the accession states. Likewise, this article will analyze whether the relatively ad hoc transitional measures taken by twelve of the EU-15 member states are contradictory to the text of the Treaty of Rome, specifically Article 39, and the foundations of the European Union.

II. Free Movement of Workers in the European Union

There is little question that the creation of a common market within the European Union has been a success. The “four freedoms” have served as the cornerstones of the common market since its creation, ensuring “an open market economy with free competition.”¹¹ Specifically, the free movement of workers in the EU has proved to be an indispensable freedom that has provided further economic, political, and social integration. The free movement of workers is

10. Shimmel, *supra* note 4, at 764.

11. EC Treaty, *supra* note 7, art. 4.

established and protected by Article 39 of the Treaty of Rome.¹² Further, Articles 40-42 serve the goals of Article 39 by further protecting and encouraging the free movement of workers.

A. A Worker Defined

Before outlining the free movement rights that a worker is afforded within the European Union, it is necessary to define a worker for purposes of the Treaty of Rome. Unfortunately, since the inception of Article 39, there has not been any one definition of a worker that has seen consistent application. In fact, the Treaty of Rome fails to provide such a definition.¹³ Similarly, the European Court of Justice (ECJ)¹⁴ concedes that “there is no single definition of worker in Community law: it varies according to the area in which the definition is to be applied.”¹⁵ However, over time, with the judicial assistance of the ECJ, the worker has been conceptualized to a point of practicable understanding.¹⁶

For example, in the case of *Lawrie-Blum v. Land Baden-Wurttemberg*, the ECJ declared, the “essential feature of an employment relationship is that for a certain period of time a person performs services for another and under the direction of another person in return for which he receives remuneration.”¹⁷ In *Steymann v. Staatssecretaris van Justitie*, the ECJ determined that “genuine and effective” activity for which the community receives a benefit and

12. For the text of Article 39 of the EC Treaty, see footnote 8.

13. Bruce Shine, Article, *The European Union's Right of Free Movement of Workers*, 30 U. MEM. L. REV. 817, 824 (2000).

14. The European Court of Justice “shall ensure that in the interpretation and application of this treaty [the EC Treaty] the law is observed.” The ECJ’s role of interpretation of treaties is vital to the European Union. Treaty Article 220.

15. *Id.*

16. It is appropriate to point out that the ECJ has historically taken a rather liberal approach to Article 39 in an effort to encourage free movement by eliminating barriers and obstacles.

17. The case specifically held that a trainee teacher was considered a worker for purposes of Article 39. *Id.*

for which the member is in turn provided his substance “must be regarded as economic activity.”¹⁸ The case of *Levin v. Staatssecretaris van Justice* provided a similar and predictable result. The case held that individuals engaged in part-time economic activities were workers within the context Article 39.¹⁹ Finally, the case of *Union Royale Belge de Societes de Football Assoc. ASBL v. Bosman* determined that professional football players are workers within the context of Article 39.²⁰

B. Application of Treaty Articles 39 – 42

A general understanding of what constitutes a worker within the EU provides the adequate background for a discussion of the application of Articles 39-42. Generally speaking, Article 39 grants EU workers the right to accept offers of employment in other member states, move freely within another member state, to stay in another member state for purposes of employment, and to remain in that member state after having been employed there, subject to certain limitations.²¹ Article 40 of the Treaty of Rome grants the European Council the authority to issue directives and make regulations to bring about the objectives set forth in Article 39.²² Article 41 states that EU Member States should encourage the exchange of young workers.²³ Finally, Article 42 explains that the European Council shall adopt measure to ensure the social security of the migrant workers and their dependents.²⁴

18. *Id.* at 825.

19. *Id.*

20. *Id.* at 826.

21. EC Treaty, *supra* note 7, art. 39.

22. EC Treaty, *supra* note 7, art. 40.

23. EC Treaty, *supra* note 7, art. 41.

24. EC Treaty, *supra* note 7, art. 42.

Clearly, Article 39 is the cornerstone of the Free Movement of Workers within the EU. However, the authority granted to the European Council by Article 40, to issue directives and make regulations to ensure the free movement of workers, is essential. For instance, the Council passed Regulation 1612/68 on 15 October 1968. The Regulation states: “Any national of a Member State, shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State...”²⁵ The regulation goes on to state that any national of a member state “shall, in particular, have the right to take up available employment in the territory of another Member State with the same priority as nationals of that state.”²⁶ Regulation 1612/68 is the legislative embodiment of the provisions of Article 39. The regulation clearly defines the rights of a worker within the union while requiring the allowance of the free movement of workers, without discrimination based on nationality, by the member states.

Further, Regulation 1612/68 delineates the rights guaranteed to family members of migrant workers. Title III, Article 10 explains that a worker’s spouse, descendants under age 21 or dependents, and dependent relatives of the worker or spouse “shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State.”²⁷ The rights guaranteed by Article 10 of the regulation undoubtedly enhance the likelihood that European workers will take advantage of the free movement rights afforded to them. By allowing the worker’s family

25. Regulation (EEC) No. 1612/68 Of The Council of 15 October 1968 on freedom of movement for workers within the Community, 1968 OJ L 257, 19.10.1968, eur-lex.europa.eu/LexUriServ/site/en/co nsleg/1968/R / 01968R1612-20060430-en.pdf.

26. *Id.*

27. *Id.*

members to move and live with the worker in the new state of residence, allowing the worker's family members to seek work in the new state,²⁸ and allowing the worker's/spouse's children to enter the educational systems of the new state,²⁹ Regulation 1612/68 created an avenue for European families to seek opportunities in EU Member States that had not been available before the ratification of the Treaty of Rome.

Finally, beyond providing a workable definition of a worker for purposes of Article 39, the European Court of Justice has also played a significant role in shaping the rights of the European worker. In particular, The ECJ case, *R. v. Immigration Appeal Tribunal ex parte Atonissen* recognizes the EU worker's right to cross borders while engaging in a search for employment.³⁰ The right recognized in this case is subject to a "temporal limitation,"³¹ which consists of a period of six months for finding employment. However, the time period can be lengthened if the migrant "provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged."³²

Many view *R. v. Immigration Appeal Tribunal ex parte Atonissen* as pure judicial activism.³³ The text of Article 39 contains little, if any, language that suggests the Treaty of Rome drafters intended to create a right of free movement for purposes of seeking employment. Similarly, the ECJ provided no prior case law that suggested the existence of this right.³⁴

28. *Id.* at 5.

29. *Id.*

30. Shine, *supra* note 13, at 827.

31. *Id.* at 828.

32. *Id.* (quoting *R v. Immigration Appeal Tribunal ex parte Atonissen* at I-780).

33. *Id.*

34. *Id.*

Regardless, the case provides another example of the ECJ's liberal perspective on the free movement of workers.

On the whole, the right to the free movement of workers in the EU stands on a significant body of law. Through a combination of Articles 39-42 of the Treaty of Rome, EU Commission Regulations, and ECJ case law, the right to free movement of workers has a very strong foundation and is very well protected. Interestingly, as will be seen, when May 1, 2004 arrived with a "big bang" and ten new EU Member States, the strong foundation and protection of the right to free movement of workers was put aside for eight of the ten accession states. It was replaced almost entirely with fears of mass migration and potentially high unemployment.

II. Accession: The Now Qualified Right to Free Movement of Workers

A. How Did The European Union Get To This Point?

The European Union is a truly remarkable political entity. Since the creation of the ECSC in 1951, what is now called the EU has more than quadrupled its original six-state membership. The big bang expansion in 2004 marked the EU's fifth wave of accession³⁵ in just over 50 years.³⁶ The big bang gave the EU 25 Member States. Each and every wave of accession has created new challenges and new opportunities for the EU. Each member state adds its own culture, history, economy, ideas, and most often its own language to the EU mix. In fact, the big bang gave the EU twenty-one official languages. Amazingly, the administrative nightmare that is twenty-one official languages has not made the EU any less appealing to non-

35. The previous four waves of accession took place in 1972, 1979, 1985, and 1994 respectively. *See* Shimmel, *supra* note 4, at 775.

36. In 2007 the EU will expand once again marking the sixth wave of accession. Romania and Bulgaria will become EU Member States.

member states. There remain a number of sovereign states that would jump at an invitation to join the European Union.

This particular wave of accession, however, created challenges unlike any seen before in the EU. Never before had the EU dealt with the accession of a former-Communist controlled Member State. The big bang provided the EU with eight former-Communist Member States, all Central and Eastern European countries (CEECs). The acceding CEECs “do not have the same tradition of stable democratic institutions and capitalist infrastructure common to certain Western European nations.”³⁷ Simply put, such a difference in history and tradition raised serious concern among the EU-15 citizens and governments, particularly with respect to the free movement of workers.

B. The Prominent Fears

With respect to the free movement of workers, EU-15 accession fears are simple; EU-15 citizens “worry that opening the door [to the accession countries] will siphon off wealth and jobs, exacerbating their own [Member State] economic doldrums.”³⁸ Fears emanated that CEEC citizens would move to EU-15 Member States to take advantage of more generous welfare programs.³⁹ Likewise, EU-15 citizens worried that they would lose their own jobs to migrants that were willing to take the same job for less pay.⁴⁰ In April 2003, 62% of EU-15 citizens surveyed conveyed that they “rather agreed” that “with the enlargement, *many* citizens of the

37. See Shimmel, *supra* note 4, at 775.

38. John Darton, *Under One Flag: As EU Expansion Nears, Apprehension Rises*, The International Herald Tribune (Paris), March 2, 2004.

39. Monica Byrska, *The Unfinished Enlargement: Report of Free movement of people in EU-25*. European Citizen Action Service. May 2004. P. 3.

40. See Shimmel, *supra* note 4, at 784.

new Member States” would settle in EU-15 Member States.⁴¹ Logistically, the fears seem warranted. EU-15 Member States typically pay better wages for labor, have better welfare programs, and traditionally have a higher Gross Domestic Product than CEECs.⁴² It seems only natural that CEEC citizens would be looking to relocate to EU-15 member states to take advantage, much like EU citizens had been doing since the passage of Regulation 1612/68 in 1968.

Unfortunately for the CEECs, myths about mass migration pervaded media reports only creating more public outrage about the prospect of an influx of immigrants and a reactionary drawback on the availability of labor. United Kingdom tabloids, unsurprisingly, were some of the most outspoken. One such tabloid exclaimed, “The Roma gypsies of Eastern Europe are heading to Britain to leech on us ... we do not want them here.”⁴³ Likewise, numerous reports tried to estimate the total number of migrants that would be “flooding” the EU-15 Member States. The various contradictory reports concluded that anywhere from “millions”⁴⁴ to a meager 41,000 CEEC nationals per year⁴⁵ would be looking to take advantage of free movement in the European Union. In the end, the onslaught of negative attention that surrounded the big bang enlargement resulted in an entirely one-sided debate on the issue of free movement of workers, with one particular side, the EU-15, having most of the bargaining power.

41. EOS Gallup Europe, *Enlargement of the European Union* (2003), http://ec.europa.eu/public_opinion/flash/fl140_en.pdf. (opinion poll conducted upon request of the European Commission Directorate General).

42. Poland, the big bang country with the highest GDP represents only 2% of the GDP of the EU. Likewise, the Czech Republic is the second richest big bang country, but has a GDP that is less than a third of the GDP of Germany, its border state. See Darton, *supra* note 38.

43. Darton, *supra* note 38, quoting “The Daily Express.”

44. Romana Sarduska, *Reshaping Europe – Or ‘How to Keep Poor Cousins in (Their) Home’: A Comment on the Transformation of Europe*, 100 YALE L.J. 2501, 2503 (1991).

45. Byrska, *supra* note 39, at 3.

C. How Did the EU-15 Address These Fears?

Practically speaking, the European Union has traditionally maintained a “take-it or leave-it” attitude toward accession. The EU makes it clear that if candidate countries are unable to agree to, or meet the requirements that the current Member States define, then the candidate country will not be granted accession. This “take-it or leave-it” mentality is exemplified by the “Acquis Communautaire.”⁴⁶ The Acquis does not maintain a true legal definition, but is a term of art that stems from Articles 2 and 3 of the Treaty of Rome.⁴⁷ As of May 1, 2004, the Acquis consisted of over 80,000 pages of legal text, embodied in 31 chapters.⁴⁸ In theory, every acceding Member State has agreed to, and is acting in accordance with, all 80,000 pages of the Acquis by the time of the accession. This process is referred to as “harmonization.” If the harmonization process for any specific candidate is not completed, the accession will be delayed until completion. The harmonization process of the CEECs started 15 years prior to the date of accession.⁴⁹

In addition to the Acquis, candidate countries have to meet three pre-conditions before accession to the EU can take place. The three pre-conditions, known as the “Copenhagen Criteria” were developed by the European Council in 1993.⁵⁰ The pre-conditions are: (1) stable

46. From here forward the Acquis Communautaire will be referred to as Acquis.

47. Katherine Krause, *European Union Directives and Poland: A Case Study*, U. PA. J. INT'L ECON. L. 155, 158 (2006).

48. “The acquis consists of the foundational treaties [of the EU]; the ‘institutional structure’ under them; EU legislation and acts; international agreements between the EU and third parties; legislation and acts passed in connection with accession negotiations; the ‘political objective’ of the treaties; certain core principles of EU law including the direct effect of certain treaty provisions and legislation, the superiority of EU law to conflicting laws in individual Member States, and the ‘uniform interpretation’ of EU law; and other miscellaneous principles that have been added to the acquis by different EU institutions throughout the years. Shimmel, *supra* note 10, at 774.

49. The EU began preparations to assist the CEECs in meeting the Acquis and the Copenhagen Criteria in 1989. *See* Shimmel, *supra* note 4, at 776.

50. Krause, *supra* note 47, at 158.

institutions guaranteeing democracy and the rule of law, with full respect for fundamental human rights and the protection of minorities; (2) a functional market economy, with free market competition, and the ability to cope with competitive pressure and market forces within the Union; and (3) the ability and the administrative infrastructure necessary to fulfill all of the obligations of membership.⁵¹ The Copenhagen Criteria were drafted specifically for Central and Eastern European countries. The EU wanted to ensure that each country could meet these three general principles, all inherent to a successful accession. Practically speaking, the EU wanted to make sure that the CEECs were able to “recreate themselves in the EU’s image.”⁵²

Lastly, and most importantly for purposes of this discussion, every proposed accession is accompanied with intense and deliberate accession negotiations before any country is granted admission into the EU. Under the terms of the Acquis, each candidate country is subject to legislation and acts passed in connection with accession negotiations,⁵³ as well as an accession treaty. Not surprisingly, much accession negotiation for the big bang centered on the right to the free movement of workers in the EU, and the how these rights would be delivered to the incoming EU Member States, particularly the CEECs. The EU-15 maintained a precarious position. Surely EU-15 officials understood that the free movement of workers makes up one of four EU freedoms which provide the foundation of the internal market and the union itself. Likewise, EU-15 officials knew the protections that the Treaty of Rome and the ECJ had given the free movement of workers since the treaty was signed. On the other hand, the fear of EU-15 citizens and officials of mass immigration and a deteriorating job market created a mindset that

51. *Id.*

52. Shimmel, *supra* note 4, at 775 (quoting Helen E. Hartnell, *Subregional Coalescence in European Regional Integration*, 16 WIS. INT’L. L.J. 115, 127 (1997)).

53. See note 48.

providing an immediate right to free movement of workers for the acceding CEECs was too much to give. The result reached was a compromise.⁵⁴ The compromise, known as the transitional measures, raises questions of legality, necessity, and loyalty to both persons and ideals.

The transitional measures for the free movement of workers became effective through the signing of the Accession Treaty on April 16, 2003.⁵⁵ The transitional measures laid out in the accession treaty “allow the fifteen Member States [EU-15] to individually decide upon the (non) application and the length of temporary restrictions, which are organized under the flexible form of “‘2+3+2’ years scenario.”⁵⁶ The 2+3+2 scenario allows for the individual EU-15 Member State to determine the proper timeline for the implementation of free movement of worker rights for the CEEC accession states in that particular Member State; however, the full rights to free movement of CEEC workers must eventually be granted. Nevertheless, any EU-15 Member State could choose not to apply transitional measures if it wished.⁵⁷ Likewise, the Accession Treaty determined that any accession state that is restricted by an EU-15 Member State may apply reciprocal restrictions to that state, essentially preventing the EU-15 worker from using his free movement rights to enter and reside in the accession state.⁵⁸

54. Shimmel, *supra* note 4, at 778.

55. Europa, http://europa.eu/index_en.htm (follow “Employment and Social Affairs” hyperlink; then follow “Free Movement of Workers” hyperlink; then follow “Free Movement of Workers” hyperlink) (last visited March 7, 2007).

56. Julianna Traser, *Report on the Free Movement of Workers: Who’s Afraid of EU Enlargement?*, European Citizen Action Service. 7, ¶ 2 (2005), http://www.barka.org.pl/misja_anglia/czytel/ecas_rap_eng.pdf.

57. Shimmel, *supra* note 4, at 778.

58. Europa, *supra*, note 55.

As of May 1, 2004, three EU-15 Member States, the UK, Ireland, and Sweden, had elected not to enforce the transitional measures on the CEECs.⁵⁹ For the remaining twelve EU-15 Member States,⁶⁰ the transitional measures became effective on the date of accession. Through the 2+3+2 year format, during the first two years after accession (2004-2006) the twelve remaining EU-15 Member States “must apply their national [immigration] law or any bilateral agreements concluded with the new Member States under Community law.”⁶¹ In other words, the EU-15 Member State “can automatically delay implementation of freedom of movement for workers without any individualized showing that harm is likely to occur from allowing CEEC nationals to work within their borders.”⁶² However, the “standstill clause” disallows Member States from making access to their labor markets more restrictive than it was at the date of the signing of the Accession Treaty.⁶³ Generally speaking, in order for accession Member State workers to gain access to a restricted Member State, there is no change. The worker must engage in the same process as he had previously. Most often, the worker must obtain a work permit to enter the labor market.⁶⁴

Near the end of the initial two-year transitional period, the European Commission must produce a report for each Member State applying transitional measures.⁶⁵ The European Council will use information gleaned from the Commission’s report to issue a non-binding review for the

59. “Who’s afraid of EU enlargement,” *Supra*, note 56 at 10, 12, and 13.

60. The remaining twelve are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, and Spain.

61. Europa, *supra* note 55.

62. Shimmel, *supra* note 4, at 779.

63. Europa, *supra* note 55.

64. *Id.*

65. Byrska, *supra* note 39, at 10.

applicable Member States.⁶⁶ Irrespective of the Council's non-binding review, any Member State that wishes to extend the application of its national measures for an additional three years (2+ 3 +2) must only notify the European Commission at the appropriate time. The period of application is 2006 – 2009. On the other hand, any Member State that fails to notify the Commission of its plan to continue application of its national measures will automatically open its borders to CEEC workers in accordance with Article 39 of the Treaty of Rome and any further EU provisions governing the free movement of workers.⁶⁷

Further, though all national measures relating to immigration *should* cease by 2009, any EU-15 Member State that wishes to continue application of national measures for an additional two years (2+3+2), may be permitted to do so only if the state observes major disruption in its labor market or a threat thereof.⁶⁸ The period of application is 2009 – 2011. The issues of what constitutes a “major disruption” and, likewise, what constitutes the appropriate “threat thereof” have not garnered much attention or discussion to this date. Such issues will likely have to be addressed in the near future.

Finally, the EU-15 Member States were able to muster one final piece to the “we think we want you, but we just don't necessarily want you right now” accession puzzle. This piece, known as the “safeguard clause,” allows any EU-15 Member State, regardless of previous application or non-application of transitional measures, to apply to the European Commission for “partial or total of application of the EU provisions referring to the free movement of workers, in

66. *Id.*

67. *Id.*

68. Europa, *supra* note 55.

case of disturbances to the labour market or threat thereof.”⁶⁹ In order for the safeguard clause to be applied, the application must be completed during the seven year transitional period, and the European Commission must grant its permission.⁷⁰ The safeguard clause provides the EU-15 Member States an arguably necessary safety valve for the protection of their labor markets.⁷¹

The implementation of the transitional measures demonstrated an obvious retraction from the traditional European Union free movement ideology. Rather than fervently protecting and enhancing free movement rights for European workers, the transitional measures represented one of the first restrictions on free movement rights since the signing of the Treaty of Rome. As such, it is necessary to analyze the implementation of the transitional measures with respect to necessity, effectiveness, and the deepening integration of the European Union in the modern era.

III. Transitional Measures Analyzed

A. Necessity or Overreaction?

As the three-year anniversary of the big bang accession nears, it becomes more appropriate to consider the need for control over the CEECs and their respective rights to free movement of workers, or lack thereof. Considering that much of the free movement bargaining was spawned from the fear demonstrated in the public opinion of EU-15 citizens that mass immigration was not only a possibility, but likely, three appropriate necessity-bellwethers are the three EU-15 Member States that did not exercise any transitional measures on the CEECs. The experiences of the United Kingdom, Ireland, and Sweden, specifically regarding the post-

69. Byrska, *supra* note 39, at 11.

70. *Id.*

71. Similar to the safeguard clause, there is an additional limited clause that pertains only to Austria and Germany, due mostly to their geographic proximity to the CEECs. The clause allows Germany and Austria to temporarily restrict the free movement of service workers to the two Member States if the respective service sectors are seriously affected. Europa, *supra* note 55.

accession movement of CEEC nationals, should provide some indication of the appropriateness of the public's fear and the legislators' response.

With respect to the United Kingdom, the UK media was most outspoken as to the danger of free movement of CEEC workers. Surprisingly, however, the UK legislature chose not to enact transitional measures. Early indicators suggest that the decision returned positive results. Although the UK was the top destination for migrating CEEC workers, resulting in 175,000 migrating CEEC nationals between May 2004 and March 2005,⁷² the migrants constituted only 0.4% of the total working population.⁷³ Likewise, many CEEC migrants took undesirable jobs that may have otherwise been left unoccupied.⁷⁴ The presence of additional workers benefited the UK economy. The UK economy saw a 500 million pound net gain during the twelve months following accession.⁷⁵ Such a positive return on the decision not to enact transitional measures has likely quieted many UK accession-critics.

Further positive results have been reported in Ireland. The Irish economy, widely considered one of the most successful in the world, has been actively recruiting CEEC workers since 1999.⁷⁶ Many consider the pre-accession arrival of CEEC workers as a dominant factor in the up-tick in the Irish economy. By May 1, 2004, a great number of CEEC nationals were already residing in Ireland. Not surprisingly then, the twelve months after enlargement saw an increase of approximately 85,000 CEEC migrants.⁷⁷ Early indications are that most arriving

72. Traser, *supra* note 56, at 10.

73. *Id.* at 11.

74. *Id.*

75. *Id.*

76. *Id.* at 12.

77. Traser, *supra* note 56, at 12.

migrants have been able to find work. The greatest number of migrants found employment in the construction sector.⁷⁸

Finally, Sweden, the EU-15 Member State least worried about enlargement,⁷⁹ has seen no detrimental effects from its decision to grant full free movement rights to CEEC workers.

Sweden saw moderate, but not dangerous, increases in migrants between May 2004 and December 2004. Approximately 22,000 residence permits were issued to migrants during that time, mostly due to the arrival of CEEC workers, most of them Polish.⁸⁰ Perhaps most indicative of the success of the CEEC migrants is that the social security system of Sweden allocated a meager 18,000 euros to benefit CEEC nationals in 2004.⁸¹

At this point it is premature to make any conclusions from the experiences of the UK, Ireland, and Sweden; however it seems that there are two hypotheses that can be drawn. The first hypothesis, that which can be utilized by the anti-free movement camp, is that considering the relatively high migration rates in the UK, Ireland, and Sweden, if free movement rights were unrestricted in the remaining twelve EU-15 Member States, high migration rates would be seen in every Member State due to the increase in options (i.e. twelve more states in which to reside). The argument to augment this hypothesis is that only those workers who desired to live in the UK, Ireland, or Sweden, respectively, were the workers who chose to migrate. Therefore, those workers who wish to live in Germany, for example, have not yet migrated, but plan to migrate once restrictions are lifted.

78. *Id.* at 13.

79. A Eurobarometer poll found that only 7% of the population considered enlargement “worrying.”
Id.

80. *Id.*

81. *Id.* at 14.

On the contrary, the second hypothesis, that which can be utilized by the pro-free movement camp, is that if free movement of workers were unrestricted in all EU-15 Member States, the migration rates that were evident in the UK, Ireland, and Sweden would be spread over a larger number of Member States and a larger geographical area. The argument to augment this hypothesis is not that the workers desired to live in the UK, Ireland, or Sweden, but rather that they did not want to live in their states of nationality. Assuming *arguendo* that this statement is true, the migration rates would not increase drastically if free movement rights were unrestricted in the EU-15 Member States, because many of those workers that desired to move have already done so. The second hypothesis seems all the more likely when considering the attitude of CEEC workers themselves.

Throughout the free movement negotiations, what seemed more and more evident was that Member State legislators were forgetting about the most important variable, the attitude and intention of CEEC workers. It seemed that too much attention was paid to the unheralded fears and projections of the EU-15 citizens and governments, but not to the very people who were at the center of the debate. For instance, rather than hearing an EU-based report that “only 1% of CEEC nationals of working age had a ‘firm intention’ of migrating west,”⁸² Member State legislators heard “The Roma gypsies of Eastern Europe are heading to Britain to leech on us!”⁸³ Likewise, Member State legislators seemed to ignore the EU Commission’s estimate that only roughly 335,000 CEEC workers would relocate to EU-15 Member States if full free movement rights were granted.⁸⁴ Considering that the EU currently accepts roughly 1.5 million immigrants

82. 1% amounts to approximately 20,000 people. Shimmel, *supra* note 4, at 787.

83. See footnote 43.

84. See Shimmel, *supra* note 4, at 787.

from non-EU countries each year,⁸⁵ the EU-15 Member State fears seem more inappropriate, yet altogether fascinating.

Similarly, to the fault of the EU-15 legislators, the issue of free movement was addressed from only one perspective, which was the *economic* perspective. The EU-15 disregarded social, familial, and historical factors that undoubtedly weigh on a worker's decision to migrate to another state. The EU-15 Member States based their fears on the assumption that CEEC workers will feel a need to migrate in order to take advantage of better wages, more job opportunities, and better social benefits. The decision to migrate is much too complicated to make such a money-based assumption. For instance, language barriers, cultural differences, familial interests, ties to property, administrative procedures, etc. can provide serious difficulties for the aspiring migrant.⁸⁶ For many CEEC workers it is simpler and more beneficial to stay home. In a like manner, an EU-based study suggested that nearly two-thirds of the CEEC workers that intended to migrate also intended to return to their country of nationalization within the ten years following accession.⁸⁷

Finally, the twelve EU-15 Member States that restricted free movement failed to realize that the relatively limited number of migrants that might be received in their countries would actually be quite beneficial, not detrimental, to their respective economies. Numerous recent studies indicate a decrease in birth rate and an increase in retirement-age citizens in the EU-15 Member States. For instance, "by 2020, 27% of the population of the old Member States is

85. *Id.* at 788.

86. *See* Byrska, *supra* note 39, at 4.

87. *See* Shimmel, *supra* note 4, at 787.

expected to be over 64 years of age, and thus retired.”⁸⁸ An unsurprising corollary is that the EU crude birth rate has reduced by almost 50% since 1960.⁸⁹ Obviously an increase in retirees and a decrease in young people results in a decreasing labor pool. CEEC migrant workers could have provided a seemingly necessary lift to the labor pool. Similarly, as the EU-15 labor pools have shrunk, it has become increasingly difficult to fill the low-paying and relatively undesirable jobs.⁹⁰ CEEC workers could fill such jobs. That very scenario played out in the UK, where CEEC workers were able to take positions that UK nationals would not.⁹¹ In such cases CEEC workers are not taking jobs away from EU-15 nationals. Rather CEEC workers are providing necessary labor that is beneficial to the economy.

On the whole, it seems that the European Union missed an opportunity to deepen integration and to unify 25 Member States by drawing the wrong conclusions from the wrong places. Rather than considering the possible positive results that the free movement of CEEC workers could bring, and rather than considering the perspectives of the CEEC workers, the restricting EU-15 Member States took to rampant, unfounded fears, and approached the issues from an economic-standpoint that was inappropriate. Early indications suggest that the restricting EU-15 Member States were mistaken. Likewise, the transitional measures seem to be contrary to the foundations of the European Union, both from the perspective of a political and economic union.

B. The Transitional Measures are Contrary to EU Ideals

88. *Id.* at 789.

89. *Id.*

90. *Id.* at 790.

91. *See Traser, supra* note 56, at 10.

Like most government or political bodies, the European Union prides itself on its ideals and relatively young traditions. Unfortunately, the transitional measures applied to the CEECs after accession do not properly correspond with EU ideals and traditions. The free movement of workers is one of four EU freedoms that are considered foundational to the political union and the internal market. The freedom is protected by Articles 39-42 of the Treaty of Rome. Likewise, free movement of workers is considered essential to the creation of “true unity among EU nationals.”⁹² Yet, the transitional measures applied by the twelve EU-15 Member States limit this foundational freedom on a whim, thereby hindering the deepening of political and economic integration within the EU. Likewise, the transitional measures leave to question the EU’s commitment to a union in which Europeans “are no longer kept apart by phony ideological barriers.”⁹³

Considering the amount of protection that has been given the four freedoms, particularly the free movement of workers, the relatively ad hoc transitional measures that have been applied to the CEECs do not seem justifiable from an ideological standpoint. For instance, considering the applicable EU Council regulations that have been passed pertaining to the free movement of workers, all favorable, and the ECJ opinions that have sometimes enhanced free movement of worker rights even beyond legal text in an effort to protect rights, the transitional measures seem completely incompatible. Quite simply, by limiting rights that have been so vehemently protected in the past, the transitional measures seem to discredit the very traditions and missions that the EU has professed to uphold.

92. Shimmel, *supra* note 4, at 795.

93. *Id.* at 760. (citing Romano Prodi, then President of the European Commission, who made this declaration on the date of accession).

The EU-15 Member States are walking a very fine line. On one side, the EU-15 Member States are trying to maintain their own sovereign identities and control over their own labor markets, all while continuing to integrate within an enlarging Europe. On the other side, the EU-15 Member States are still trying to maintain sovereignty and control, but they are doing so at the expense of the creation of a second-class EU membership, and thereby hindering integration. The second-class EU Member State has become a partial reality. By enacting transitional measures on the free movement rights of the CEECs, the EU-15 has conferred limited rights on the CEECs. Simply, the CEECs are not viewed on the same plane as the EU-15 Member States. Although the perception of CEECs will likely improve over time, the current configuration is terribly detrimental to a union that relies on deepened integration for its success. Although there is little doubt that the CEECs were willing to trade limited rights for the prospect of EU membership, if the transitional measures are prolonged for too long, discontent among the CEECs is all but guaranteed. Such discontent will only make it more difficult for the EU to continue to deepen integration.

IV. Conclusion

The transitional measures restricting the free movement of workers for the EU's acceding CEEC Member States restrict more than just a fundamental freedom of the European Union. The transitional measures restrict opportunity; opportunity to integrate markets, to integrate people, to integrate ideas, to integrate political goals, and most importantly, to integrate the continent of Europe. On its face, the mass migration theory that spawned the transitional measures is not entirely inappropriate. It is understandable that the EU-15 Member States were concerned that their labor markets would see an increase in migrant workers after the former-

Communist accession states gained entry into the Union. The general premise is logical.

Generally speaking, why would an individual work one job for low pay when he could work the same job, in another location, for twice the pay? However, if viewed from the proper perspective(s), i.e., that of the CEEC workers' attitudes and intentions toward immigration and not the economic view taken by the EU-15, the migration theory loses credibility. As seen, there are numerous reasons that an individual would choose to remain in his home country, rather than immigrating West. Unsurprisingly, early indications are that the economic-based migration fears of the EU-15 were primarily inaccurate.

Likewise, history demonstrates that the right to free movement of workers has been vehemently protected by the drafters of the Treaty of Rome, the European Council, and the European Court of Justice. Free movement of workers is supposedly one of four fundamental EU freedoms. To suddenly restrict this fundamental freedom based on fear is contrary to EU history and EU free movement rhetoric. The EU-15 Member States should not have restricted the free movement rights of the acceding CEECs unless there was evidential proof that the restrictions were absolutely necessary. The EU-15 failed to show proof of necessity, but rather acted in response to fear. The EU-15 response to immigration fears cuts to the core of the European Union; it goes against years of pro-free movement political and judicial action, and years of pro-free movement rhetoric. Undoubtedly, the transitional measures will have some debilitating effects on European Union efforts to deepen integration.