2

Migrant Workers Finding Their Way into Community Law

2.1 The Initial Free Movement Framework Aimed at the Optimal Allocation of Manpower

Free movement of all factors of production (worker, goods, capital, and services) is so fundamental to our understanding of Community law that it is scarcely questioned whether the inclusion of migrant workers in the Treaties was an automatic element of the intended closer cooperation between the founding Member States. On this matter, Christian had suggested that free movement found its way into the Treaty framework due to Italy's pressure for the use of Italian workers in the rest of the Member States.[1] The countries negotiating the European Project in the aftermath of World War II joined with different interests and posed different threats to the stability of the European future.[2] Italy was the only emigration country of the founding six and, at that time, was experiencing problems related to overpopulation and unemployment.[3] Positioning its overpopulation problem in combination with the political threats of this period, Italy managed to secure labour positions for its unemployed population in the form of free movement of workers within the ECSC under Article 69 ECSC.[4] In this initial framework, free

[1] David Christian, 'Resistance to International Worker Mobility: A Barrier to European Unity' (1955) 8 Industrial and Labor Relations Review 379, 379–389; Daniel Thym, '"Citizens" and "Foreigners" in EU Law: Migration Law and Its Cosmopolitan Outlook' (2016) 22 ELJ 296, 300; Luuk van Middelaar, *The Passage to Europe: How a Continent Became a Union* (Yale University Press 2013) 256.

[2] David Arter, *The Politics of European Integration in the Twentieth Century* (Dartmouth 1993).

[3] Francesca Fauri (ed), *The History of Migration in Europe: Perspectives from Economics, Politics and Sociology* (Routledge 2015).

[4] Christina Blanco Sío-López and Paolo Tedeschi, 'Migrants and European Institutions: A Study on the Attempts to Address the Economic and Social Challenges of Immigration in EU Member States' in Francesca Fauri (ed), *The History of Migration in Europe: Perspectives from Economics, Politics and Sociology* (Routledge 2015).

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movement was not open to all workers, but only to qualified workers in the coal and steel industries, and under a specific procedure on vacancies.[5] By limiting the personal scope of free movement, the founding Member States wanted to ensure that no massive migratory waves would be caused by this concession to Italian interests.[6]

The abolition of the requirement of qualifications as a prerequisite for enjoying the right to free movement came with the Treaty of Rome.[7] Under this Treaty, the optimal allocation of manpower and its integration in the national societies was the objective of free movement, which was focused on abolishing the hardships deriving from the migrant status of the workers in the European industries.[8] Member States did not perceive the Treaty of Rome as creating an obligation for them to employ Community migrants.[9] Instead, the prevailing understanding was that nationals should always be chosen first to fill vacancies. If nationals were not in need of employment or were not sufficient, then a Member State could turn to Community migrants through a specifically designed procedure. If Community migrants did not suffice, then Member States could resort to TCNs. This national perception of the Treaty framework is not very different from what is in place today regarding the principle of Union preference in the labour market.[10] At the same time, this perception of free movement was nowhere close to a teleological reading of a scheme that would eventually foster a true political community. On the contrary, Member States perceived free movement as a labour migration framework that created obligations of preferential treatment to Community migrant workers only as long as national workers were not sufficient to fulfil labour needs.

What is more, at that point in time, there was nothing distinguishing the migrant workers employed in the Member States depending on

[5] Articles 69 (1) and (4), ECSC Treaty. Under Article 69 (2) and (3) of the ECSC Treaty, Member States would also draft a list of the skilled trades and their qualifications, which could be revisited in case of labour shortage.

[6] Blanco Sío-López and Tedeschi (n 4) 118.

[7] Article 48, EEC Treaty.

[8] Bertrand MA (1957), Rapport complémentaire fait au nom de la Commission des Affaires sociales sur la migration et la libre circulation des travailleurs dans la Communauté, Exercice 1957–1958 Première session extraordinaire, Document 5 et 11; Communauté européenne du Charbon et de l'Acier (1956), *Obstacles à la mobilité des travailleurs et problèmes sociaux de réadaptation*.

[9] European Community Information Service, Press Notice, Common Market takes initial step toward free mobility for workers, 15 June 1961.

[10] See 1994 Council Resolution, discussed in detail in Section 6.1.1.

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whether or not they held Community nationality. On this matter, Thym points out:

> It would be wrong, however, to assume that the Rome Treaty wanted to establish universal free movement irrespective of nationality. During negotiations, there was agreement that only nationals of the member states should be covered; an explicit nationality clause was discarded in reaction to Franco-Italian disputes about the status of workers from Algeria and German concerns about the status of citizens from communist East Germany.[11]

Regardless of the intentions of the drafters, institutional practice pointed to a uniform approach towards both TCN and Community migrants. Specifically, the first Commission reports on free movement of workers generally discussed the number of labour migrants employed in Community Member States, regardless of their origin.[12] Even after the adoption of a framework that prioritized Community workers, the relevant Commission Reports looked at the labour market situation in Member States and examined how national manpower demand was covered by migrant workers in general, and not exclusively by Community migrants.[13]

At the time, the importance of labour mobility as a means to increase the production capacities of national industries was so prominent that there were discussions on including TCNs in the Community scheme of

[11] The quote appears verbatim in Thym (n 1) 303; Daniel Thym, 'Institutional and Constitutional Framework' in Evangelia Tsourdi and Philippe De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar 2022) 57. The same point is also raised in Daniel Thym, 'Ambiguities of Personhood, Citizenship, Migration and Fundamental Rights in EU Law' in Loïc Azoulai, Ségolène Barbou des Places, and Etienne Pataut (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart 2016) 122; In all works, the author refers to Simone AW Goedings, *Labor Migration in an Integrating Europe: National Migration Policies and the Free Movement of Workers; 1950–1968* (Sdu Uitgevers 2005).

[12] Bertrand (n 8), Document 5.

[13] Commission (1965), Libre circulation et migrations des travailleurs dans la Communauté. Bilan annuel des activités de compensation et de placement au sein de la Communauté (art. 25 § 4 du règlement no 15/61 art. 36 § 4 du règlement no 38/64), 48ff; Commission (1966), La libre circulation de la main-d'œuvre et les marches du travail dans la CEE, Rapport établi en application des dispositions des articles 29 et 36 du règlement n° 38/64 relatif à la libre circulation des travailleurs, 36 ff; Commission (1967), La libre circulation de la main-d'œuvre et les marches du travail dans la CEE, Rapport établi en application des dispositions des articles 29 et 36 du règlement n° 38/64 relatif à la libre circulation des travailleurs à l 'intérieur de la CEE, 16–19; Commission (1968), La libre circulation de la main-d'œuvre et les marches du travail dans la CEE, Rapport établi en application des dispositions des articles 29 et 36 du règlement n° 38/64 relatif à la libre circulation des travailleurs à l 'intérieur de la CEE, 34 ff.

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mobility in order to meet Community labour needs.[14] Any opening up of the Community labour markets in this way would always take place with oversight so as to not risk the unlimited access of foreign workers to national markets, which was seen as possibly limiting the quality of life for nationals.[15]

In Section 2.1.1, I turn to the secondary law adopted in successive steps in 1961, 1964, and 1968 to operationalize the free movement provisions. The analysis shows that free movement was structured as a labour mobility scheme aimed at addressing the uneven distribution of manpower between the Member States. The economic expansion of the Community was pursued through the 'optimum valorization of the technical abilities of human beings' residing in the Member States.[16] At the same time, the social aims of the Community, namely improving living standards, were to be realized through strategies related to achieving the full potential of labour mobility in order to maximize productive activities in Community industries, and were not reflected in an extensive attribution of rights in legal instruments.[17] Section 2.2 examines how this framework was interpreted by the CJEU whose judgments revolutionized the rights of EU migrant workers.

2.1.1 The 1961 Framework

The original framework regulating free movement in the Community was provided in Regulation 15/1961 and the Directive of the same year.[18] The 1961 Regulation was adopted with an emphasis on prioritizing national markets. Specifically, the 1961 Regulation gave preference to free movement of workers towards Member States that could not satisfy

[14] Bertrand (n 8) Document 11; Commission (1960), Synthèse des rapports établis en 1960 sur la situation actuelle du service social des travailleurs migrants dans les six pays membres de la CEE.

[15] Bertrand (n 8) Document 11, para 55.

[16] Giuseppe Petrilli, Member of the Commission, Chairman of the Social Affairs Group, The Social Policy in Bulletin de la Communauté économique européenne (1959)2 6.

[17] An example is mass unemployment, to which the response was rapid occupational training to maximize labour mobility. See Bulletin of the European Economic Community (1960)10 40.

[18] Règlement n° 15 relatif aux premières mesures pour la réalisation de la libre circulation des travailleurs à l'intérieur de la Communauté [1961] OJ 57/1073; Directive du Conseil en matière de procédures et pratiques administratives relatives à l'introduction, l'emploi et le séjour des travailleurs d'un État membre, ainsi que de leur famille, dans les autres États membres de la Communauté [1961] OJ 80/1513.

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their labour needs by recourse to national workers.[19] Simply put, Community workers could take up work in another Member State if such work could not be carried by national workers.[20] What is more, they could exercise their free movement rights only after obtaining a specific job offer.[21] This was in order to avoid an 'invasion of workers from other countries' that could 'upset the economic and the social order of the national markets'.[22]

The scheme initiated by the 1961 Regulation was based on cooperation between national authorities and the Commission to ensure that national vacancies would be occupied by Community workers. In this regard, national employment offices were tasked with sending information to the Commission on such vacant positions in each Member State as needed to be filled by international labour.[23] Simultaneously, the Community set up a European Office on the coordination of this scheme.[24] Migrant workers moved following authorization to work in another Member State. Such authorization could be prolonged for one year in case of employment in the same profession.[25] After three years, the workers were provided with the possibility of exercising another profession for which they were qualified, while after four years they had the possibility to pursue regular employment in any profession.[26]

The aim of this Regulation was to replace the traditional migratory schemes between Member States based on bilateral or multilateral agreements.[27] In this regard, it granted migrant workers the right to equal treatment with respect to their working conditions and the right to vote in their respective trade unions.[28] In addition, migrant workers could be joined by their spouses and children under the age of twenty-one, who were also given access to the labour market.[29]

[19] Preamble, Regulation 15/1961.
[20] Articles 1(1) and 2.
[21] Article 2, Regulation 15/1961.
[22] Lionello Levi Sandri, The free movement of workers in the countries of the European Economic Community in Bulletin of the European Economic Community (1961)6 5–9.
[23] Cf Articles 3, 16, Regulation 15/1961. Article 18 mentions that 'les informations concernant le nombre d'offres et de demandes d'emploi par profession, enregistrées par leurs services en vue d'une *compensation internationale*' [emphasis added].
[24] Articles 22, 23, Regulation 15/1961.
[25] Article 6(1), Regulation 15/1961.
[26] Article 6(2) and (3), Regulation 15/1961.
[27] Levi Sandri (n 22) 5.
[28] Article 8, Regulation 15/1961.
[29] Article 11, Regulation 15/1961.

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The right to equal treatment was introduced as a necessary part of the Community framework. It was not based on considerations regarding human rights guarantees for migrant workers, but rather derived from the 'new spirit of European solidarity'.[30] It was presented as a concession made by the Member States with a view to creating a labour market that would ensure the best use of the 'Community's human potential'.[31] It was the capacity of migrants as workers (not as human beings, or as nationals of the Member States) that ensured them the right to equality of treatment. This also ensured that native workers would be protected from unfair competition that could be caused from migrants taking up work for lower wages and less favourable working conditions.[32]

This first regulation was pronounced by Levi Sandri as 'an element of economic integration in its own right' and an 'important step towards the integration of Europe'.[33] The rights attributed to Community workers reflected a vision of social progress going hand-in-hand with economic development. These rights 'without representing such a direct return for progress in the individual worker's productivity, are nevertheless useful on a broader view, and satisfy requirements which progressive societies cannot evade'.[34] These words reflect the continuous balance of economic and social considerations behind the attribution of rights for Community migrants. They are attributed to migrants because of their function for growth, but also with a view to raising living standards for both nationals and migrants within the Member States. The Commission's vision of free movement was guided by the interdependence of economic growth and social progress in a way that today we would call economic and social sustainability of migration.

2.1.2 The 1964 Framework

At the second stage, Regulation 38/64 and Directives 220 and 221/64 were adopted.[35] The 1964 framework abolished the clauses on the

[30] Levi Sandri (n 22) 6.
[31] Ibid.
[32] Ibid 9.
[33] Ibid 5–6.
[34] Bulletin of the European Economic Community (1964)9/10, Introduction to the survey of social developments in the Community in 1963, 6.
[35] Règlement n° 38/64/CEE relatif à la libre circulation des travailleurs à l'intérieur de la Communauté [1964] OJ 62/965; Directive 64/240/EEC on the abolition of restrictions on the movement and residence of Member States' workers and their families within the

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priority of the national labour market. It did, however, maintain Member State discretion to restrict free movement rights, 's'il existe un excédent de main-d'œuvre ou si l'équilibre du marché de l'emploi est mis en grave danger'.[36] This possibility was used by the Netherlands, Belgium, and France with respect to specific regions of their countries or specific professions.[37] The scheme put in place by the 1961 Regulation, whereby vacant positions were notified and coordinated by national employment offices in cooperation with the Commission, was maintained.[38] However, the rights of Community workers were now assimilated with those of national workers after two years of employment following their original entry to another Member State.[39] Migrant workers under the 1964 Regulation maintained the equal treatment rights with respect to their working conditions. In parallel, their rights to participation in trade unions were extended to include the right to be elected as well, upon condition of employment in the same company for at least three years.[40] The conditions on family admission also evolved to include all dependent relations of the worker.[41]

At this stage, human mobility among the Member States was restricted in an instrumental use of people as a resource on the path to economic development of Europe. In a report on the economic situation of the Community in 1964 and the outlook for 1965, this instrumentality is pronounced as follows: 'It is of course essential that each worker should

Community [1964] OJ 62/981. See also Directive 64/221/EEC on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1964] OJ 56/850.

[36] Preamble, Regulation 38/64/ Such suspension took place upon notification under Articles 2 and 4–6, which also provided for exceptions.

[37] Commission (1965), Libre circulation et migrations des travailleurs dans la Communauté. Bilan annuel des activités de compensation et de placement au sein de la Communauté, 48–50; Commission (1966), La libre circulation de la main-d'œuvre et les marches du travail dans la CEE, 57–58; Commission (1967), La libre circulation de la main-d'œuvre et les marches du travail dans la CEE, Rapport 1967, 24–25; Commission (1968), La libre circulation de la main-d'œuvre et les marches du travail dans la CEE. Rapport 1968, 65–67. Bertrand (n 8) Document 11; Commission (1960), Synthèse des rapports établis en 1960 sur la situation actuelle du service social des travailleurs migrants dans les six pays membres de la C.E.E.; H ter Heide, 'The Free Movement of Workers in the Final Phase' (1969) 6 CMLRev 466, 467.

[38] Articles 1, 24 and 32, Regulation 38/64.

[39] Article 1, Regulation 38/64.

[40] Articles 8, 9(2), Regulation 38/64.

[41] Article 17, Regulation 38/64.

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have a job, but it is also necessary that he should be employed where the economy most needs his contribution, and where he can make the best use of his abilities.'[42] Free movement rights were not tied to the individual agency of the people of Europe, but were rather conditioned by the workers' contribution to economic development.[43]

2.1.3 *The 1968 Framework*

The third and final phase of harmonization came with Regulation 1612/68 and Directive 68/360.[44] The 1968 Regulation, in its preamble, points to the links between mobility and development both for the individual and for the states involved:

> [W]hereas mobility of labour within the Community must be one of the means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement, while helping to satisfy the requirements of the economies of the Member States.[45]

The connection of mobility to national economies further implied that such mobility should be restricted in cases where Member States experienced or foresaw disturbances in their labour market which could threaten the standard of living and level of employment in a specific region or industry.[46] In any case, the phrasing of this Regulation was more open and guaranteed access to the labour market of Member States to every Community worker under the same conditions as nationals of the host Member States.[47] The 1968 framework also provided more enhanced protection for workers against potential discriminatory practices.[48]

[42] Bulletin of the European Economic Community (1965)3 11.
[43] See also Bulletin of the European Economic Community (1965)4 18; Bulletin of the European Economic Community (1966)8, Address introducing the Ninth General Report on the activities of the Community 7.
[44] Regulation 1612/68 on freedom of movement for workers within the Community [1968] OJ L 257/2; Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families [1968] OJ L 257/13.
[45] Preamble, Regulation 1612/68.
[46] Ibid.
[47] Preamble, Article 1, Regulation 1612/68.
[48] Articles 3, 4 and 7–9, Regulation 1612/68.

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Despite the right to access Community labour markets, the scheme was still based on a mechanism of exchange of information between Member States and the European Co-ordination office regarding vacancies that could not be filled by the national labour market, but also applicants who were willing to undertake employment in another Member State.[49] The scheme thus aimed to match vacancies in one Member State to the surplus of manpower in another.[50] Vacancies could also be announced to non-Member States, if it was considered that Member States could not provide a sufficient number of workers.[51] This further serves to point out that labour migration under the free movement framework was intimately connected to the production needs of the time.

Even though the 1968 Regulation was a lot more progressive in terms of workers' rights compared to the previous ones, the extension of free movement rights was still balanced by the mechanism foreseen in Title III of the Regulation. This mechanism provided for an analysis to be carried out by the Member States and the Commission twice per year on the labour positions occupied by TCNs, the expected developments of the labour market, and the manpower movements in the Community.[52] Member States had to give priority to Community workers in order to ensure a balance between vacancies and employment applications.[53] Nevertheless, Article 20 of the 1968 Regulation provided that, upon approval by the Commission, Member States could partially or totally suspend the mechanisms provided for vacancy clearance, in case of existent or expected disturbances in the national labour market that could threaten the standard of living or level of employment in a specific region or occupation.[54] It should be noted, however, that unlike the 1964 Regulation, Member States could not adopt these measures unilaterally.

The analysis of secondary law shows that free movement was progressively opened to ensure orderly migration of workers and to avoid negative effects to national economies. The demand of primary law to ensure free movement of workers was gradually achieved via secondary law that evolved through the incorporation of clauses related to national

[49] Article 15, Regulation 1612/68.
[50] Article 16, Regulation 1612/68.
[51] Article 16(2), Regulation 1612/68.
[52] Article 19(1), Regulation 1612/68.
[53] Article 19(2), Regulation 1612/68.
[54] Articles 15–17 and 20(1), Regulation 1612/68.

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labour market priority and the possibility to restrict free movement for economic reasons. This shows how economic considerations shaped the applicable legal framework that operationalized Article 48 EEC.

The three phases of liberalization of movement were all connected to different concerns as to how national labour markets operate in relation to a Community-wide free movement objective. In essence, the institutional build-up of free movement was shaped with a view to addressing manpower mismatches between the national labour markets, mismatches which posed dangers for the unhindered pursuit of growth.[55] At that stage of industrialization, the productive capacities of Member States and availability of manpower were codependent.[56] The Commission therefore had to set up a system that could address the disequilibrium between national labour markets (shortage of labour in Germany and the Netherlands which had greater productive capacities and surplus of unskilled labour in Italy) to make the best of the human capital of the Community Member States.[57]

The adoption of the 1968 Regulation marked the end of the transitional period provided under Article 8 EEC for the establishment of the common market. According to the Commission, the provisions of this Regulation along with the Directive of the same year would serve to create European awareness by attributing identical rights to all Community migrants.[58] Moreover, the Commission envisioned the extension of these rights with the eventual purpose of making the free movement framework an element of geographic and vocational mobility for a single Community labour market.[59] In this setting, migration was perceived as a means of a functioning common market, which should be able to cover shortages in the respective national markets. Community workers were first and foremost manpower, and their movement was directed towards the optimal allocation of resources within the common market. Even though there was an attempt to present free movement 'as something more important and more exacting than the free movement of

[55] Bulletin of the European Economic Community (1960)5.
[56] Bulletin of the European Economic Community (1960)3 39.
[57] Bulletin of the European Economic Community (1960)10 40; Bulletin of the European Economic Community (1960)5 35; Bulletin of the European Economic Community (1960)4 43. See also Levi Sandri (n 22) 6.
[58] Commission Information Memo P-50/68, Complete freedom of movement for workers now a reality.
[59] Ibid.

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a factor of production',[60] the attribution of rights to migrants in this context was dictated by their economic contribution. At this stage, there was no perception of migrant workers as Europeans with connected historical and political identities.

In what was presented as an achievement towards the end of a political union, Levi Sandri stated that 'all the citizens of the Member States are placed on an equal footing and therefore possess the same status'.[61] This equal footing, however, was framed in the pursuit of what he called 'man's most important practical activity' – work, and not on the basis of their political existence in the Community.[62] At this stage of liberalization of free movement, we see an unlimited emphasis on worker status as the core source of the social and human rights tied to migration. With this in mind, Section 2.2 turns to the Court and examines the way in which it revolutionized the protection enjoyed by migrant workers.

2.2 Social Rights of Community Migrants: A Judicial (R) Evolution

In the secondary law adopted to implement free movement of workers' provisions, the set of rights enjoyed by Community workers was dictated by Regulation 1612/68.[63] Article 7 of the Regulation implemented the non-discrimination principle of Article 48 EEC. It provided that migrant workers should enjoy equal treatment in relation to their working conditions and equal access to the social and tax advantages that are available to national workers. The Regulation also provided for the right of migrant workers to be joined by their family in the host Member State (Article 10), the right of family members to pursue employment (Article 11), and the right of migrant children to access education in the host Member State (Article 12).

In addition to this, Regulations 3 and 4 of 1958 and later Regulation 1408/71 were adopted under Article 51 EEC to coordinate social security between the Member States. Social security rights were harmonized to facilitate free movement of workers, and this objective conditioned the

[60] Lionello Levi Sandri, Free movement of workers in the European Community, Bulletin of the European Economic Community (1968)11 7.
[61] Ibid.
[62] Ibid 6.
[63] Until 2011 when it was repealed by Regulation 492/2011.

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interpretation of the relevant regulations.[64] The Court developed a rich case-law on social security dealing primarily with the calculation of pension rights or accident costs.[65] By focusing on the abolition of barriers to ensure the greatest possible free movement for migrant workers and their families, it ensured the protection of Community workers.[66] However, in cases where the Court assessed that the rights of Community workers could not be protected under the more specific scope of application of Regulation 1408/71 on social security rights, it did not exclude the relevant rights from the scope of Community law. Rather, it used the principle of non-discrimination and created extensive rights, by recourse to the concept of social advantages under Article 7 Regulation 1612/68.

By reviewing of the case-law of the Court on the social rights granted to migrant workers (Section 2.2.1) and their families (Section 2.2.2), we can see how economic considerations conditioned the consolidation of social rights for migrant workers. Section 2.2.3 will demonstrate how this reasoning played out in relation to access to education by migrant workers and their families. The *ratio* underlying the judgments is that granting social protection to migrants and thereby improving their living and working conditions can guarantee labour mobility that will in turn lead to the development of the Member States' economies. The achievement of growth was considered to bring about social progress as a by-product, by the raising of living standards for the worker in the form of social rights.

2.2.1 *Social Advantages Extending the Scope of Equal Treatment*

During the 1970s and 1980s, the Court addressed many different aspects of Regulation 1612/68 and developed a rich case-law that extended the

[64] Case 75/63 (*Hoekstra*) *Unger*, ECLI:EU:C:1964:19, 184.

[65] Case 92/63, *Nonnenmacher*, ECLI:EU:C:1964:40; Judgment of 15 July 1964, Case 100/63, *Van der Veen*, ECLI:EU:C:1964:65; Case 24/64, *Dingemans*, ECLI:EU:C:1964:86; Case 31/64, *Bertholet*, ECLI:EU:C:1965:18; Case 33/64, *Van Dijk*, ECLI:EU:C:1965:19; Case 33/65, *Dekker*, ECLI:EU:C:1965:118.

[66] Case 44/65, *Singer et Fils*, ECLI:EU:C:1965:122; Case 61/65, *Vaassen-Goebbels*, ECLI:EU:C:1966:39; Case 4/66, *Hagenbeek*, ECLI:EU:C:1966:43; Case 1/67, *Ciechelsky*, ECLI:EU:C:1967:27; Case 2/67, *De Moor*, ECLI:EU:C:1967:28; Case 6/67, *Guerra*, ECLI:EU:C:1967:29; Case 9/67, *Colditz*, ECLI:EU:C:1967:30; Case 11/67, *Couture*, 11/67, ECLI:EU:C:1967:52; Case 14/67, *Welchner*, ECLI:EU:C:1967:48; Case 18/67, *Cossutta*, ECLI:EU:C:1967:46; Case 19/67 *Van Der Vecht*, ECLI:EU:C:1967:49; Case 22/67, *Goffart*, ECLI:EU:C:1967:47; Case 19/68, *De Cicco*, ECLI:EU:C:1968:56.

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rights granted to migrant workers beyond what might be imagined under a literal reading of the Regulation. The logic behind this approach can be found in the 5th Recital of Regulation 1612/68, which prescribes, *inter alia*, that free movement should be exercised in freedom and dignity, and that worker and their families should be integrated in the host country. The economic benefits of migration and its position as means to achieve further development of the Union were tied to an improvement in the living and working conditions of the migrant and eventual social progress of the Community.

The provision of Article 7(2) Regulation 1612/68 provided that migrant workers should enjoy equal treatment in relation to their working conditions, and equal access to the social and tax advantages that are available to national workers. This provision was central to the development of the relevant case-law. In all cases where the Court dealt with discriminatory practices against migrant workers, it resolved them by recourse to the non-discrimination principle of Article 48 EEC, and Article 7 of Regulation 1612/68, which was held to be a more specific application of Article 7 EEC.

The Court interpreted the concept of social advantages broadly and found that they did not have to be directly linked to a contract of employment. Specifically, it defined social advantages as all the advantages

> which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the Community.[67]

Already in 1969, the Court examined its first free movement case, which concerned protection against disadvantages resulting from fulfilment of military service.[68] *Ugliola*, an Italian worker in Germany, who had completed his military service in Italy, claimed the protection of a German law which provided that military service should be taken into account for the calculation of benefits related to the conditions of work and employment. Germany put forward an argument related to the economic burden it would have to bear if it were to apply the national

[67] Case 207/78 *Ministère public v Even*, ECLI:EU:C:1979:144.
[68] Case 15/69, *Ugliola*, ECLI:EU:C:1969:46.

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benefits to workers who performed their military service in other Member States. Essentially, it suggested that in such a case, it 'would be indirectly relieving the defence budget of those States'.[69] AG Gand's Opinion in the case reflected the economic integration basis of the Community and highlighted that free movement of workers was promoted and protected due to the multilateral advantages drawn by all members of the Community.[70] The Opinion implied that workers were not seen as full subjects of the Community.[71] They were rather protected in a format similar to bilateral migration treaties: the nationals of a state of origin should enjoy protection in a host state because the host state's nationals enjoy equal protection in the state of origin. The Court found that national law should extend to migrant workers in light of the principle of equal treatment under Article 48 EEC and 7 Regulation 1612/68.

Following this case, the Court's docket consisted of cases on different national benefits and their classification under Community law. In most cases, where the benefits could not be classified under social security coordination, the Court used Article 7(2) of Regulation 1612/68 and declared them to be social and tax advantages. Thus, it established an extensive reading that fortified the social protection offered to workers.[72]

At the same time, this reasoning was applied as regards discriminatory practices in Member States which were completely unrelated to employment. In *Marsman*, the Court found that Community workers were entitled to the special protection against dismissal. Such a protection was granted under German law only to workers who were resident in Germany. The Court held that the protection should extend to all migrants who work in Germany, even if they reside in another Member State.[73] In *Mutsch*, the Court held that the right to be heard by a Court in one's own language was a social advantage under Article 7 (2) of Regulation 1612/68.[74]

Then, in *Netherlands v Reed*, the Court held that the right of a Community worker to be accompanied by his unmarried partner also

[69] Case 15/69, *Ugliola*, ECLI:EU:C:1969:46, p. 367.
[70] Opinion of AG Gand in Case 15/69, *Ugliola*, ECLI:EU:C:1969:38.
[71] In contrast to what was stated in Case 26/62, *Van Gend & Loos*, ECLI:EU:C:1963:1 that referred to the individual as a full subject of Community law.
[72] Case 65/81, *Reina*, ECLI:EU:C:1982:6; Case 249/83, *Hoeckx*, ECLI:EU:C:1985:139, para 22.
[73] Case 44/72, *Marsman v Rosskamp*, ECLI:EU:C:1972:120.
[74] Case 137/84, *Mutsch*, ECLI:EU:C:1985:335.

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constituted a social advantage.[75] Article 10(1) Regulation 1612/68 provided the right of migrant workers to be joined by their spouse. The wording of the provision could not be stretched to incorporate family reunification rights for the unmarried partner.[76] Despite this, the Court held that the right to be accompanied by an unmarried partner fell within the scope of Community law. This right was recognized as a social advantage for the purposes of Regulation 1612/68 in light of the economic function of the Regulation.[77] The Court found that the residence permit of the unmarried partner supports the integration of the migrant worker in the host state and thereby contributes to the free movement of workers framework.[78]

In conclusion, the Court's case-law at the early stages of the EU project dealt with discriminatory practices against migrant workers in the Member States. Such cases were resolved by recourse to the non-discrimination principle of Article 48 EEC and Article 7 of Regulation 1612/68, which was held to be a more specific application of Article 7 EEC. As the Community developed, the Court attempted to guarantee the more human aspects of free movement. However, the competence of the Community on the market could not go further than the prescriptions of Article 51 EEC on the harmonization of social security systems. Where the Court saw that the rights of Community workers could not be protected under the more specific scope of application of Regulation 1408/71 on social security rights (due to the personal nature of certain rights or the relation to specific benefits in kind), it used the principle of non-discrimination and created a set of rights under the concept of social advantages under Regulation 1612/68.

2.2.2 *Extensive Interpretation of Social Advantages for the Families of Migrant Workers*

In parallel with this broad interpretation of social advantages for migrant workers, the Court developed a line of case-law on benefits for workers' families. This extension was affected by employing a similar line of reasoning. In most cases, the Court recognized derivative rights for migrant workers' families as social advantages under Article 7(2) Regulation 1612/68. In the relevant case-law, the Court always clarified

[75] Case 59/85, *Netherlands v Reed*, ECLI:EU:C:1986:157.
[76] Ibid, para 16.
[77] Ibid, para 28.
[78] Ibid, para 38.

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that social advantages granted to the worker's family were in all cases derivative rights, and they were enjoyed by virtue of the person's association to the migrant worker. This is because the members of a worker's family were granted the right to move in order to join the worker and ensure that they migrate in dignity.[79] Thus, the status of the migrant worker was the source of rights for the worker's family. The migrant worker was the only one engaged in the process of economic development of the Community and, as a result, the only subject that could draw rights directly from Community law. In this context, the Court recognized the right of workers' families to fare reduction cards for large families that were available to nationals of the host Member State,[80] handicap allowance for dependent children,[81] and the right of dependent family members to old people's benefit.[82]

The protection afforded to workers' families was further extended in *Deak*, where the Court held that unemployment benefits could be granted to TCN family members of Community workers as social advantages under Article 7(2) of Regulation 1612/68.[83] The Court held that Deak could not draw rights to a benefit under Regulation 1408/71 on social security, as this Regulation applied to benefits related to personal rights of Community workers, and he was a TCN associated to a worker.[84] In this context, the Court went on to examine whether protection could stem from Article 7(2) Regulation 1612/68, and it found that under this provision, advantages of this kind should be attributed to the worker's family. An unemployment benefit for the worker's child should be recognized as a social advantage of the worker themself due to the objective of effective exercise of free movement rights:

> A worker anxious to ensure for his [sic] children the enjoyment of the social benefits provided for by the legislation of the Member States for the support of young persons seeking employment would be induced not to remain in the Member State where he had established himself and found employment if that State could refuse to pay the benefits in question to his children because of their foreign nationality.[85]

[79] 5th Recital and Article 10, Regulation 1612/68.
[80] Case 32/75, *Cristini*, ECLI:EU:C:1975:120, para 16.
[81] Case 63/76, *Inzirillo*, ECLI:EU:C:1976:192.
[82] Case 261/83, *Castelli*, ECLI:EU:C:1984:280; similar in Case 157/84, *Frascogna*, ECLI:EU:C:1985:243.
[83] Case 94/84, *Deak*, ECLI:EU:C:1985:264.
[84] Ibid, paras 15–16.
[85] Ibid, para 23.

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Subsequently, the Court held that the principle of non-discrimination, which migrant workers enjoy in relation to their employment, also extended to their TCN spouses. In *Gül*, a Cypriot doctor married to a British worker in Germany was denied the renewal of his temporally limited authorization to practice medicine due to the fact that there was an increasing level of unemployment among doctors of German nationality.[86] The Court held that the right of access to the employment market enjoyed by the spouse of the migrant worker under Articles 10 and 11 Regulation 1612/68 was linked to the rights enjoyed by the worker under Article 48 EEC.[87] As long as the spouse relies on such 'secondary rights', their access to employment should take place under the same conditions of non-discrimination as those enjoyed by the migrant worker beneficiary of free movement.[88]

Later, the Court built on *Hoeckx* and the entitlement of workers to minimex, a Belgian minimum subsistence benefit, finding that dependent family members were also entitled to this benefit. Lebon, a French national, lived in Belgium with her father, who received a retirement pension there.[89] She received minimex, which was discontinued on the ground of lack of evidence that she was looking for a job. The Court considered that Lebon came under the scope of Community law, since her father was a retired Community worker. It thus confirmed the extension of equal treatment regarding social advantages under Article 7 Regulation 1612/68 to members of the worker's family.[90] It also emphasized that this extension of equal treatment referred to rights derivative from the worker and extended to family members only to relieve the migrant worker from undue burden. As a result, the descendants of migrant workers can rely on equal treatment only to the extent that they are dependent on the worker.[91]

Such rights as are enjoyed without regard to the nationality of the family members required an association with the worker. This means that benefits that are attributed in the form of personal rights could not be claimed under Article 7(2) of Regulation 1612/68.[92] It is the association to a worker, or the dependency on them in certain cases, that forms

[86] Case 131/85, *Gül*, ECLI:EU:C:1986:200, para 6.
[87] Ibid, para 20.
[88] Ibid.
[89] Case 316/85, *Lebon*, ECLI:EU:C:1987:302.
[90] Ibid, para 12.
[91] Ibid, para 13.
[92] Case C-243/91, *Taghavi*, ECLI:EU:C:1992:306, para 12.

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the basis of the rights of family members. At this stage of Community law, families and family members were not protected independently out of considerations of humanity; instead, they were situated within the functional logic of the Community. They were granted rights because they facilitated migration in dignity.[93] What is more, when the association with the worker ends, there is no longer a basis to claim the rights under Community law. This was confirmed in *Diatta*, where the Court implicitly held that an official divorce would take away residence rights of a TCN spouse of a migrant worker.[94]

2.2.3 *The Social Protection of Migrant Workers and Their Families in Education*

The case-law analysed in Section 2.2.2 shows how the Court interpreted the concept of social advantages broadly as a means to facilitate free movement and to promote the economic objectives served by labour mobility. The economic progress supported by labour migration would bring about social progress for the migrant as a by-product. This section turns to how this reasoning played out in relation to access to education. It shows that equal access to education was guaranteed for Community workers and their families because it supported personal development that could make them more competitive in the internal market. Non-discrimination and the effective exercise of free movement rights have been examined in a series of preliminary rulings related to enrolment fees for access to education or grants related to maintenance while in education.[95] Sections 2.2.3.1 and 2.2.3.2 will look at how the effective protection of social rights developed in the case-law related to access to education of children of Community workers (Section 2.2.3.1) as well as of Community workers themselves (Section 2.2.3.2). The analysis will highlight the close link between economic and social objectives also in relation to this type of social rights.

[93] For a different focus, see Clare McGlynn, 'Families and the European Union Charter of Fundamental Rights: Progressive Change or Entrenching the Status Quo' (2001) 26 ELR 582, 587.

[94] Case 267/83, *Diatta*, ECLI:EU:C:1985:67, whereas separation and residence in different houses does not take away such rights.

[95] Case 152/82, *Forcheri*, ECLI:EU:C:1983:205; Case 293/83, *Gravier*, ECLI:EU:C:1985:69; Case 235/87, *Matteucci*, ECLI:EU:C:1988:460; Case C-357/89, *Raulin*, C-357/89, ECLI:EU:C:1992:87; Case 39/86, *Lair*, ECLI:EU:C:1988:322; Case 309/85, *Barra*, ECLI:EU:C:1988:42; Case 24/86, *Blaizot*, ECLI:EU:C:1988:43.

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2.2.3.1 The Double Objective of Access to Education for Children of Community Workers

The case-law of the Court during the 1970s made groundbreaking steps in relation to the protection of children of migrant workers and their access to education. Article 12 of Regulation 1612/68 provided for the equal access of migrant children to education in the host Member State. This provision was interpreted by the Court in relation to benefits of different kind and the rights of access to education for children of migrant workers under Article 12 of Regulation 1612/1968.

The first line of cases examined disability benefits for children of migrant workers. In *Michel S*, the Court recognized that the child of a Community worker was entitled to access any benefits aimed at improving the fitness for work of disabled individuals under Article 12 Regulation 1612/68.[96] Subsequently, in *F*, the Court found that benefits under Article 12 could also be granted to children of migrant workers, even when such children had no prospect of employability.[97] In that case, Belgium, where the migrant family resided, argued that the only reason why disability benefits should be granted to children of migrant workers was to improve the children's fitness for employment. This could not be the case for F's child, who had no prospect of employment due to their disability. The Court did not accept this argument. Similar to *Deak*, the Court put forward the effective enjoyment and exercise of free movement rights and emphasized that if this benefit was not recognized,

> [A] worker anxious to ensure to his child the lasting enjoyment of the benefits necessitated by his condition as a handicapped person, would be induced not to remain in the Member State where he has established himself and has found his employment.[98]

In these first cases, the derivative rights of children were interpreted in an instrumental manner. Children of migrant workers should enjoy social rights in the host Member State because otherwise the worker would not be able to move and become an active part of the Community labour market. The second line of case-law of the Court developed by reference to the right of migrant children to equal access to education in the host Member State.

In *Casagrande*, the Court addressed the question whether migrant children of Community workers should have access to education grants

[96] Case 76/72, *Michel S*, ECLI:EU:C:1973:46.
[97] Case7/75, *Mr and Mrs F*, ECLI:EU:C:1975:80.
[98] Ibid, para 20; Case 63/76, *Inzirillo*, para 17.

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available to children of German nationals. The case was resolved in favour of the migrant children with reference to the fifth recital of Regulation 1612/68,[99] which enshrined the intended purpose of integration of the migrant family in the host country. This reasoning was confirmed in *Alaimo*.[100] As a result, migrant children were entitled to equality not only in terms of admission to education but also, more broadly, with respect to all measures, adopted by Member States, that could facilitate their course of education.

The issue was developed by the Court in *di Leo*, which concerned a German educational grant for attendance of courses outside Germany.[101] The daughter of an Italian worker was refused this grant, because under national law, even though the grant could be provided to children of Community nationals, the education could not be provided in the state of which they were nationals. Despite the clear case-law on Article 12 of Regulation 1612/68 and its application to educational grants, the German and Dutch governments argued that if the children of a migrant worker were to study in their state of origin, the objective of the Regulation, which is to promote integration, would not be pursued.[102]

The Court rejected these arguments. It emphasized that integration of migrant workers in the host country should take place in respect of liberty and dignity.[103] To that end, it was essential that children of migrant workers, who resided with them in the host country, should be able to choose their education in the same way that children of nationals did.[104] As a result, Article 12 of Regulation 1612/68 also extended to grants for training or education abroad. However, Article 12 imposed obligations only on the Member State in which migrant workers resided. In *Humbel and Edel*, the Court held that protection from discrimination in relation to access to education could not be extended to create obligations for a third Member State in relation to any migrant worker within the Community.[105]

[99] Case 9/74, *Casagrande*, ECLI:EU:C:1974:74, para 6.
[100] Case 68/74, *Alaimo*, ECLI:EU:C:1975:11.
[101] C-308/89, *Di Leo*, ECLI:EU:C:1990:400.
[102] Ibid, para 11; Case 9/74, *Casagrande*.
[103] C-308/89, *Di Leo*, para 13.
[104] Ibid.
[105] Case 263/86, *Humbel and Edel*, ECLI:EU:C:1988:45, 1, para 10. In that case, French workers in Luxembourg claimed the repayment of 'minerval' [enrolment fee] for their sons' education, arguing that Luxembourgish nationals are not required to pay such fee when they access education in Belgium.

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Overall, in the aforementioned case-law, the Court acknowledged various objectives underlying the broad interpretation of secondary law. First, the rights of children were meant to facilitate the function of their worker parent in the internal market. Especially when it comes to children with no prospect of employment, the central idea was that the worker should be facilitated in the host Member State; otherwise, they would be less willing to migrate. This reason is a primarily economic one tied to providing incentives for labour migration. Second, equal access to education for migrant children is ensured in order to achieve integration. Integration in this case is sought as a purely social objective. It is a recognition that the common historical and cultural background of Community workers is not enough in itself. Rather, action needs to be taken to promote the social advancement of migrant families by facilitating their incorporation into national societies. Section 2.2.3.2 turns to migrant workers themselves and their rights to education to investigate how economic and social objectives appear in their protection under Community law with regard to education.

2.2.3.2 Migrants' Rights While in Education: Protection Dependent on an Effective Market Link

The Court's extensive interpretation of social advantages presented earlier in Section 2.2.1 also applied to maintenance grants for students, insofar as they could qualify as workers. This was confirmed in *Lair*, which concerned training grants requested by a French national in Germany.[106] Germany refused to award the grants on the ground that the worker had not been engaged in occupational activity in Germany for five years prior to their studies. The Court took this opportunity to clarify the difference between access grants and maintenance grants. It reiterated that grants related to registration and tuition fees, insofar as they concerned access to education, came within the scope of the Treaty as conditions of access to vocational training, and Article 7 EEC was thus applicable.[107] In contrast, grants attributed by Member States to students for maintenance during their education fell outside the scope of Community law as they fell under educational policy, which was a competence retained by the Member States.[108]

[106] Case 39/86, *Lair*.
[107] Ibid, para 14; Case 293/83, *Gravier* and 24/86, *Blaizot*.
[108] Case 39/86, *Lair*, para 15.

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The Court could have concluded the case at this stage – but it did not. It tried to examine whether that type of assistance could fall under the notion of social advantage for migrant workers under Article 7 of Regulation 1612/68. In this regard, Article 7(3) provided for access to training in vocational schools and retraining centres. But the school in question did not fall in either of these categories. This did not preclude the Court from qualifying the training grant at issue as a general social advantage under Article 7(2) of Regulation 1612/68.[109] During the proceedings, Member States argued that once a person became a student, they lost their status as workers and, accordingly, the entitlement to social advantages in the host Member State.[110] The Court resisted such a limitation of the right to equal access to social advantages. Specifically, the Court held that as regards grants for university education, the status of worker could form the basis of entitlements as long as there was a relationship between the previous employment and the course of study.[111]

This function of studies as a means of developing a worker's capacities can only be invalidated if 'a migrant has involuntarily become unemployed and is obliged by conditions on the job market to undertake occupational retraining in another field of activity'.[112] Hence, the granting of entitlements to migrant students presupposes that it takes place in the context of professional development that could reinforce their professional mobility. If the course of study had no link with one's occupational activities, then the status of worker and the benefits that come attached to it could not be retained.[113]

In *Brown*, the Court additionally held that when a Community national entered in an employment relationship for a short period (eight-month traineeship in this case) with a view to undertaking studies in the same field, and where his employer employed him only because he was already accepted for admission, that person qualified as a worker under the Treaty, but he did not qualify for maintenance benefits related to study under Article 7(2) of Regulation 1612/68.[114] This created a 'legal

[109] Ibid, para 22.
[110] Ibid, para 29.
[111] Ibid, para 37.
[112] Ibid.
[113] C-357/89, *Raulin*, para 22.
[114] Case 197/86, *Brown*, ECLI:EU:C:1988:323, paras 23, 28.

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loophole' according to O'Keeffe and Johnson.[115] Prospective students could take up casual work in the country where they intend to study and qualify as workers.[116] In such cases, they would be eligible for all the benefits available to workers in that state under Regulation 1612/68. This issue was clarified in *Raulin*.[117] There the Court held that enjoying benefits related to education through the concept of social advantages under Article 7(2) of Regulation 1612/68 required an independent employment relationship prior to pursuing studies. The nature and duration of the prior employment had to be taken into account and the migrant needed to show that there was an effective and genuine exercise of economic activity.[118]

Finally, in *Matteucci*, the Court held that equal treatment of migrant workers should also apply in relation to scholarships awarded pursuant to a bilateral agreement between two specific Member States.[119] Specifically, the Court observed that even if such types of agreement fell under the cultural sphere, they could not jeopardize the rights of Community workers to equal treatment.[120] What is more, similarly to the case-law on access to education,[121] the Court held that Article 7(2) of Regulation 1612/68 created a responsibility in the social sphere on each Member State to ensure equality of treatment for every Community migrant worker whether they pursued training in the territory of their host Member State or abroad.[122]

This case-law shows that the Court proceeded in far-reaching interpretation and application of Community law in the educational sphere. This led to a significant enlargement of equal treatment rights when it comes to maintenance while in education. Nevertheless, this was never disconnected from the functional logic of education in the Community legal order. The Community worker was not attributed rights on the grounds of human dignity and freedom of choice on how to pursue life, or at least the Court's reasoning does not point to such bases for

[115] David O'Keeffe and Esther Johnson, 'From Discrimination to Obstacles to Free Movement: Recent Developments Concerning the Free Movement of Workers 1989–1994' (1994) 31 CMLRev 1313, 1318.
[116] Ibid.
[117] C-357/89, *Raulin*.
[118] Ibid, para 14.
[119] Case 235/87, *Matteucci*, ECLI:EU:C:1988:460.
[120] Ibid, para 14.
[121] C-308/89, *Di Leo*.
[122] Case 235/87, *Matteucci*, para 16.

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justification. Rather, they were attributed rights to survive while better tailoring themselves to serve the market. This close interdependence of social rights for migrants and economic growth under Community law points to considerations that would nowadays fall under the economic and social pillars of sustainability.

Overall, the analysis in this chapter demonstrated how free movement was progressively opened up to ensure orderly migration of workers and to avoid detrimental effects on national economies from lack of labour migrants. The demand of primary law to allow free movement of workers was gradually achieved via secondary law that evolved with the incorporation of clauses related to national labour market priority and the possibility to restrict free movement for economic reasons. This highlights the presence of economic sustainability considerations driving the applicable legal framework that operationalized Article 48 EEC. Next to the legal framework, the rulings of the Court revolutionized the social rights of Community migrants by an extensive application of the free movement provisions. The analysis in this section revealed the centrality of economic objectives in the reasoning of the Court as a basis for broader interpretations facilitating free movement. By promoting such objectives, the Court also guaranteed social progress for the Community migrants and their families in the form of rights they were entitled to. Against this background, Chapter 3 engages with the material related to migrants from third countries and investigates whether and how similar considerations drove the Commission's and the Council's agenda to coordinate national labour migration policies.

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