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

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# **WHO HAS THE RIGHT TO INTRA EUROPEAN SOCIAL SECURITY? - FROM MARKET CITIZENS TO EUROPEAN CITIZENS AND BEYOND 2**

<b>1: The Historical Setting of a Personal Scope</b>	<b>4</b>
1.1: Who Is Included in the Personal Scope?	4
1.2: The Historical Definition of ‘Employed Person’	6
1.3: Settling the Personal Scope of 1408/71 – Inherited Definition and Beyond	8
1.4: An Anticipated Development - Bringing in the Self-Employed	9
1.5: Council Codification and Further Interpretation	10
1.6: In the Light of the Treaty Spirit - Dynamic Aims and Means	12
<b>2: Proposing a Generalised Personal Scope</b>	<b>13</b>
2.1: A People’s Europe – Proposing New Value to European Citizenship	14
2.2: Proposals, Recommendations and a Partial Adoption	15
2.3: Beyond European Citizenship – Preparing for the Extension to Third Country Nationals	16
2.4: The First Separate Proposal on Third Country Nationals	18
2.5: The Scope and Limits of the Treaty – the Reach of Community Competence?	19
2.6: Proposing New Borders of a Personal Scope	21
<b>3: Negotiating a Generalised Personal Scope</b>	<b>21</b>
3.1: Modernisation and Simplification Proposed and Negotiated	22
3.2: Negotiating the Treaty Base	24
3.3: Searching for a Legal Base – Third Country Nationals Readdressed	26
3.4: The Case-Law Solution of a Political Problem	28
3.5: Proposal Split in Two	29
3.6: Negotiating the Borders of a Personal Scope	32
<b>Concluding Remarks</b>	<b>34</b>
<b>Bibliography</b>	<b>36</b>
<b>Footnotes</b>	<b>39</b>

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

By Dorte Sindbjerg Martinsen\*

This paper traces out the process of how the personal scope of Regulation 1408/71<sup>1</sup>, coordinating social security rights across European borders, has been defined and extended over time. The paper examines the legal–political dialogue, cultivating a process which for more than 4 decades has questioned and settled the scope of ‘who has a right to intra European social security’. This process departed from the notion of Community worker ‘*stricto sensu*’, i.e. the market citizen<sup>2</sup> but has gradually expanded to the point where the extension to all European citizens is currently being negotiated and where third country nationals have recently been included in the personal scope. This evolution, thus apparently decouples the right to coordinated social security from a communitarian conception of welfare.

Regulation 1408/71 was adopted by the Council in 1971 as a Community instrument to realise the aim of free movement of workers.<sup>3</sup> The regulation was approved using the legal basis of the Rome Treaty’s (hereafter Treaty) Article 51 (now Art. 42), which required unanimity. Unanimity has been maintained as the procedural rule, which indeed has conditioned the incremental development of the regulation. The history of the regulation, however, dates back long before 1971 to one of the Community’s first major legislative pieces, Regulation no. 3/58<sup>4</sup>, and before that to bilateral agreements between present member states (Holloway 1981). Regulation 1408/71, in addition to inheriting certain principles and coordinating methods, also inherited a broad interpretation of ‘worker’ as well as a most extensive material scope.<sup>5</sup> Since then, principles and substance have been extended on the basis of 1408’s own premises and its Treaty base. The coordination system institutionalised by Regulation 1408 has been viewed as the most advanced social policy achievement of the EU, and as the most comprehensive system of access to cross-border health care in international social law (Eichenhofer 2001, p. 227; Palm et. al 2000, p. 28). The regulation prescribes that migrants included in the personal scope have equal social security rights within the material scope of the regulation when settling in another member state as the nationals of that state, as they have a right to export defined social security

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rights if deciding to reside in another member state. The regulation thus prohibits national legislation which discriminates against migrants from other member states, as it partly prohibits territorial principles formulated in national social security legislation.

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

The paper is divided in three parts, focusing individually on the institutional actors of Court, Commission and Council, whose actions and reactions nonetheless overlap, intertwined as they are. In fact, regarding the recurring discussion in political science and law-in-context<sup>6</sup>, a specific analysis of the question 'who has the right to intra European social security' demonstrates that the Court, the Commission and the Council of Ministers participate in a dialogue, which compromises the autonomy and position of each of them. This dialogue reflects changes in preferences over time, as well as transformations in the reading of the Community's objectives and competences. The first section focuses on the role of the *Court* and its historical definitions for 'employed persons'. It also considers the purpose of the Regulation's predecessor and its Treaty base. The second section analyses the agenda set by the *Commission*, which, by continuously linking intra-European social security to the free movement of persons and Union citizenship, as well as to the stated political commitment to treat non-Community nationals equally, argued that the regulation should be extended to all persons, irrespective of economic activity and nationality. The third section turns to the reactions by the *Council* and individual member states and analyses how the negotiations on a generalised personal scope evolve, and how the Court's ruling – by what appears as political choice rather than judicial conviction - finally settles the matter and paves the way for a political compromise, formally entitling legally residing third country nationals to intra European social security.

The integration of social security rights in Europe has been one of small subtle steps. However, aggregated over time, the individual steps towards 'more

Europe' constitute a historical move from rights granted to market citizens, narrowly defined, to a European citizenship right and beyond, as well including legally residing third country nationals. Alongside that process, the political and judicial perception of Community objectives and competences has gradually changed.

### **1: The Historical Setting of a Personal Scope**

The personal scope of Regulation 1408 has been extended incrementally through judicial interpretations by the Court, Commission proposals and the Council's codification thereof. The current personal scope has been under definition since the adoption of Regulation 1408's predecessor, Regulation no. 3 in 1958. Despite more than four decades of hampering out the personal scope, it is still not finally settled but currently negotiated in the Council and subjected to new interpretations.

Behind the personal scope as it stands today is both the Court's early and gradually evolving interpretations of 'employed person', as well as the scope and limits of the Treaty's Article 42 (ex. Art. 51). An ongoing interpretation of the spirit of the regulation's Treaty base, initiated years before the free movement of workers was implemented by secondary legislation in 1968<sup>7</sup>, is behind the ever broader understanding of the personal scope, and the gradual construction of its own meaning.

In this first section, we examine how an independent social security conceptualisation of employed person developed from the judicial activism of the Court, and how 1408 inherited the personal scope from its predecessor Regulation no. 3, but subsequently extended it far beyond that. First we sketch the current personal scope of 1408/71 and compares the unique definition of 'employed person' with Regulation 1612/68's definition of 'worker'. Second, we analyse the historical definition of 'employed person' based on Regulation no. 3. In the third part, we illustrate how 1408 subsequently inherited its notion of 'worker'. The fourth part presents a discussion of the inclusion of self-employed persons in early case-law, while part five analyses the later Council codification hereof.

#### **1.1: Who Is Included in the Personal Scope?**

Article 2 of Regulation 1408/71 lays down the personal scope, currently covering a wide set of personal categories<sup>8</sup>:

- *Employed and self-employed persons* who are or have been insured under the legislation of one of the member states;
- *Civil servants*;
- *Students*;
- *Pensioners*, including those who have become pensioners before their country joined the EU or the EEA;
- Members of *families* and *survivors* of the above-mentioned personal categories; and,
- As from 1 June 2003, *nationals from third countries* as well as their *family members* and their *survivors*, provided that these are legal residents in the territory of a Member State and that their situation is not confined in all respects within a single Member State.<sup>9</sup>

The last category results from the very recent amendment of 1408's personal scope, and thus is a provisional conclusion of a 'long-running saga' (Peers 2002, p. 1395). Traditionally, article 2 has entailed two criteria for a person to invoke the right to co-ordinated social security. First of all, apart from refugees, stateless persons, and family members, one must be a national of a member state. Secondly, one must qualify within one of the personal categories listed above.

The first criterion meant that a third country national would not enjoy any rights according to 1408, unless he or she was a family member of a Community national, in which case nationality became irrelevant, or else, if he or she was a refugee or a stateless person. The regulation thus clearly discriminated against third country workers despite their possibly considerable contributions to a member state's economy. Apparently, the recently adopted amendment puts an end to an intense debate between the Commission, Council, Parliament and Court on the status of third country nationals, and finally gives equal rights to a previously deprived group. However radical such an extension may seem, it should be noted that in practice it is not of much use. Third country nationals legally residing in member states have no right to free movement, but they can *only* invoke the rights according to Regulation 1408 if they *do move* between member states. The negotiations on the position of third country nationals will be discussed in detail in sections two and three below.

The second criterion means that in order to be included in the personal scope, one has to fulfil the criteria as listed in Article 1 of the regulation. Article 1 lays down that one qualifies as an employed or self-employed person if insured by a social security scheme for employed or self-employed persons on a compulsory or voluntary basis. The relevant schemes are listed by each individual member state in annex 1 of the regulation. Thus, the inclusiveness of national law becomes

decisive. According to 1408, when national law allows a person without an employment contract to participate in a social security scheme for employed persons, that person holds worker status. The concept of ‘worker’ in the Treaty’s Article 42 and Regulation 1408 relies on a particular social security law definition, and the meaning of this definition is established with reference to national legislation (Langer 2000, p. 56; Haverkate & Huster 1999, p. 89 & p. 96; van Raepenbusch 1997, pp. 74-75).

The special social security meaning of ‘employed person’ in 1408/71 implies that the concept differs from the meaning of ‘worker’ according to the Treaty’s Article 39 (ex Art. 48) and Regulation 1612/68, where “worker” is defined by labour law. The personal scope of Regulation 1612/68 is a narrower one, addressing the worker ‘*stricto sensu*’, those with a contract of employment.<sup>10</sup> Regulation 1612/68 does not cover the unemployed seeking work, nor the self-employed (Pennings 1998, p. 103; Haverkate & Huster 1999, p. 90).<sup>11</sup> Furthermore, a ‘social advantage’, earned according to 1612/68, cannot in principle be exported (Huster 1999, p. 15). However, the equal treatment provision of Regulation 1612 as stated in Article 7 (2)<sup>12</sup> entitles the migrant worker to a broad scope of ‘social advantages’ which, through the Court’s interpretation, includes benefits outside of a contract of employment (Jacobs 2000, p. 36). Case-law has widened the scope of “social advantages” to include childbirth loans<sup>13</sup>, invalidity benefits<sup>14</sup>, minimum means of subsistence<sup>15</sup>, financial support for studies<sup>16</sup>, maternity benefits<sup>17</sup> and benefits for large families<sup>18</sup> (Stoor 2000, pp. 116-117). In addition to this, the Court has interpreted the personal scope of 1612 generously, pushing the limits of an ‘effective and genuine’ activity to exclude nothing but activities “on such a small scale as to be regarded as purely marginal and ancillary” (O’Leary 1999, p. 392)<sup>19</sup>. Although case-law may have pushed Regulation 1408 and 1612 in the same direction, extending their scope of application, the equal treatment provisions of the two regulations still refer to distinctive functions and rationales. Article 7 of 1612 and its clarification in case-law aim to promote full integration of the migrant worker into the host state. Regulation 1408 in full text and provision aims to promote cross-border mobility by ensuring that rights can be acquired under another member state’s legislation, and that acquired rights are maintained and aggregated when moving between states (Stoor 2000, pp. 120-121).

## **1.2: The Historical Definition of ‘Employed Person’**

The distinctiveness of the concept of worker in Regulation 1408 was established through clusters of case-law, and subsequently codified by the Council. The historical process establishing the Community’s social security meaning of

worker, started from the same place as the ‘worker’ in Regulation 1612 and in the Treaty’s article 39, with a more traditional understanding of the ‘wage-earner’. The concept, however, gradually developed its own meaning and scope through case-law and the Council’s codification of it.

Soon after Regulation no. 3 came into force, the disagreements among member states on the extent of the personal scope became clear. France and Luxembourg held the opinion that the regulation only applied to workers ‘*stricto sensu*’, i.e. workers with an employment contract. The other member states found no such limitations in the regulation. The discussion continued in the ‘Administrative Commission on Social Security for Migrant Workers’<sup>20</sup>, where the member states in 1962 managed to agree on the broader interpretation of the concept (Holloway 1981, p. 166). However, the setting out of the conceptual meaning went on in the form of legal dialogues between the national Courts and the European Court of Justice.

In one of the first social security cases, 75/63 Hoekstra, the Court interpreted the personal scope in Regulation no. 3 quite broadly, presumably applying it far beyond what the authors of the regulation could have imagined (van Raepenbusch 1997, p. 74).<sup>21</sup> In the Hoekstra case, the Court emphasised that since Regulation no. 3 was adopted on the basis of Article 51 of the Treaty, the meaning of ‘wage-earner’ depended on the scope of this Treaty provision. Included in the Treaty’s chapter on workers and placed in Title III on free movement of persons, services, and capital, situated in part two of the Treaty, describing its foundations, the Court interpreted the aim of Article 51 to be:

“The establishment of as *complete a freedom of movement of workers as possible*, which thus forms part of the “foundations” of the community, therefore constitutes the principal objective of article 51 and thereby conditions the interpretation of the regulations adopted in implementation of that article” (Summary of the Judgement, 75/63 Hoekstra, emphasis added).

The objective to establish “as complete a freedom of movement of workers as possible” meant that the term ‘wage-earner’ could not be defined by national legislation alone. The objectives of the Treaty would not be achieved if the concept was “unilaterally fixed and modified by national law” (Summary of the Judgement, 75/63 Hoekstra). The preliminary questions of the case furthermore addressed the question whether the term ‘wage-earner’ covered a person such as Mrs Hoekstra, who was no longer in active employment, but still covered by the social security scheme for employed persons, and whose movement was motivated by leisure. The Court answered that the concept ‘wage-earner or assimilated workers’ referred to “all those who, as such and under whatever description, are covered by the different national systems of social security”

(ibid). The Court thus clarified that it was the attachment to a social security scheme for wage-earners that linked a person to the Community regulation. This conception even covered those who no longer held active employment, but continued to be voluntarily insured in a social security scheme for wage-earners (Holloway 1981, p. 168). Thus the concept did not restrict protection to those in active employment. Also, the motives of the movement were treated as irrelevant, since Regulation no. 3 did not only cover movements for work reasons, but also for leisure, such as Mrs Hoekstra desire to stay with her parents in Germany (Langer 2000, p. 57).

Since one of its first social security cases, the Court has stretched the personal scope through a teleological interpretation, where the aim and spirit of the Treaty have been decisive for the conceptual borders of ‘wage-earner’. The earlier cluster of cases interpreting Regulation no. 3 confirmed that ‘worker’ was not defined by national law, but rather according to Community law, and that a broad interpretation in light of the Treaty’s Article 51 was called for. Subsequent case-law repeated that the reasons motivating movements were irrelevant as long as the person moving was covered by a social security scheme for wage-earners. In the 44/65 Singer case<sup>22</sup> concerning a German mineworker killed in a car accident during his holiday in France, one of the involved parties argued that it would be against the aim of Article 51 to apply the regulation to the leisure situation as well. However, the Court confirmed its Hoekstra interpretation, referring once again to the spirit of Article 51:

“It would not be in conformity with that spirit [of the Treaty] to limit the concept of “worker” solely to migrant worker *stricto sensu* or solely to workers required to move for the purpose of their employment. Nothing in article 51 imposes such distinctions, which would in any case tend to make the application of the rules in question impracticable. On the other hand, the system adopted by regulation no. 3, which consists in abolishing as far as possible the territorial limitations on the application of the different social security schemes, certainly corresponds to the objectives of article 51 of the treaty” (Summary of the Judgement, 44/65 Singer).

### **1.3: Settling the Personal Scope of 1408/71 – Inherited Definition and Beyond**

The case-law on the scope of Regulation no. 3 developed a broad definition of worker, clarifying that the actual nature of the work was irrelevant (Cornelissen 1997, p. 42). The definition went far beyond the written text of the regulation, extending the personal scope to practically everyone insured under a social security scheme for wage-earners (van Rapenbusch 1996, p. 75). When adopting Regulation 1408, the same extended scope was codified in Article 1 (a), defining a worker merely by his attachment to a relevant social security scheme.

Although 1408/71, when adopted, contained the institutional experience of its predecessor and inherited its notion of ‘worker’, the personal scope of coordinated social security rights was far from settled, and it continued to be disputed for the next three decades. Legal dialogues between citizens, national courts and the Court of Justice have questioned and clarified the rights of family members<sup>23</sup>, the concept of employed and self-employed persons, and whether employment status depends on the hours spent on the work-activity<sup>24</sup>. Through its successive case-law, the Court declared that the migrant’s family has an individual right to equal treatment<sup>25</sup>, that the meanings of employed and self-employed are extensive, and that the amount of hours spent working does not influence one’s status as worker whatsoever. The individual development of Regulation 1408’s personal scope emphasised that the regulation applied to persons who were not migrant workers within the meaning of the Treaty’s Article 39, nor within the meaning of Regulation 1612. As time went by, the applicable scope of the regulation became wider as its notion of worker became more precise.

#### **1.4: An Anticipated Development - Bringing in the Self-Employed**

Two years after 1408 was approved, the UK, Ireland, and Denmark joined the Community, and with this first enlargement the *acquis communautaire* was to be applied to the residence-based social security models of the new members. The application was by no means straightforward, one reason being that the residence-based model did not have distinct schemes for workers on the one hand and other categories of persons on the other. The problem with applying institutionalised rules to different social security traditions became evident in case 17/76 Brack, on which both Britain and Denmark submitted observations.<sup>26</sup>

In the Brack case, the Court was asked whether a British national who had been an employed person 17 years previous, but was self-employed at the time of the actual incident, had a right to cash sickness benefits for a period of illness in France.<sup>27</sup> Mr Brack had been insured under the British national insurance scheme both as an employed and as a self-employed person. The observation submitted by the British government provided a description of the development of its social security legislation, which initially covered only narrowly defined classes of workers, but gradually had been extended to other classes. The general scheme did not draw a distinction between those regarded as wage-earning workers and those belonging to other categories.

In the Danish observation, the government drew attention to the fact that the legislation of the three new member states differed on important aspects, covering either all persons resident in the territory of the competent state or the entire national population irrespective of employment. The Danish government found it unacceptable that the regulation should also apply to self-employed persons who had formerly been workers. Such an extension of the personal scope would, according to the Danish government,

“bring about an unreasonable extension of the area of application of the regulation in that *most nationals of the Member States have been workers at one time or another*” (ECR 1976, p. 1443, emphasis added).

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

“...it must be borne in mind that, as the Court has previously held, the Community rules on social security “follow a general tendency of the social law of Member States to extend the benefits of social security in favour of new categories of persons by reasons of identical risks’” (para 20 of the Judgement).<sup>28</sup>

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

“persons who, although they have lost the status as employed persons, remain compulsorily insured under the same scheme which covered them previously when they had that status” (para 24 of the Judgement).

In the Brack case, the European Court of Justice granted intra-European social security rights to the self-employed, 5 years before the Council adopted the amendment Regulation 1390/81, which definitively included the category.

### **1.5: Council Codification and Further Interpretation**

A key feature throughout the historical development of co-ordinated social security has been continuous work to amend the regulation. The high number of

proposed amendments suggests that from the Commission's point of view, co-ordinated social security is never really sufficient or up-to-date.

When the Commission began its revision of Regulation no. 3 in 1964, it initially envisaged that the self-employed would be included in the personal scope (van Raepenbusch 1997, p. 71). However, the proposal was later withdrawn on the argument that including the self-employed would add too much technical complexity to the regulation (Holloway 1981, p. 296).

In light of the case-law interpretations of the personal scope, the Commission proposed in December 1977 that the self-employed should be included.<sup>29</sup> The proposal was subsequently amended and re-proposed to the Council in October 1978.<sup>30</sup> At the same time, the 'Administrative Commission' suggested extending the applicable scope to include all persons covered by a social security scheme of a member state, regardless of their employment status (Pieters 1997, p. 205). However, the latter idea remained pending until the beginning of the 1990s when it was re-vitalised in the light of the three residence directives<sup>31</sup> (van Raepenbusch 1997, p. 80).

Envisaged as early as 1964, the self-employed and their family members were finally included in the personal scope by the Regulation amendment 1390/81, adopted in May 1981.<sup>32</sup> In the explanatory memorandum, the extension of the scope of application was reasoned by the fact that the free movement of persons is not confined to employed persons, and in the framework of the freedom of establishment and the freedom to supply services, Regulation 1408 should include the self-employed as well. The explanatory memorandum further reasoned that since 1408 already covered certain categories of self-employed persons, it should, for the sake of equity, be extended to all self-employed.

Whereas the inclusion of the self-employed in the co-ordinating framework was deemed necessary for attaining one of the Community objectives, the Treaty did not provide a specific legal basis for this purpose. Since the Treaty's Article 51 could not be used as a legal basis for any extension of social security rules beyond workers, the self-employed were brought within the regulatory scope on the legal basis of Article 235 (now Art. 308).<sup>33</sup> The Council hereby agreed that the Community objectives went beyond the strict meaning of Article 51. The total Treaty basis for the inclusion of self-employed thus consisted of Articles 2, 7, 51 and 235.

Despite its inclusion, the meaning of "self-employed" was not immediately elaborated, and had to be clarified through another legal dispute. In case 300/84

van Roosmalen, the Court was asked whether a Roman Catholic priest fell within the definition of self-employed.<sup>34</sup> In its judgement, the Court emphasised that Regulation 1390 was adopted to achieve the same objectives as 1408, and therefore self-employed were entitled to the same level of protection as employed persons. The term “self-employed” had a wide meaning as well (Cornelissen 1996, p. 421; Pennings 1998, p. 43). Despite a somewhat non-standard kind of self-employment, a person engaged in work such as van Roosmalen’s would fall within the personal scope of the regulation, because like ‘employed person’ ‘self-employed’ was to be interpreted according to the objective of the Treaty’s Article 51.

“With regard to the interpretation of the expression “self-employed person”, it must first be pointed out that initially the provisions of Regulation no 1408/71, adopted for the implementation of Article 51 of the Treaty, applied only to those who were covered by the term “employed person”. According to the established case-law of the court, “employed person” is a term of Community law rather than national law and must be interpreted broadly, having regard to the objective of Article 51, which is to contribute towards the establishment of the greatest possible freedom of movement for migrant workers, an objective which is one of the foundations of the Community” (para 18 of the Judgment).

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

### **1.6: In the Light of the Treaty Spirit - Dynamic Aims and Means**

The personal scope of both Regulation 3 and its descendant Regulation 1408 extended incrementally due to a teleological interpretation by the Court and the Council’s acceptance and codification of it. The Court cultivated a distinct social security notion of ‘worker’, which from its earliest interpretations covered more than those in active employment, such as individuals moving for leisure. The first cases justified the wide interpretation on the basis of Article 51 of the Treaty itself. The principal objective of Article 51 was not simply to guarantee migrant workers social security, but also to promote the greatest possible freedom of movement for workers. Interpretations followed the guiding light of the Treaty spirit. After the adoption of 1408, the Court anticipated the imminent inclusion of the self-employed, once again justified as being in keeping with the spirit of the Treaty. Five years later, the Council adopted the regulation amendment which finally covered the self-employed. However, no matter how broadly the aims of the Treaty’s Article 51 were constructed, it could not be used as the legal basis of any extension beyond workers. Adopting Regulation 1390/81 required Article 235 (now Art. 308) as the other Treaty base. In this way, the member states

accepted that the purpose of 1408 was beyond promoting the free movement of *workers*. The adoption illustrates that the Community objective with Regulation 1408 and the Treaty's Article 51 in conjunction with Articles 235, 2 and 7 was by no means given, but was still open to further interpretation. With the self-employed persons included under the umbrella, the Court continued its broad definition of the personal scope, whereby the line of reasoning in previous case-law served as grounds for new conclusions. Since 'employed persons' was understood broadly, 'self-employed' had to be as well.

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

## ***2: Proposing a Generalised Personal Scope***

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

This section focuses on the Commission's position as initiator, and it analyses the way in which it managed, through proposals and recommendations, to set an agenda that proved the insufficiency of 1408's personal scope. As later negotiations demonstrate, the Commission pursued its agenda by coupling key issues. European citizenship and the free movement of persons were invoked as strong arguments for extending co-ordination of social security rights to all Community nationals. The moral obligation and the political commitment to improve the legal status of third country nationals became arguments for including persons who were no member states nationals. Below, the analysis first illustrates how a "People's Europe" developed into a citizenship argument, and how Commission recommendations were used as a means to substantiate the need to extend Regulation 1408. Second, it explains how the Commission initiated its dialogue with the member states concerning the extension of the

regulatory scope beyond European citizens, and also how the Commission initially interpreted the scope and limits of the Treaty base so as to justify an extension to third country nationals.

## **2.1: A People's Europe – Proposing New Value to European Citizenship**

The adoption of the three residence directives in 1990 revived the idea, which dated back to the late seventies, that 1408 should be extended to all member states' citizens. In December 1991, the Commission presented a proposal to extend the regulation to all Community citizens insured in a member state.<sup>35</sup> The proposal was reasoned by the new general right of residence, and found "indispensable in the context of the social dimension of the internal market and a People's Europe" (COM (91) 528, p. 3).

However, it soon became clear that the member states were far from prepared to grant any such radical extension of the personal scope. The Commission therefore had a long way to go to gain support for its proposal. The soft-law tool of recommendations was used to emphasize how "the peoples of Europe" merited equal rights. European citizenship was brought in as a new dimension of European integration (Cornelissen 1997, p. 30). In the communication "Modernising and Improving Social Protection in the European Union"<sup>36</sup>, the Commission argued:

"The original dimension of European integration, i.e. a common market allowing and fostering free movement of workers, has been enriched by a new *concept*, namely that of *European citizenship*. The personal scope of Regulation 1408/71 should be adapted accordingly" (COM (97) 102, p. 16, emphasis added).

Soft-law communications on the free movement of persons continued in 1997, and also dealt with the instrument of 1408. On a Commission mandate, a high level panel on the free movement of persons was set up to identify the "obstacles which confront European citizens seeking to exercise their rights to move freely and to work within the Union" ("Report of the High Level Panel", p. 91).<sup>37</sup> The report was motivated by the Commission's recognition that of the four fundamental freedoms of the single market, the least progress had been made on the free movement of persons. The Commission argued that even though free movement was an institutionalised right, it was not yet a practicable fact for the European people. The report confirmed the Commission's line of reasoning according to which the exercise of free movement was argued to constitute an essential means leading to other Union objectives;

"The effectiveness of the right to move freely would contribute not only to attaining the objectives of the single market but also bringing the Community closer to the goal of an

*“ever closer union among the peoples of Europe”* envisaged in the original treaties, which gave form to the Communities and, subsequently, to the European Union” (“Report of the High Level Panel”, p. 94, emphasis added).

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

The panel’s recommendations were later followed up in “An Action Plan on the Free Movement of Workers”. In this document, the Commission stressed that free movement had to be seen in a new perspective. The Commission expected that due to demographic changes and the changed nature of working life, free movement would become much more important over the next 10-20 years than it had been for the last 30 years (COM (97) 586, p. 8). Although the ‘*acquis communautaire*’ was pointed out as the starting point for reinforcing free movement, it contained “serious flaws and lacunae” (COM (97) 586, p. 5). Once again, the Commission identified the right of free movement as a substantial part of European citizenship:

“Moreover, following the report of the High Level Panel, which also concerns free movement of persons who are not exercising an economic activity, the Commission has already announced its intention to present in 1998 proposals to simplify and enhance the existing secondary legislation with a view to drawing all consequences in order *to give full value to citizenship of the Union*” (COM (97) 586, p. 9, emphasis added).

The communication emphasised co-ordination of social security rights as a prerequisite for free movement, but labelled the Community system in need of reform and simplification. The Commission obliged itself to press for the adoption of pending proposals, among others the proposal on the personal scope from 1991. Furthermore, it intended to present a simplification proposal before the end of 1998 (COM (97) 586, pp. 11-12).

## **2.2: Proposals, Recommendations and a Partial Adoption**

The proposals and recommendations set forth by the Commission in the 1990s introduced and reinforced new perspectives on the co-ordination of social security rights. Whereas the institutional aim in the 1970s and 1980s had been to more efficiently allocate production factors, by the 1990s, the goal of cultural integration among the “peoples of Europe” had been added among the economic objectives of the single market. According to this line of reasoning, 1408 should

be up-dated to the overall Union development and brought in line with the general right of free movement. The Commission formulated its point of view clearly; cross-border social security rights should be attached to European citizenship rights.

However, the proposal of a generalised personal scope made no headway until the late 1990s. During the Austrian presidency in the autumn of 1998, a compromise was formulated that proposed a separate extension of the personal scope to students. The strategy of the Commission and the Austrian presidency was to isolate the more controversial part of COM (91) 528 on the extension to non-active persons and special schemes for civil servants, and thereby accelerate the Council's approval of the inclusion of students.<sup>38</sup> Furthermore, the compromise was made possible by proposing a separate material scope for students. The proposal held students outside of the regulation's part on social pension, and the material impact of the extended personal scope was thus reduced (Interview, DG Employment and Social Affairs, 12 September 2001). Since students had already been granted the right to medical treatment outside of their home country<sup>39</sup>, the inclusion only meant access to cross-border family benefits. The Council adopted the proposal including students in December 1998 and codified the inclusion in Regulation 307/99 of 8 February 1999.<sup>40</sup> As had been the case with self-employed, students were included on the grounds of both Articles 51 and 235 of the Treaty.

### **2.3: Beyond European Citizenship – Preparing for the Extension to Third Country Nationals**

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

The background behind the Commission's initiative was the fact that even though third country nationals are not entitled to free movement under Community law, they may, due to international law or bilateral agreements, enjoy the right to move between member states (Interview, DG Employment and Social Affairs, 13 September 2001). Due to their exclusion from 1408/71, they risked losing any social security entitlements they had accrued via regular contributions to a member state's social security scheme, if they left that member state for another (Roberts 2000, p. 190).

On these grounds, the Commission opened the discussion in 1993, questioning whether it was still justifiable to exclude third country nationals from the protection offered by 1408 (COM (93) 551). The question was posed by the Belgian chair to member state representatives at an informal Council in Charleroi in November 1993. However, the meeting did not mobilise sufficient support for a general extension of 1408 beyond Community citizens. The meeting nevertheless suggested that a limited extension granting third country nationals a right to intra European health care, as regulated under Article 22 of 1408/71, might be supported (Roberts 2000, p. 192). On this basis, the Commission announced its intention to extend Article 22 to third country nationals as a first step (COM (94) 333). Furthermore, at the Portuguese colloquium in November 1994, the Commission presented its long-term intentions to extend the whole scope of 1408 to non-Community nationals legally residing in the Union. The member states' delegates attending were told that such an extension would not only satisfy a moral obligation, but that it would also introduce a legal and administrative simplification (Roberts *ibid*). Even though granting third country nationals a right to health care benefits would only be an initial and very limited extension of 1408, the proposal was vetoed by the UK when finally presented to the Council in November 1995. As part of the same negotiations, the Council adopted Regulation 3095/95, which extended 1408/71's Article 22 to all member states' nationals insured in a social security scheme.

This initial Council refusal did not however discourage the Commission from proceeding with its long-term intention. In the recommendation that suggested free movement and 1408 brought in line with European citizenship, the Commission also insisted that 1408 on the whole should be extended to third country nationals (COM (97) 102, p. 17). The Commission obliged itself to present a separate proposal in 1997 concerning 1408's extension to non-Community nationals with legal residence in the Union (COM (97) 586, p. 12).

## **2.4: The First Separate Proposal on Third Country Nationals**

Within the normative framework of the European Year Against Racism in 1997, the Commission came up with its announced separate proposal on an extension of 1408 to third country nationals, legally residing and insured in one of the member states.<sup>41</sup> The rather extensive explanatory memorandum of COM (97) 561, amounting to no less than 8 pages, indicates that the proposal might have been controversial on several points.

The proposal was motivated by the general desire to improve the legal status of Community residing third country nationals. The Commission emphasised that this objective was generally accepted and had been formulated in its own recommendations; in resolutions from the European Parliament; and in opinions from the Economic and Social Committee (COM (97) 561, p. 2). Moreover, the Commission reminded the Council that it had recognised;

“the great importance of implementing, in the field of social policy, policies based on the principle of non-discrimination and equal opportunity at Community and Member State level, within the framework of their respective powers, as a contribution to the common fight against racism and xenophobia” (COM (97) 561, p. 3, quoted from Council resolution<sup>42</sup> of 5 October 1995).

The Commission pointed out that third country nationals suffered from a “muddled legal situation”, where rights were by no means uniform and each individual case could be considered through a “multiplicity of protection levels” (COM (97) 561, p. 5). Some might be covered by 1408 as refugees or stateless persons, some as family members, others through an agreement between the Community and a specific third country, and yet others by individual bilateral or multilateral agreements. A remaining group of third country nationals might not benefit from any social security protection at all, if they move within the Community. This complexity was identified as harmful to individuals and the source of administrative difficulties when deciding specific rights. The Commission noted that third country nationals contribute to the social security systems of member states, just as Community nationals do.

The Commission did not find that 1408’s requirement to be “nationals of one of the Member States” precluded an extension of the regulation to third country nationals. It emphasised that the nationality requirement was not an absolute, and indeed was set aside in the cases of family members and survivors, refugees and stateless persons, and persons from the EEA member countries (COM (97) 561, p. 4).

## 2.5: The Scope and Limits of the Treaty – the Reach of Community Competence?

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

“Regulation (EEC) No 1408/71 is not just geared to the free movement of workers *but also constitutes an instrument of social protection*. For the purpose of applying the Regulation, the crucial element is *not* exercise of the right to freedom of movement *but the fact that the person concerned is insured under a social security scheme*. The *purpose* is to maintain social protection for persons moving within the Community for whatever reason. In line with the task devolving on the Community under Article 2 of the EC Treaty, the *aim is to provide a high level of social protection*” (COM (97) 561, p. 8, emphasis added).

To support its interpretation, the Commission pointed out that 1408 also regulated the cases where the person concerned might not have exercised his right to free movement for workers, but where a problem of social security arose due to a cross-border situation.<sup>43</sup> Furthermore, it substantiated its viewpoint with the historical fact that Regulation no. 3 was adopted on the basis of Article 51 ten years before the right to free movement for workers actually came into force in 1968 with Regulation 1612/68 and directive 68/360. Finally, the Commission reminded the Council and the Court that they had already applied the regulation to persons who were not migrant workers according to the meaning of Article 48 of the Treaty, and thus,

“appear to recognize that Article 51 of the EC Treaty allows the Community to co-ordinate national social security schemes for all workers insured under one of those schemes, even if they are not migrant workers within the meaning of Article 48 of the EC Treaty” (COM (97) 561, p. 9).

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

Despite the various arguments listed by the Commission, member states remained dead-locked on the issue, and it was left unresolved for years. One political concern put forward by the UK was that although the proposal emphasised that third country nationals were not granted any right of free movement under Community law<sup>44</sup>, it still remained unclear if non-community nationals would be entitled to the social protection of the regulation without having moved between member states. 1408's Article 3, stating equal treatment, in conjunction with Article 2 of COM (97) 561 could be understood as if the regulation covered non-Community nationals moving from a third country directly into a member state, and who had only been subject to the legislation of one member state (Roberts 2000, p. 194, Langer 2000, p. 42). The UK thus feared that Community law could oblige member states to treat third country nationals equally to their own nationals on the basis of 1408/71, without their having moved across Community borders.

Directly or indirectly, the major disagreement hampering negotiations in the Council was the question of the appropriate Treaty basis and the scope and limits of Community competences. On the one hand, the Commission held that 1408 had become an instrument of social policy even when free movement had not been exercised. It did not find that the use of Articles 42 and 308 as Treaty base required the personal category addressed to also enjoy the right to free movement. On the other hand, a minority of member governments, i.e. the United Kingdom, Denmark and Ireland, maintained that Articles 42 and 308 did not together constitute an appropriate Treaty base (Council document<sup>45</sup> 12831/99, SOC 394). Behind these reservations was a political conviction that since the Treaty conferred free movement on Community citizens only, the task formulated in the Treaty's Article 2 to promote a high level of social protection equally applied only to citizens of the Community. These member governments thus found that the primary law of the Community did not contain any competence to extend the personal scope of 1408/71 beyond Community nationals. Such an extension would fundamentally extend the Community's objectives and thus require a Treaty amendment (Roberts 2000, p. 195).

Until November 2001, the Commission maintained that Article 42 and 308 together constituted the appropriate Treaty base on which to extend 1408 to third country nationals. Both the European Parliament and most member states supported the Commission.<sup>46</sup> In the autumn of 1999, the Finnish presidency intended to get negotiations out of deadlock by presenting various types of compromises in which the extension of the regulation had been restricted in terms of the material scope. None of these compromises, however, were approved. The presidency thus concluded that it was not the substance of the proposal that

caused problems, but rather its legal basis. Only Denmark continued to express its political reservations about extending 1408 to third country nationals, whereas all the other member states were in principle in favour (Council document<sup>47</sup> 13186/99, SOC 414). However, as long as no agreement was reached on the legal basis of the proposal, member states were unwilling to continue the discussions on the actual content of the proposal. The question on the legal basis was a dead-end for COM (97) 561, and no progress was made despite the political commitment declared by the great majority. Meanwhile, the Treaty of Amsterdam paved the way for a compromise between the two positions.

## **2.6: Proposing New Borders of a Personal Scope**

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

By proposing a regulatory scope including non-active persons and third country nationals, the Commission went far beyond the strict wording of the Treaty's Article 42, literally aiming to provide freedom of movement for workers by coordinating their social security rights. According to the Commission, Regulation 1408 had become an instrument of social policy and not merely an instrument of promoting free movement. The Commission did not find that it would be beyond the scope of the Treaty, and thus the competence of the Community, to extend 1408's personal scope to third country nationals legally residing in a member state. This viewpoint widely supported, though being opposed by the minority of the United Kingdom, Ireland and Denmark. Although the Amsterdam Treaty and the Tampere conclusions gave new momentum to ease rigid positions, the disagreement on Community competences and the appropriate Treaty base continued until the case-law of the Court in 2001 came to settle the matter, as shall be demonstrated below.

## **3: Negotiating a Generalised Personal Scope**

While the previous section described the Commission's agenda to pursue a more generalised personal scope, this section analyses the subsequent negotiations on

including non-active persons and third country nationals in the personal scope. The analysis is presented in five stages. First, we examine the reform proposed by the Commission to simplify and modernise 1408, and how that proposal was initially negotiated in the Council. Second, we look at how the Commission attempted to overcome a deadlock by proposing a full-scale reform of Article 42 during the Treaty of Nice negotiations. Third, we discuss how the political question of the inclusion of third country nationals turned into a legal search for the correct Treaty base. Fourth, we describe the case-law solution that emerged out of that legal search. Finally, in the fifth part, we analyse how the Khalil judgement brought about a breakthrough in negotiations, and how the original Commission proposal was split in two whereby negotiations on the rights of European citizens were held separate from those of third country nationals. After a decade of negotiations and political-judicial dispute, legally residing third country nationals have finally been granted a right to intra-European social security in 14 member states, in the exception being Denmark. However, without the right of free movement, the extension is first and foremost of an abstract and symbolic value rather than it is enforceable in practical terms, as will be argued below.

### **3.1: Modernisation and Simplification Proposed and Negotiated**

With no appreciable progress on the separate proposal concerning third country nationals, the Commission presented its long announced proposal to simplify and modernise Regulation 1408 by late December 1998, which had been politically mandated at the Edinburgh Council in 1992.<sup>48</sup> The 6 years between mandate and proposal had been used for detailed discussions in the ‘Administrative Commission’ and seminars held in each individual member state, followed by careful drafting (Interview, German Federal Ministry of Labour and Social Affairs, 19 September 2001). The aim of the proposal was twofold; to *simplify* and *modernise* 1408.

The Edinburgh Council recognised the need to simplify the regulation at the highest political level. The political mandate was followed up by the Commission in its various communications, arguing that, over the years, the instrumental value of the regulation had decreased by its overwhelming complexity. During its almost 30 years of institutional existence, 1408 had undergone more than 30 amendments on the personal and material scope and especially on the details. However, the many amendments mainly compromised modest changes, and no full-scale reforms. The requirement of unanimity had repeatedly hindered major reforms, and the consensus procedure had established a practice where a strong political pressure in favour of an exception to the main rule was met by adding an

annex (Interview, DG Employment and Social Affairs, 12 September 2001). However, the practice of adding exceptions had created a situation where very important aspects of the regulation were found in annexes and not the main text (Interview, Danish Ministry of Social Affairs, 8 November 2002). Within this procedural context, complexity had gradually been fortified by (Pennings 2001, pp. 45-47) 1) the many exceptions from the main rules formulated in the annexes; 2) the case-law interpretations of how to read the regulatory text, distancing the literal text from the correct interpretation; and 3) the lack of memorandum explaining the rationale of the individual provisions, wherefore administrative institutions and the ECJ have had to continuously interpret the actual content of the article. The result was that rights and obligations could not be read directly from the text, but had to be ‘translated’ on the basis of a detailed knowledge of the extensive annexed text and established case-law as well as of national administrative practises. The complexity of 1408 made it unreadable for the migrant wishing to inform herself of her rights, difficult to access for those who wished to advise the migrant, and difficult to administer for the respective national competent institutions. In the Commission’s proposal, simplification had concretely produced a more accessible regulatory text, in which the 99 governing articles had been reduced to 70.

With simplification as one ambitious purpose, the proposal furthermore aimed at modernising 1408. The negotiations on modernisation highlighted several sensitive political issues. First of all, modernisation concerned an amended personal scope. As originally proposed, the regulation was meant to “apply to all persons who are or have been covered by the social security legislation of any of the Member States” (COM (1998) 779, p. 4). This formulation meant that ‘persons’ would be covered irrespective of their economic status *and* of their nationality. Hereby 1408 would come to include non-active persons, students with no separate substantive scope, and third country nationals. By including non-active persons and non-community nationals, the original proposal addressed the two main controversial aspects of the previous Proposals (91) 528 and (97) 561. Secondly, the material scope of 1408 was supposed to be modernised so as to cover pre-retirement benefits, besides the classic branches of social security (COM (1998) 779, *ibid*, Eichenhofer 2000, p. 233). Furthermore, the maximum period for exporting unemployment benefits should be extended from 3 to 6 months.

As originally formulated, the proposal added Article 18 to the Treaty base, besides Articles 42 and 308. The Commission thus suggested that, formally, 1408 should be based on the provision on free movement in the Treaty’s part on citizenship of the Union. In the explanatory memorandum, the former aim of the

regulation - to promote free movement of *workers* - had now been replaced by the aim of giving “real and tangible value” to the free movement of *persons*:

“Community legislation on social security is a *sine qua non* for exercising the right to *free movement of persons*. Only by ensuring that *persons* moving within the Community do not suffer disadvantages in their social security rights will this freedom guaranteed by the Treaty be of real and tangible value” (COM (1998) 779, p. 1, emphasis added).

From the outset, the Council in principle agreed to simplify the regulation (Interview, DG Employment and Social Affairs, 13 September 2001). Although the Commission drafted the proposal, the member states had been closely involved in its creation, mandating simplification at the Edinburgh Council and participating in the preparatory discussions in the ‘Administrative Commission’ as in the national seminars. The extent of reform could therefore hardly be surprising to the national representatives. Nevertheless, discussions in the Council’s ‘working party on social questions’ progressed slowly.

Negotiations, initiated during the German presidency in the first half of 1999 continued during the Finnish, Portuguese and French presidencies, but without noticeable result (Interview, Danish Permanent Representation, 18 December 2002). On simplification, progress was difficult when discussing individual provisions or exemptions, favoured by a specific member state or group of member states. Discussing the details, national representatives added reservations, waiting for a political mandate or further scrutiny of the matter. Since the current regulatory text reflected a subtle balance of compromises between the member states, even modest changes became delicate (Interview, Danish Ministry of Social Affairs, 4 April 2001).

However, the real crux of the matter appeared to be the politically sensitive parts of the proposal (Pennings 2001, 45). The inclusion of third country nationals repeated itself as most controversial, and from the beginning Denmark and the UK held strong reservations (Roberts 2000, Council Document<sup>49</sup> 8807/99, SOC 228). Also the inclusion of non-active persons caused some trouble, and, furthermore, the extension of the material scope delayed negotiations (Interview, DG Employment and Social Affairs, 12 September 2001).

### **3.2: Negotiating the Treaty Base**

In the mean time, the intergovernmental conference on institutional reform, negotiating the Treaty of Nice, held out the prospect that the deadlock situation could be resolved by changing the procedure and content of the Treaty’s Article 42. Pointing to the perspective of enlargement to up to 28 Member States, the

Commission argued that qualified majority voting should be the rule and unanimity the exception.<sup>50</sup> In its first initiative, the Commission noted that over the years the unanimity requirement in Article 42 had often rendered reform of Regulation 1408 impossible.<sup>51</sup> Ongoing negotiations on COM (1998) 779 suffered the same difficulties, since the unanimity requirement seriously hindered progress. The Commission therefore proposed the procedure of Article 42 amended to qualified majority voting. In addition, it argued that it was necessary to broaden the formulation of Article 42, extending its scope beyond workers. The amendment of 1408 to self-employed and students had only been possible with Article 308 as a second legal basis. If a future extension of the personal scope would still have to be approved in conjunction with the Treaty's Article 308, requiring unanimity, it would make no difference to approve qualified majority to Article 42. Article 42 would therefore be rewritten "to cover not only migrant workers but all *persons* who exercise the right to move and reside freely within the Union" (COM (2000) 114, p. 10, emphasis added).

Finally, in line with the European Council conclusions in Tampere, the redrafted article should also make it possible for the Council to extend the co-ordination instruments to third country nationals.<sup>52</sup> The Commission set out explicitly that the Treaty's Article 63, as amended by the Treaty of Amsterdam, could not be used to provide social protection for third country nationals moving within the Union, since the article only concerned their admission and residence (COM (2000) 114, *ibid*).

The Commission's approach was backed by the Portuguese presidency preparing the agenda for the intergovernmental conference. The presidency suggested qualified majority voting applied to Article 42, holding that whereas unanimity should still govern the Treaty's social provisions regarded as "highly sensitive politically", QMV should be envisaged for the social provisions "closely linked to the establishment and operation of the internal market" (CONFER 4708/00, p. 2)<sup>53</sup>. The Portuguese presidency found that qualified majority voting was the appropriate procedure for Article 42 due to its close link to the achievement of the internal market. It furthermore argued that it was institutionally illogical to maintain unanimity side by side with the Parliament's co-decision.

However, as the discussions on the institutional reforms proceeded between Commission, presidency and the other member states, it turned out that the initial Commission proposal was not unanimously supported. The following French presidency tried to formulate a compromise by maintaining qualified majority voting as the procedure, but proposing a less radical change of Article 42's wording. The presidency proposed a compromise whereby the Commission's

extension to all persons, including third country nationals, was to be replaced by a more modest Article 42 covering workers, self-employed, students and pensioners. In other words, the content of the proposed Article 42 embraced all categories of persons currently covered by 1408 as well as those who had been included by the use of Article 308 as legal basis (CONFER 4767/00, CONFER 4776/00)<sup>54</sup>. The proposed formulation of Article 42 would make it possible to reform Regulation 1408 with regards to its current personal scope by qualified majority voting. But any extension beyond that would still require the use of Article 308, and thus unanimity. However, this effort to change the letter and scope of primary law did not gain sufficient support. In the end, the UK announced that it could not accept any change of procedure or content of Article 42. Despite intense work on the institutional reform of the context, content, and procedural illogic of Article 42, the article remained as it stood.

Concurrent with the intergovernmental conference's failed attempts to facilitate any approval of the simplification and modernisation of 1408 on the grounds of Article 42 was the Treaty of Nice's explicit provision that Article 18(2) of the Treaty could not be used as legal base for the adoption of (1998) 779. The current Article 18(3) of the EC Treaty, as amended by the Treaty of Nice, specifies that Community actions needed to attain the objective of the Union citizen's free movement and residence within the territory of the member states do not apply to "provisions on social security or social protection". In light of the Nice intergovernmental conference, the Commission had to omit Article 18 as suggested treaty base.

### **3.3: Searching for a Legal Base – Third Country Nationals Readdressed**

Whereas the Treaty of Nice did not reduce the Treaty limitations to extend the personal scope of 1408/71, the Treaty of Amsterdam had already introduced important changes in the primary law premises for negotiating modernisation and simplification. The Amsterdam Treaty amendments made title IV on "Visas, Asylum, Immigration and other Policies related to the Free Movement of Persons" and its Article 63 a possible Treaty base upon which to extend 1408 to non-Community nationals. Furthermore, the Treaty of Amsterdam had already amended Article 42, still requiring unanimity, but granting the European Parliament co-decision. The future negotiations on modernisation and simplifications thus counted an extra veto-player.

In addition to this, the European Council of Tampere 15-16 October 1999 subjected the status of third country nationals to renewed political attention, and the member states politically committed themselves to work for a treatment more equal to that of Community nationals:

“The legal status of third country nationals should be approximated to that of Member States' nationals. A person, who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens; e.g. the right to reside, receive education, and work as an employee or self-employed person, as well as the principle of non-discrimination vis-à-vis the citizens of the State of residence (Tampere Presidency Conclusions, point 21).”

By the Tampere conclusions, the Commission's proposal to include non-Community nationals in the personal scope of 1408 should have gained sufficient momentum for progress. Despite the fact that the Tampere conclusions mandated the Commission and the Finnish presidency to proceed with the work, the dispute on the legal basis continued to block any progress. Whereas the qualified majority of 12 member states were in favour of adopting the proposal on the basis of Articles 42 and 308, as suggested by the Commission, the UK and Ireland were not, and instead argued that after the Amsterdam Treaty came into force by May 1999, the appropriate legal basis was the new Article 63(4). Denmark announced that it would accept neither Article 42 in conjunction with 308 nor 63(4) as legal bases for extending 1408 beyond community nationals, and repeated its political problem with the extension as such (Council document<sup>55</sup> 12831/99, SOC 394).

Denmark, the UK and Ireland opposed the use of the legal base that had, traditionally, been used for extensions of 1408. Relying on Article 63(4) as a legal base, however, meant that all three member states could stay outside the extension of 1408. Under the Protocol on the position of the UK and Ireland, the two member states must opt in to participate in title IV of the Treaty. Furthermore, the protocol on the Danish position excludes Denmark from participating in title IV. Examining the positions of the three states, it becomes clear that their reservations were motivated differently. Both the UK and Ireland saw article 42 as limited to EU nationals. Despite this reservation, Ireland emphasised, as early as in November 1999, that it was a question of the appropriate legal base and that it would choose to “opt in” on the basis of article 63.4. Also the UK stressed that its problem was purely a legal one, and that, politically, it supported the extension (Council document<sup>56</sup> 12831/99, SOC 394).

From the outset, Denmark refused the traditional legal base as well as the new one, and politically opposed any extension of 1408 to third country nationals

(Council document<sup>57</sup> 12830/99, SOC 393). However, a few months after the coming into force of the Amsterdam Treaty, Article 63(4) was examined and rendered a sufficient legal base by the Council's legal service (Council document<sup>58</sup> 11043/99, SOC 306). On this background, Denmark consented to examine the use of 63(4), and two years later finally accepted it (Council document<sup>59</sup> 13186/99, SOC 414, Council document<sup>60</sup> 13027/01, SOC 391). The Danish position changed as negotiations proceeded. Denmark finally decided to change its foot-dragging and isolated position. However, due to the Danish opt-out, such a change of position was politically free of charge.

Together, the Amsterdam Treaty and the Tampere conclusions offered a legal alternative and a political mandate. Regardless of the momentum this supposedly gave to the negotiations on the inclusion of third country nationals in 1408, the negotiations did not progress in the Council for the next two years. During that time, the Commission initiated improvements on the general status of non-community nationals, for example by proposing a partial free movement for long-term residents, mandated by the Tampere conclusions (COM (2001) 127)<sup>61</sup>.

Among other issues, the question of third country nationals had pushed Proposal (1998) 779 into a deadlock of political and legal reservations. Facing the improbability of a political break-through, the Commission and the Council awaited a legal clarification of the dispute which they assumed would occur with the Khalil case (Interview, DG Employment and Social Affairs, 13 September 2001, Council document<sup>62</sup>, 12296/01, SOC 362).

### **3.4: The Case-Law Solution of a Political Problem**

On October 11<sup>th</sup> 2001, the Court decided in the Joined cases C-95/99 to C-98/99 and C-180/99 *Khalil* and others.<sup>63</sup> The concrete cases concerned whether Community law, as stated in Regulation 1408/71, entitled stateless persons to the German child benefit and child raising allowance. Stateless persons and refugees do not enjoy any right to freedom of movement under Community law, and German law<sup>64</sup> makes foreigners' entitlement to family benefits dependent on their possession of a residence permit. Although not asked directly, the Court laid the preliminary reference out as if to examine whether it was valid to include stateless persons, refugees and their family members in the personal scope of 1408/71 on the Treaty basis of Article 42, although they were not Community nationals. In this examination, the case became relevant to the question of whether Article 42 could be used as the legal base for the extension of 1408 to third country nationals, or whether the article was limited to granting rights to EU nationals, since only they are entitled to free movement under Community law.

The Court found that the inclusion of stateless persons and refugees had to be considered in its historical context. The original inclusion of stateless persons and refugees took place in a historical context of international and European agreements, signed by the six original member states, in which the Geneva Convention<sup>65</sup>, the European interim agreements<sup>66</sup> and the New York Convention<sup>67</sup> formulated the norm to grant equal treatment to these groups of persons. The European convention on social security of 1957<sup>68</sup>, which to a large extent was replicated in Regulation no. 3, was prepared in this context and granted the principle of equal treatment not only to the nationals of the contracting parties but to stateless persons and refugees as well (para 50 & 51). Regulation 1408 later inherited both the personal scope of Regulation no. 3 and its embedded norm. On the basis of these historical considerations, the Court answered to the first question that its examination had not pointed to any factors making 1408's inclusion of stateless persons and refugees invalid (para 58).

The second question put forward by the referring German Court asked the Court whether stateless persons and refugees could rely on the rights granted by 1408 if they had moved to a member state directly from a third country, i.e. if they might rely on the protection of 1408 without having moved within the Community. The Court's answer to the second question was fairly short. The ECJ referred to established case-law under which it had concluded that Article 42 of the Treaty and the equal treatment provision of 1408 did not apply to situations which happen only within the same member state.<sup>69</sup> For the same reason, the Court concluded that stateless persons and refugees could not rely on 1408 if all aspects of their situations referred to one and the same member state (para 72). The Court thereby affirmed that the regulation could only be invoked when a Community cross-border movement had taken place.

### **3.5: Proposal Split in Two**

On the basis of the Khalil judgement, the Council resumed its discussions on the appropriate legal base for including non-Community nationals in 1408. Compared with previous considerations on the legal matter, its quick decision on the matter after Khalil stands out remarkably. At the Employment and Social Policy Council, 3 December 2001, the Council stated that in light of the Khalil judgement, Article 42 did not appear to be the appropriate legal basis for extending 1408 to third country nationals. At the same meeting, the Council instead agreed on the possibility of using Article 63(4) as an alternative legal basis (Council document<sup>70</sup> 15056/01, SOC 530). The case-law decision had thus transformed a 12-15 majority in favour of the traditional legal basis of 1408/71 to

an unanimous rejection of that same basis and an agreement on the new Article 63(4).

Furthermore, at the same meeting the Council adopted a text subdividing Proposal (98) 779 into 12 parameters<sup>71</sup>, each dealing with individual modernisation and simplification topics that had been mandated at the Stockholm European Council in March the same year (Stockholm Presidency Conclusions, Point 33).

In the text on the parameters, the Council stated the basic principles of coordination to be:

“Subject to the limitations and conditions which it lays down, the Treaty guarantees free movement of *European citizens* within the European Union. This freedom can be fully utilised only if *people* who move between countries are certain that they will not lose their social security entitlements. Freedom of movement was initially limited, in the history of the building of Europe, to *workers* and members of their family. Today it extends to the *citizens of the European Union*” (Council document<sup>72</sup> 15045/01, SOC 529, emphasis added).

The second parameter deals with the personal scope. It states that the personal scope should be extended to all European nationals. This means that in the future, coordination will apply ‘to all those who are or have been insured by a social security system in a Member State’. The adopted text points out that:

“The application of coordination to all insured *persons* also meets the need to adapt it [regulation 1408/71] to the development of free movement within the Union, which has changed from a right in favour of *workers only* to a *right and a reality for all European citizens*” (Council document *ibid*, emphasis added).

The parameter generalising the personal scope to all European nationals was provisionally adopted during the Spanish presidency in the first half of 2002 (Interview, Danish Permanent Representation, 18 December 2002). The reformulated modernisation and simplification proposal is finally expected to be adopted at the end of 2003, so that the reformed regulation will be in place before the enlargement of the Union by May 2004 (Interview, Danish Ministry of Social Affairs, 15 May 2003). The perspective of enlargement has constituted an important deadline throughout negotiations.

The text of the conclusion cited above demonstrates the Council’s commitment to generalise the right to intra-European social security. The Council has hereby formally agreed that intra-European social security rights should no longer be limited to market citizens, but should be extended to all citizens of the European Union. From a historical point of view such an extension stands out as a milestone.

At the same time, the parameter text on the personal scope concludes that the negotiations on third country nationals should be carried out independently. Hereby the original Proposal (98) 779 has been split in two.

By its quick actions, the Commission seemed to have left out all doubts about Article 63 as the correct Treaty base for the inclusion of third country nationals. Only 2 months after the decisive Council meeting, the Commission presented its second separate proposal on third country nationals, COM (2002) 59<sup>73</sup>, with the sole purpose of extending 1408 to cover non-community nationals as well. However, the argumentation in the explanatory memorandum had changed. The fact that the Commission viewed social protection as the other objective of 1408 had been omitted, and instead it was stressed that, in light of the Amsterdam Treaty and the recent case-law of Khalil, the question of the Treaty basis had been re-examined with the conclusion that Article 63(4) appeared to be the appropriate one.

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

The threat of vast complexity with 3 member states not coordinating social security rights for third country nationals was, however, reduced, when the UK and Ireland in May 2002 announced their ‘opt in’ on the adoption and application of proposal COM (2002) 59 (Council document<sup>74</sup> 8482/02, SOC 216). The UK, which had opposed the extension of 1408 to third country nationals from the first proposal on, had finally changed its position.<sup>75</sup>

Even though the Khalil judgement apparently silenced all disagreements between member states and the Commission on the legal basis, the European Parliament did not immediately accept this sudden conciliation. In the Parliament’s report on proposal (2002) 59, it noted that it fully supported the original proposal, which had now been “withdrawn by the Commission under pressure from the Council”, and that it:

“is not convinced by the argument the Commission is now using, to the effect that it is compelled by the Khalil and others judgment (case C-95/99) to use a different legal basis” (EP Report A5-0369/2002<sup>76</sup>).

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

“not indulge in legal hair-splitting which might impede the rapid resolution of the matter at issue. Particularly since agreement now seems to have been reached in the Council on this proposal, the proverb “strike while the iron is hot” seems to apply more than ever” (EP Report, *ibid*).

Proposal COM (2002) 59 was finally adopted by the Council on May 15<sup>th</sup> 2003.<sup>77</sup> Having been on the agenda as far back as 1993, legally residing third country nationals were finally included within the personal scope of 1408/71.

### **3.6: Negotiating the Borders of a Personal Scope**

Current negotiations on modernising and simplifying social security coordination render it probable that, by the end of 2003, the personal scope of 1408/71 will be extended to *all* European citizens. Non-active persons and students will finally, and without exception, enjoy the right to intra-European social security. The future adoption marks a historical move from a privilege held only by workers to a right reflecting Union citizenship.

All the same, before generalising 1408's personal scope to Community nationals, the Council adopted its extension to third country nationals. At first sight, the adoption of Regulation 859/2003 seems to be a radical move towards a more egalitarian clarification of 'who has a right to intra-European social security', disregarding a communitarian conception of welfare.

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

First of all, legally residing third country nationals do not enjoy the right to free movement according to Community law. On the contrary, Regulation 859/2003 emphasises that the application of 1408/71 does not give third country nationals “any entitlement to enter, to stay or to reside in a Member State or to have access to its labour market”. Furthermore, the regulation sets out explicitly that 1408/71

is “not applicable in a situation which is confined in all respects within a single Member State”. Only the small number of non-Community nationals who, due to international law or bilateral agreements, move between member states will, therefore, be able to practice their newly granted rights. Thus the right to intra-European social security appears rather meaningless, since third country nationals lack the underlying right of free movement (Peers 2002). That could be changed, however, if the Council decides to adopt the proposal on a partial free movement for long-term residents from third countries<sup>78</sup>.

Secondly, the position of Denmark remains unclear. Denmark has announced its intentions to commit itself to a parallel agreement, according to which the same rights and obligations would apply to third country nationals moving to or from Denmark as in the other 14 member states (Jyllands-Posten 5 June 2002; Interview, Danish Ministry of Social Affairs, 8 November 2002 & 15 May 2003). At present no agreement applies to Denmark, for which reason non-Community nationals are still confronted with varying protection levels. Whether or not the announced political commitment to adopt a parallel agreement will be followed up by political action is still unclear.

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

## ***Concluding Remarks***

The personal scope of ‘who has the right to intra-European social security’ has been under debate and negotiation for more than four decades. With worker ‘*stricto sensu*’ as the point of departure for a generalised personal scope including the non-active European citizen as well as legally residing third country nationals, a specific integration story is depicted in which intra European rights are extended on the basis of flexible concepts and a dynamic perception of the Community’s objectives and competences.

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

From the outset, the judicial activism of the Court amplified the meaning of ‘employed persons’ and interpreted the aim of the legal basis in the most extensive way. When the Council later brought in the self-employed, it merely codified what had already been ruled by the Court, and the member states unanimously agreed that the aim of 1408 went even further than what could be based on the most extensive reading of the Treaty’s Article 51. The Treaty’s Article 235 (now 308) became the additional legal basis to achieve new policy aims. The agenda-setting capacity of the Commission once more assured that the collective perception of aims and means did not stagnate. European citizenship became the next key-concept, substantiating new need for reform and further energizing the process. Proposing the generalisation of the personal scope of 1408 to all European citizens was not a departure from established reasoning, since Community nationals enjoy the underlying right of free movement. That is however not the case with third country nationals. By proposing that non-Community nationals be included in 1408’s personal scope, the Commission attempted to introduce a path-breaking understanding of the regulatory aim, where the decisive factor was no longer to exercise the right of free movement but to be insured under a social security scheme. The full consequences of such a break remain speculative, but were hypothesised by the UK government and vetoed. The intense dispute concerning the appropriate legal basis for including third country nationals can be interpreted as both a Commission defeat and as an example of successful mediation. On the one hand, the Commission and the large majority of member states were finally forced to accept Treaty Article 63 (4) as legal basis. The final choice of legal basis shows that under the unanimity rule, the minority prevails. On the other hand, the Commission managed by compromising its own and 12 member states initial preferences to put an end to a long-lasting controversy and achieve the desired political result. In the end, such an outcome transcends a negotiating process characterised by political and legal

reluctance. The practical effect of the political result depends on the future inter-institutional actions and reactions, and whether new and subtle steps of integration gradually will grant free movement to at least some categories of legally resident non-Community nationals.

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## Footnotes

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<sup>1</sup> Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

<sup>2</sup> The concept of 'market citizen', as it is used here, refers to the one exercising economic activity. Among others, a market citizen is the worker 'stricto sensu', i.e. the one with a contract of employment. The European market citizen is one production factor among three others; goods, services and capital, whose free movement is one of the constituting pillars of the internal market. In the following analysis, 'market citizen' is used as a contrast to 'European citizen'. The former refers to a status where market participation releases rights. As a contrast, the latter has rights without necessarily being an active market participant.

<sup>3</sup> Since the coming into force of the Agreement on the European Economic Area (EEA) on the 1<sup>st</sup> of January 1994, Regulation 1408/71 also applies to the nationals from Norway, Iceland and Liechtenstein. This means that the rights and obligations entailed in the regulation apply to 18 states. This paper will, however, not distinguish between EU and EEA nationals, but simply refer to the rights of EU or European citizens.

<sup>4</sup> Council Regulation no. 3/58 of 25 September 1958.

<sup>5</sup> Regulation 1408/71 is organised around a set of main principles whose stated objective is to promote free movement. There are four main principles;

- *The principle of non-discrimination* on grounds of nationality, which is concretely expressed in Article 3 of the regulation and Article 12 of the Treaty. The principle applies without exception.
- *The principle of exportability*. Acquired rights are exportable within the geographical scope of the regulation. The principle is expressed by Article 42 of the Treaty and mirrored in Article 10 of the regulation.
- *The principle of aggregation*. Social security rights earned in one state are added to rights earned by afterwards working in another state. The principle is formulated in the Treaty's Article 42.
- *The principle of pro-ratisation*. The regulation gives the right to a pro-rata share if the beneficiary has not worked long enough, lived long enough or been insured long enough, in one member state to receive the full social security benefit.

The *material scope* of regulation 1408/71 entails the 8 traditional social security forms as defined by ILO in its convention 102. The regulation applies to all national social security legislation on; (a) sickness and maternity; (b) invalidity benefits; (c) old-age pensions; (d) survivors' benefits; (e) accidents at work and occupational diseases; (f) death grants; (g) unemployment benefits; (h) family benefits.

<sup>6</sup> See among (many) others Alter 1998 & 2001; Burley & Mattli 1993; Garrett, Keleman & Schultz 1998; Moravcsik 1991 & 1993; Pollack 1998 & 2003; Stone Sweet & Brunell 1998; Stone Sweet & Sandholtz 1998; Weiler 1993 & 1994.

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<sup>7</sup> The free movement of workers was adopted in the secondary legislation by Council Regulation (EEC) No. 1612/68 of 15 October 1968 on freedom of movement of workers within the Community (OJ L 257, 19.10.1968, p. 2) and by Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ L 257, 19.10.1968, p. 13).

<sup>8</sup> As amended by Council Regulation (EC) No 307/1999 of 8 February 1999 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 with a view to extending them to cover students.

<sup>9</sup> As laid down by Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality.

<sup>10</sup> The narrower personal scope of regulation 1612/68 would mean, if interpreted literally, that family members of the worker would not be entitled to the ‘social advantages’ of the host state. The Court has, however, interpreted Article 7 (2) in a much broader way, arguing that if family members were not granted social rights that would hinder free movement and thus contradict the objective and spirit of the free movement provision (Pennings 1998, p. 104). The broad interpretation was, among other cases, exemplified in case 157/84, 6 June 1985. *Maria Frascogna v Caisse des depots et consignations*. ECR 1985, page 1739; in case 94/84, 20 June 1985. *Office national de l’emploi v Jozef Deak*. ECR 1985, page 1873; in case C-310/91, 27 May 1993. *Hugo Schmid v Belgian State*, represented by the Minister van Sociale Voorz. ECR 1993, page I-3011.

<sup>11</sup> The exclusion of the unemployed was however questioned by the Antonissen judgement where the Court ruled that the Treaty’s Article 48 (now Art. 39) also protects the one in search of work [Case C-292/89, *The Queen v. Immigration Appeal Tribunal, ex parte Antonissen*, 16 February 1991. ECR 1991, p. I-745].

<sup>12</sup> Article 7 of regulation 1612/68 reads:

“1) A worker who is a national of a member state may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regard remuneration, dismissal, and should he become unemployed, reinstatement or re-employment;

2) He shall enjoy the same social and tax advantages as national workers”.

<sup>13</sup> 14 January 1982, case 65/81, *Francesco Reina and Letizia Reina v. landeskreditbank Baden Württemberg*, ECR, 1982, p. 33.

<sup>14</sup> 16 December 1976, Case 63/76, *Inzirillo v. Caisse d’allocations familiales de l’arrondissement de Lyon*, ECR, 1976, p. 2057; ECJ, 27 May 1993, Case C-310/91, *Schmid v. Belgian State*, ECR, 1993, p. 3011.

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<sup>15</sup> Case 261/83 *Castelli*; case 249/83 *Hoeckx*; case 122/84 *Scrivner*; case 139/85 R.H. *Kempf*.

<sup>16</sup> Case 235/87 *Matteucci*; Case C-308/89 *Leo*; case C-3/90 *Bernini*.

<sup>17</sup> Case C-111/91 Commission of the European Communities v. Grand-Duchy of Luxemburg.

<sup>18</sup> Case C-185/96 Commission of the European Communities v. Hellenic Republic.

<sup>19</sup> **Case-note:** The Court laid down an extensive meaning of Regulation 1612's worker concept in the case of *Levin* [case 53/81, *Levin v. staatssecretaris van Justities* 1982, ECR 1982, p. 1035], where the Court clarified that part-time work is not excluded from the definition. Even when part time work is insufficient to fully support the person, it may classify as 'effective and genuine'. The Court went even further in the case of *Kempf* [case 139/85 R.H. *Kempf v. Staatsecretaris van Justitie*, ECR 1987, p. 1741]. *Kempf* is a part time German music teacher, residing in the Netherlands, who supplemented his earnings from public benefit. The Court found his work 'effective and genuine' even though it was only 12 hours a week, and concluded that the status of worker could not be denied simply because the additional funds were public ones. Also in the case of *Lawrie-Blum* [ECJ, 3 July 1986, Case 66/85, *Deborah Lawrie-Blum v. Land Baden-Württemberg*, ECR 1986, p. 2121], the Court took a broad approach, stating that although a trainee teacher only taught a few hours a week, she was still classified as a worker. The Court ruled that the essential characteristic of an employment relationship is that one person performs an act or service for another person and is paid for it. For an in depth description of the extensive interpretation by the Court of the worker concept see, among others, O'Leary (1999); Jacobs (2000).

<sup>20</sup> The 'Administrative Commission on Social Security for Migrant Workers' is attached to the Commission. The 'Administrative Commission' consists of a government representative from each member state and a representative from the Commission. The Commission provides secretarial service for the Administrative Commission. The tasks of the Administrative Commission are among others to deal with administrative and interpretive questions regarding the regulation, to develop the cooperation between the member states in social security matters and to submit suggestions for amendments to the Commission on the basis of the more practical insight of its members. The Administrative Commission is one important forum of contact between member governments and Commission. Provision 80 & 81 of Regulation 1408/71 describe the composition and tasks of the Administrative Commission.

<sup>21</sup> **Case-note:** Case 75/63 *Mrs Hoekstra (née Unger) v Bestuur der Cont. Bedrijfsvereniging voor Detailhandel en Ambachten*, 19 March 1964. ECR 1964, p. 177. *Mrs Hoekstra* (born *Unger*) was residing in the Netherlands and had been compulsorily insured against sickness as a person with a contract of employment. When she stopped working, she remained voluntarily insured. While visiting her parents in Germany, *Mrs Hoekstra* fell ill, and after her return to the Netherlands, she applied for her medical treatment costs to be reimbursed. She was, however, denied reimbursement with reference to a provision in the Dutch law, according to which the voluntarily insured could not have the costs of medical treatment reimbursed when treated outside the borders of the Netherlands.

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<sup>22</sup> Case 44/65 *Hessische Knappschaft v Maison Singer et Fils*, 9. December 1965. ECR 1965, p. 1191.

<sup>23</sup> **Case-note:** Case 7/75 *Fracas* was one of the early case-law where the Court dealt with the rights of family members [case 7/75, 17 June 1975. Mr and Mrs F. v Belgian State. ECR 1975, page 679]. Mr and Mrs Fracas are Italian nationals, residing in Belgium where Mr Fracas worked since 1947. Their son is handicapped from birth. In 1973, the parents applied for handicap benefit under Belgian law. The application was, however, rejected on the grounds that the son was neither of Belgian nationality nor fulfilled the second criteria under national law; to have resided in Belgium for at least 15 years after having reached the age of 20. In the written observation submitted by the Belgian government, the member state stressed that the benefit was a personal right and not one that could be derived through the status as family member. In the judgement, the Court stated the contrary. The handicapped child had the right to enjoy the same benefits as nationals of the residing member state. The Court also concluded that if the handicapped child could not himself acquire status as worker, the right to equality of treatment continued beyond end of minority.

<sup>24</sup> **Case-note:** The case C-2/89 *Kits van Heijningen* dealt with how much the migrant worker had to work to qualify as 'employed person' [Case C-2/89, 3 May 1990. Bestuur van de Sociale Verzekeringsbank v G.J. Kits van Heijningen. ECR 1990, page 1755]. Kits van Heijningen resided in Belgium, but worked full-time in the Netherlands, where he also taught two hours twice a week. After he retired from his fulltime activity, he kept teaching. He claimed child allowances under Dutch legislation for his two children studying. The competent institution, however, refused the application. The Dutch general law on child allowances administered under two criteria; that the claimant was a resident, or paid income tax for work performed in the Netherlands. The Court concluded that the amount of time spent on a working activity was irrelevant for the inclusion in the personal scope of Regulation 1408/71 as long as the person was insured in a member state's social security scheme for employed persons. Compared with Regulation 1612/68, the personal scope of 1408 was laid down even wider, since the work activity did not have to be 'effective or genuine'.

<sup>25</sup> **Case-note:** In the case of *Cabanis-Issarte*, the Court was asked whether it was justifiable to treat family members as a separate category, to whom the principle of equal treatment did not apply directly [Case C-308/93, 30 April 1996. Bestuur van de Sociale Verzekeringsbank v J.M. Cabanis-Issarte. ECR 1996, page I-2097]. Mrs *Cabanis-Issarte* is the surviving spouse of a migrant worker, both of French nationality. The couple resided in the Netherlands since 1948 while the husband worked there. While residing in the Netherlands, Mrs Cabanis-Issarte was compulsory insured according to the general Dutch old age insurance law. The married couple spent three years in France between 1960 and 1963, where the wife was still affiliated in the Dutch insurance scheme through voluntary contributions paid by her husband. After retirement in 1969, they moved permanently back to France. The case considered whether Mrs Cabanis-Issarte had the same right to reduced contribution when staying outside the Dutch borders as Dutch nationals. According to the national legislation, this was a personal right and did therefore not apply to the wife of the migrant worker. Analysing the wording of 1408/71's Article 3 (1), concerning equal treatment, the Court pointed out that the provision itself does not distinguish between workers, family members or surviving spouses (para 26 of the judgement). In addition, the Court emphasised that it is unquestionable that the family member

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is part of the regulation's personal scope (para 27 of the judgement). The Court concluded that the distinction between personal and derived rights had to be abandoned, apart from unemployment benefits, for which reason family members and survivors after the Cabanis-Issarte judgement can invoke the principle of equal treatment.

<sup>26</sup> Case 17/76 M. L. E. *Brack*, widow of R. J. Brack v Insurance Officer, 29 September 1976, ECR 1976, Page 1429.

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

<sup>28</sup> The Court referred to case 19/68 *De Cicco*, 19 December 1968, ECR 1968, page 473 & case 23/71 *Janssen*, 27 October 1971, ECR 1971, page 864.

<sup>29</sup> OJ C 14/9 of 18 January 1978, proposed to the Council 31 December 1977.

<sup>30</sup> OJ C 246/2 of 17 October 1987, proposed to the Council 28 September 1978.

<sup>31</sup> Council Directive 90/364/EEC of 28 June on the right of residence (OJ L 180, 13.7.1990, p. 26); Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ L 180, 13.7.1990, p. 28) and 90/366/EEC of 28 June 1990 on the right of residence for students. The Court did however not accept Article 235 as treaty basis for students and annulled the directive in 1992. The directive was subsequently amended to 93/96/EEC of 29 October 1993 (OJ L 317, of 18.12.1993, p. 59).

<sup>32</sup> Council Regulation (EEC) No 1390/81 of 12 May 1981 extending to self-employed persons and members of their families Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community.

<sup>33</sup> Article 308 of the Amsterdam Treaty (ex. Art. 235) states: "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures".

<sup>34</sup> **Case-note:** Case 300/84, 23 October 1986. A.J.M. van Roosmalen v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen. ECR 1986, page 3097. *Van Roosmalen* is a priest of Dutch nationality who always worked outside of the geographical borders of the Community. Already at the age of 22 he moved to Belgium to continue his studies. After becoming a priest he was sent to Belgian Congo (Zaire), where he

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remained for 25 years, only interrupted by three years on leave, which he spent with his parents in the Netherlands. During his stay in Zaire he was supported by his parishioners, but was at the same time voluntarily insured in the Netherlands. However, he did not pay income tax to the Dutch state while residing in Zaire. In January 1981, he became work incapable and returned to Europe. He settled temporarily in the Netherlands and received invalidity benefit here. In June 1982, he established himself in Belgium, and since he no longer fulfilled the residence requirement in the Dutch law, the competent institution decided to suspend his benefit. The preliminary reference to the European Court of Justice questioned whether van Roosmalen fell within the personal scope of the regulation and whether the residence requirement in national law was compatible with Community law.

<sup>35</sup> COM (91) 528 final. Presented by the Commission 13 December 1991.

<sup>36</sup> Communication from the Commission. COM (97) 102 final. 12 March 1997.

<sup>37</sup> "Report of the High Level Panel on the free movement of persons chaired by Mrs Simone Veil". Presented to the Commission on 18 March 1997.

<sup>38</sup> Informative note from the Danish Ministry of Labour to the European Committee of the Danish Parliament, 19 October 1998, supplement 47, p. 15.

<sup>39</sup> By Council Regulation (EC) No 3095/95 of 22 December 1995, the right to cross-border medical treatment had been granted to all insured member state citizens, thus including students.

<sup>40</sup> Council Regulation (EC) No 307/1999 of 8 February 1999 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 with a view to extending them to cover students.

<sup>41</sup> COM (97) 561 final. Presented by the Commission 12 November 1997.

<sup>42</sup> Point 3 of the Resolution of the Council and the representatives of the Governments of the Member States of 5 October 1995 on the fight against racism and xenophobia in the fields of employment and Social Policy (OJ C 296, 10.11.1995).

<sup>43</sup> The Commission emphasised that Article 10 of the regulation makes it possible for a person to export benefits to a member state in which he may never have worked, that Article 22 enables persons temporarily staying in another member state to receive health care, and that Article 73 ensures family benefits to family members who reside in another member state.

<sup>44</sup> COM (97) 561, p. 7.

<sup>45</sup> Council document of 12 November 1999.

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<sup>46</sup> See Council document of 1 June 1999, no. 8807/99, SOC 228; Council document of 11 November 1999, no. 12830/99, SOC 393; Council document of 12 November 1999, no. 12831/99, SOC 394; Council document of 22 November 1999, no. 13186/99, SOC 414; Parliament document of 7 September 1999, no. A4-0302/98; Parliament document of 5 November 2002, no. A5-0369/2002.

<sup>47</sup> Council document of 22 November 1999.

<sup>48</sup> COM (1998) 779 final. Proposal for a Council Regulation (EC) on coordination of social security systems of 21 December 1998.

<sup>49</sup> Council document of 1 June 1999.

<sup>50</sup> In COM (2000) 34 final of 26 January 2000. “Adapting the Institutions to make a Success of Enlargement – Commission Opinion in accordance with Article 48 of the Treaty on European Union on the calling of a conference of Representatives of the Governments of the Member States to amend the Treaties”.

<sup>51</sup> COM (2000) 114 final of 14 March 2000. “Communication from the Commission. Supplementary contribution of the Commission to the Intergovernmental Conference on institutional reforms. Qualified majority voting for Single Market aspects in the taxation and social security fields”.

<sup>52</sup> The wording of the Commission’s proposed Article 42 was:

”The Council shall, acting in accordance with the procedure referred to in Article 251, adopt such measures in the field of social security as are necessary to provide freedom of movement for **persons**; to this end it shall notably make arrangements to secure for migrant persons and their dependents:

- (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of several countries;
- (b) payments of benefits to persons resident in the territories of Member States.

[deletion]

**The Council may, acting in accordance with the same procedure, extend wholly or partly the benefit of this system to nationals of a third country, who are legally resident within the territory of a Member State”.**

<sup>53</sup> Presidency note on the extension of qualified majority voting of 22 February 2000.

<sup>54</sup> Presidency note on the extension of qualified majority voting of 29 August 2000, and of 28 September 2000. In the first note, the presidency formulated the personal scope of article 42 to cover “workers, self-employed workers and persons treated as such”. In the second note, “persons treated as such” was spelled out to “students and pensioners”.

<sup>55</sup> Council document of 12 November 1999.

<sup>56</sup> Council document of 12 November 1999.

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<sup>57</sup> Council document of 11 September 1999.

<sup>58</sup> Council document of 17 September 1999.

<sup>59</sup> Council document of 22 November 1999.

<sup>60</sup> Council document of 25 October 2001.

<sup>61</sup> Proposal for a Council Directive concerning the status of third country nationals who are long term residents. COM (2001) final, proposed 13 March 2001.

<sup>62</sup> Council document of 28 September 2001.

<sup>63</sup> **Case-note:** The Joined cases C-95/99 to 98/99 and C-180/99, 11 October 2001. Mervet Khalil (C-95/99), Issa Chaaban (C-96/99), Hassan Osseilli (C-97/99) and Bundesanstalt für Arbeit. Mohamad Nasser (C-98/99) and Landeshauptstadt Stuttgart. Meriem Addou (C-180/99) and Land Nordrhein-Westfalen. All cases concerned third country nationals regarded as stateless persons under German law. Mrs *Khalil* and her husband are Palestinians from Lebanon who have fled the civil war. They have lived continuously in Germany since 1984 and 1986 respectively, but have not been recognised as political refugees. Mr *Chaaban* and his wife are Kurds from Lebanon, who have fled the civil war as well. They arrived in Germany in 1985, where they have lived continuously since, but have not been recognised as political refugees. Mr *Osseilli* has a Lebanese travel document for Palestinian refugees. He and his wife have stayed in Germany since 1986. They have not been granted asylum. Also Mr *Nasser* has a Lebanese travel document for Palestinian refugees. He and his family have stayed in Germany since 1985, but have not been recognised as political refugees. In all four cases, child benefit had been stopped, because only foreigners possessing a residence permit are entitled to child benefit under the new version (entered into force on 1 January 1994) on the Federal Law on Child Benefit. Mrs *Addou* is an Algerian, who since 1988 has been living with her husband and children in Germany, whereto she came from Algeria. The family has not been granted asylum. Mrs *Addou* had been refused child raising allowance, since she does not possess any residence permit which is a requirement under the Federal Law on Child-Raising Allowance.

<sup>64</sup> Bundeskindergeldgesetz (Federal Law on Child Benefit) and Bundeserziehungsgeldgesetz (Federal Law on Child-Raising Allowance).

<sup>65</sup> The Geneva Convention was signed on July 28<sup>th</sup> 1951.

<sup>66</sup> The members of the Council of Europe signed the European interim agreements on 11 December 1953.

<sup>67</sup> The New York Convention was signed on 28 September 1954.

<sup>68</sup> The European convention on social security was signed by the 6 member states of the European Coal and Steel Community by 9<sup>th</sup> December 1957. The convention was, however, never ratified.

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<sup>69</sup> **Case-note:** Among other cases, the Court referred to the *Petit* case [case C-153/91, 22 September 1992. *Camille Petit v Office National des Pensions (ONP)*. ECR 1992, page I-4973]. *Petit* is a Belgian national, who worked in Belgium, first as an employee, then as a civil servant. When refused a pension for employed persons from the Belgium national pension office, he brought action against the decision. His action was formulated in French, but should, according to the procedural rules, had been formulated in Dutch. The preliminary questions addressed whether the principle of equal treatment in Regulation 1408/71 and its Treaty basis were applicable in the domestic situation, and whether Article 84 (4) of 1408/71, obliging member states to accept claims formulated in another member state language, also ruled in the situation where the right to free movement was not exercised. The Court laid down that the principle of equal treatment did not apply to the purely internal situation: “As the Court has consistently held, the provisions of the Treaty on freedom of movement and the regulations implementing those provisions cannot be applied to activities which are confined in all respect within a Single member state” (para 8 of the judgement).

<sup>70</sup> Council document of 6 December 2001.

<sup>71</sup> Of the 12 parameters, the 7 first are general ones, which apply horizontally to the whole regulation and the remaining 5 treat specific topics. The 1<sup>st</sup> parameter concerns the general objective to simplify the regulation, improve its readability and make it more accessible to the citizen. The 2<sup>nd</sup> parameter treats the personal scope of the regulation. The 3<sup>rd</sup> parameter deals with the material scope. Parameter 4 concerns the principle of exportability. Parameter 5 deals with posted workers, and parameter 6 allows for the member states to continue making additional social security agreements between them, based on the principles and spirit of 1408. The last general parameter, the 7<sup>th</sup> one, specifies that facts or events occurring outside the territory of the competent state should have the same legal effect as if occurring within its borders. The 8<sup>th</sup> parameter is the first specific one and concerns the sickness chapter of the regulations, which must be simplified. The Council must also consider whether the regulation needs to be adapted in the light of the more recent case law on the free movement of goods and services. Parameter 9 deals with the regulation’s chapter on social pension, and parameter 10 is on unemployment benefits, which should continue to be exportable in up to 3 months, but under facilitated circumstances. The 11<sup>th</sup> parameter concerns family benefits, and, finally, parameter 12 deals with transitional arrangements to be adopted to guarantee that more favourable acquired rights are maintained if a person moves to another member state’s less favourable arrangement.

<sup>72</sup> Council document of 6 December 2001.

<sup>73</sup> Proposal for a Council Regulation extending the provisions of Regulation (EEC) No. 1408/71 to nationals of third countries who are not already covered by these provisions solely on the ground of their nationality. Proposal of 6 February 2002.

<sup>74</sup> Council document of 2 May 2002.

<sup>75</sup> For a detailed description of the traditional position of the UK, see the work of Roberts (2000).

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<sup>76</sup> Report from EP Committee on Employment and Social Affairs of 5 November 2002. Approved by the Parliament on 21 November 2002.

<sup>77</sup> Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality.

<sup>78</sup> Proposal for a Council Directive concerning the status of third country nationals who are long term residents, COM (2001) 127 final, proposed 13 March 2001.