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WORKING ACROSS THE MEMBER-STATES:

THE FREE MOVEMENT OF WORKERS IN THE EUROPEAN UNION

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ABSTRACT:

The most significant reason for the impending departure of the United Kingdom (e.g., "Brexit") from the European Union was that citizenry's concern over the migration of workers to that country from the 27 other member-states. The free movement of workers is one of the four fundamental freedoms associated with membership in the European Union along with the free movement of services, capital, and good. The free movement of workers, pursuant to Article 45 of the Treaty on the Functioning of the European Union, allows citizens of any member-state to freely move from one member-state to another in pursuit of employment. Other rights within the Treaty also support the ability of European Union citizens to cross national boundaries in search of employment including the free movement of services (Article 56), the right to establishment (Article 56), the right to be free from discrimination based on nationality (Article 20), and the right to free movement and residence within the European Union (Article 21). The most significant purpose of this work is to fully inform the practitioner of the basic rules associated with free movement of workers in the European Union as the aforementioned Articles of the Treaty are interpreted by the European Court of Justice. Secondly, this work will explore the legal flexibility maintained by a member-state wishing to keep migrant workers from entering that member-state. Topics in this article include the public service exception, contract limitations, nationality discrimination, professional qualifications, language fluency

requirements, registration requirements, reciprocity, personnel quotas, insurance, remuneration, collective bargaining agreements, unemployment, social security benefits, taxation, business location requirements, and threats to worker mobility in the European Union in addition to information regarding the social science of labor mobility in the European Union.

I. **INTRODUCTION**.

A. THE CURRENT CONDITION OF FREE MOVEMENT OF WORKERS IN THE EU.

The issue of European Union ("EU") citizens moving from one member-state to another member-state for the purposes of employment was one of the most significant issues contributing to the United Kingdom's decision to leave the 28-member common market (a.k.a., "Brexit").[2] The purpose behind the concept of free movement of workers is to remove barriers that EU member-states may erect to limit the free movement of migrant workers.[3] Although the free movement of workers concept began in the EU as a work permit regime at the founding of the Treaty of Rome, today migrant workers roam throughout the EU filling labor shortages while also increasing their personal fare.[4] It is true that EU member-states have in the past attempted to place hurdles in front of foreign-born persons who wish to enter that member-state for the purposes of employment as the case law below will reveal.[5] Prior to the United Kingdom's

[2] *Europe's Scapegoat: The EU's Cherished Free-Movement Rights Are Less Secure Than They Seem*, ECONOMIST (August 23, 2016), available at: http://www.economist.com/news/europe/21704813-eus-cherished-free-movement-rights-are-less-secure-they-seem-europes-scapegoat (last visited Dec. 12, 2016).
[3] Herbert Brucker and Thomas Eger, *The Law and Economics of the Free Movement of Persons in the European Union, in* RESEARCH HANDBOOK ON THE ECONOMICS OF EUROPEAN UNION LAW, at 146 (Thomas Eger & Hans-Bernd Schafer eds 2012).
[4] *Europe's Scapegoat: The EU's Cherished Free-Movement Rights Are Less Secure Than They Seem, supra* note 2.
[5] Brucker & Eger, *supra* note 3, at 146.

referendum, political leaders from that member-state contended that they would end free movement of migrant workers from other EU member-states and put into place a points-based immigration system.[6] During the run-up period to the plebiscite, increasing immigration rates, especially seen after 2004 (introduction of 10 largely Eastern European member-states) and 2007 (introduction of Romania and Bulgaria), those arguing in favor of leaving the EU believed that such a decision was the only way in which to regain control of its borders.[7] Many of these same persons contended that the influx of migrant workers eroded traditions, values, and the common way of life in the United Kingdom while also burdening public resources and infrastructure.[8] The principle of free movement of workers was designed to complement the other three freedoms including the free movement of goods, services, and capital.[9] Ironically, those living in member-states that are most opposed to the free movement of workers live in the member-states that most benefit from migrant workers.[10] However, there is comment that much of the anti-migrant worker sentiment has come from domestic EU citizens that have not fared well economically over the last decade.[11]

At the time of this work, the European Commission is considering legislation that would

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[6] Jenny Gross & Nicholas Winning, *U.K.'s Michael Gove Lays Out Conservative Leadership Bid With Vow To Bring Immigration Down*, WALL ST. J. (July 1, 2016, 11:02am), available at: http://www.wsj.com/articles/gove-would-end-eu-immigration-as-he-launches-conservative-leadership-bid-1467370734 (last visited Dec. 12, 2016).
[7] Jenny Gross & Jason Douglas, *U.K.'s Immigration Unease Animates 'Brexit' Vote*, WALL ST. J. (June 16, 2016, 1:23AM), available at: http://www.wsj.com/articles/u-k-s-immigration-unease-animates-brexit-vote-1466006349 (last visited Dec. 12, 2016).
[8] *Id.*
[9] *Europe's Scapegoat: The EU's Cherished Free-Movement Rights Are Less Secure Than They Seem*, *supra* note 2.
[10] *Id.*
[11] Greg Ip, *What Really Drives Anti-Immigration Feelings*, WALL ST. J. (June 29, 2016, 7:08PM), available at: https://www.wsj.com/articles/what-really-drives-anti-immigration-feelings-1467223192?mg=id-wsj (last visited Dec. 12, 2016).

require migrant workers from other EU member-states to earn compensation at the same levels as domestic workers if a labor agreement is in place between the member-state and a trade group.[12] After the United Kingdom's policy voted to leave the EU, the remaining member-state governments acknowledged that immigration by migrant workers from other EU member-states was an issue.[13] Unlike imported products moving into a member-state, migrant workers are more likely to alter the social fabric of a member-state.[14] However, such protectionist acts by member-state governments are likely do little for domestic workers and are likely to harm consumers.[15] Those who support this legislation consist of two camps of thought including that migrant workers are being exploited and those that consist of workers within those trade groups – the latter of which consider compensation of migrant workers at levels below traditional domestic wages as "social dumping."[16] Regardless of the success of the legislation, there exists fear that other conservative political parties will push their member-state countries toward an exit from the EU on immigration grounds.[17]

However, despite the resentment espoused by some living in the EU, the EU government

[12] *Going Posted: The EU May Force Labour Exporters to Pay Local Union Wages*, ECONOMIST (July 9, 2016), available at: http://www.economist.com/news/europe/21701806-eu-may-force-labour-exporters-pay-local-union-wages-going-posted (last visited Dec. 12, 2016).
[13] Gabriele Steinhauser, Zeke Turner, & Matthew Dalton, *European Union Leaders Meet Without Britain For First Time After Brexit Vote*, WALL ST. J. (June 29, 2016, 11:19AM), available at: http://www.wsj.com/articles/european-union-leaders-meet-without-britain-to-reaffirm-union-after-brexit-1467193222 (last visited Dec. 12, 2016).
[14] Ip, *supra* note 11.
[15] *Open Argument: The Case For Free Trade Is Overwhelming. But the Losers Need More Help*, THE ECONOMIST (Apr. 2, 2016), available at: http://www.economist.com/news/leaders/21695879-case-free-trade-overwhelming-losers-need-more-help-open-argument (last visited Dec. 21, 2016).
[16] *Going Posted: The EU May Force Labour Exporters to Pay Local Union Wages, supra* note 12.
[17] Gross & Douglas, *supra* note 7.

itself estimates that the free movement of workers has increased the gross domestic product of the EU as an entirety since 2004 when 10 Eastern European countries joined the common market and migrant workers are net contributors to the economies of the member-states in which they seek employment.[18] In fact the chief rationale for the free movement of workers principle was that such a dynamic would increase the productivity of workers.[19] Workers immigrating to new member-states have also diversified the economies of the United Kingdom.[20] At present, there is no empirical support for the idea that the free movement of workers guarantee has led to a mass inflow of unskilled workers into any member-state.[21] Migrant workers who move throughout the EU can repatriate much of their wages by moving to a host member-state for employment and then send much of their earning to family members living in their home state.[22] Therefore, and somewhat alarmingly, the ability of EU citizens to freely move across member-state borders for the pursuit of work may actually be more so harming the member-states by which the migrant workers leave.[23]

However, as the United Kingdom government somewhat acknowledges, the increased control over domestic borders via a departure from the EU also includes loss of access from the single market.[24] A "soft Brexit," whereby the United Kingdom is able to secede from the EU but

[18] *Europe's Scapegoat: The EU's Cherished Free-Movement Rights Are Less Secure Than They Seem*, *supra* note 2.
[19] Brucker & Eger, *supra* note 3, at 165.
[20] Gross & Douglas, *supra* note 7.
[21] Brucker & Eger, *supra* note 3, at 177.
[22] *Europe's Scapegoat: The EU's Cherished Free-Movement Rights Are Less Secure Than They Seem*, *supra* note 2.
[23] *Id*.
[24] Stephen Fidler, Laurence Norman, & Bertrand Benoit, *After 'Brexit' Vote, Europe's Leaders Debate Timing of U.K's Departure*, WALL ST. J. (June 26, 2016, 8:01am), available at: http://www.wsj.com/articles/after-brexit-vote-europes-leaders-debate-timing-of-u-k-s-departure-1466983952 (last visited Dec. 12, 2016).

remain within the common market, is clearly preferred by the incumbent British government and would place in the United Kingdom on similar footing with Iceland, Norway, and Lichtenstein which are members of the European Economic Area ("EEA") but not part of the EU.[25] What continues is a debate across existing EU member-states as to the damage associated with Brexit and the integrity of the common market.[26] There is comment that the decline of the British pound is a sign that the markets fear that Brexit will lead to the end of foreign workers and foreign capital in the United Kingdom.[27] Regardless, it is not likely that the United Kingdom can stay in the single market without adhering to all of the requirement of the common market including the free movement of workers.[28] At the time of this writing the British opposition party is demanding a separate vote in Parliament on Brexit if the Prime Minister cannot guarantee that Brexit would keep the United Kingdom within the common market yet the Prime Minister does not want to allow for the free movement of workers.[29]

B. THE BASICS OF LABOR MOBILITY IN THE EU.

Labor mobility is seen as a must for the proper functioning of the labor markets in

[25] *Mind Your Step*, THE ECONOMIST (Oct. 8, 2016), available at: http://www.economist.com/news/britain/21708264-theresa-may-fires-starting-gun-what-looks-likely-be-hard-brexit-taking-britain-out, (last visited Dec. 21, 2016).
[26] *The Difference Between Europe's "Customs union" And "Single Market*," THE ECONOMIST (Oct. 7, 2016), available at: http://www.economist.com/blogs/economist-explains/2016/10/economist-explains-6 (last visited Dec. 21, 2016).
[27] *Brexit Is Making Britons Poorer And Meaner*, THE ECONOMIST (Oct. 11, 2016), available at: http://www.economist.com/blogs/freeexchange/2016/10/pound-and-fury (last visited Dec. 21, 2016).
[28] *Mind Your Step, supra* note 25.
[29] Alexis Flynn, *U.K. Political Parties Draw New Brexit Battle Lines*, WALL ST. J. (Nov. 6, 2016, 1:39PM) available at: http://www.wsj.com/articles/u-k-political-parties-draw-new-brexit-battle-lines-1478446584 (last visited Dec. 21, 2016); Chip Cummins, *U.K. Businesses Issue Plea For More Say in Brexit Talks*, WALL ST. J. (Oct. 8, 2016, 9:55AM), available at: http://www.wsj.com/articles/u-k-businesses-urge-government-to-retain-access-to-eu-single-market-1475920137j (last visited Dec. 21, 2016).

various countries.[30] The free movement of workers as a guarantee was originally linked to economic activity.[31] Specifically for the EU, the free movement of workers is seen as a precondition for market integration and just as important as the free movement of goods, services, and capital which help constitute the EU's four freedoms.[32] EU citizenship is conferred by each member-state.[33] The single market envisioned by the Treaty of Rome (1957) was supposed to allow for the free movement of citizens across member-state boundaries.[34] The free movement of labor was a significant social policy change in Europe affecting most employment practices.[35] The belief that a common market required the free movement of workers was a central tenant of the EU's birth.[36] Specifically, the free movement of workers is a fundamental freedom guaranteed by EU law which allows EU citizens to live in another member-state for the purpose of employment.[37] Equal to this guarantee, and perhaps more important in some circumstances, is the right to equal treatment when a citizen of one member-state seeks employment in another member-state.[38]

Despite these guarantees, the concept of labor mobility has been viewed as one of the

[30] Stephen Machin, Panu Pelkonen, & Kjell G. Salvanes, *Education and Mobility*, 10 JOURNAL OF THE EUROPEAN ECONOMIC ASSOCIATION 417, at 417 (2012).
[31] Brucker & Eger, *supra* note 3, at 146.
[32] Regine Paul, *Strategic Contextualisation: Free Movement, Labour Migration Policies and the Governance of Foreign Workers in Europe*, 34 POLICY STUDIES 122, at 124 (2013).
[33] JAMES D. DINNAGE & JEAN-LUC LAFFINEUR, THE CONSTITUTIONAL LAW OF THE EUROPEAN UNION 942 (3rd ed. 2012).
[34] ANDREW GLENCROSS, THE POLITICS OF EUROPEAN INTEGRATION 120 (2014).
[35] John R. Dobson, *Labour Mobility and Migration within the EU following the 2004 Central and East European Enlargement*, 31 EMPLOYEE RELATIONS 121, at 121-122 (2009).
[36] *Id*. at 121.
[37] Jimmy Donaghey & Paul Teague, *The Free Movement of Workers and Social Europe: Maintaining the European Ideal*, 37 Industrial Relations Journal 652, at 652 (2006).
[38] *Id*.

four fundamental freedoms that has not been fully realized in the EU.[39] As well, there is some evidence that during the last decade most member-states have put in place several restrictions on workers within their legal parameters at least whereby high-skilled workers are preferred over low-skilled workers.[40] As well, and potentially equally as problematic, despite the harmonization of the free movement of workers in the EU, the member-states have retained much power over non-EU citizen worker migration leading to a patchwork of law governing the mobility of that labor pool.[41] Regardless, the trend in Europe is for greater flexibility in employment and the employment regulations that have been promulgated since the Treaty of Rome's guarantee of free movement of workers has had a significant impact on the European workforce.[42] There now exists an EU government arm, the European Employment Service, which actively supports the free movement of labor.[43]

The concept of free movement of workers across international boundaries is not as easy as it seems. Indeed, the free movement of workers has not kept pace comparatively with the free movement of goods within the EU.[44] In many countries, there are several barriers to labor mobility.[45] Donaghey cites several reasons as to why more cross-border movement of workers

[39] *Id*.
[40] Linda Berg & Andrea Spehar, *Swimming Against the Tide: Why Sweden Supports Increased Labour Mobility Within and From Outside the EU*, 34 POLICY STUDIES 142, at 142 (2013).
[41] Paul, *supra* note 32, at 124.
[42] Philip J. O'Connell & Vanessa Gash, *The Effects of Working Time, Segmentation and Labour Market Mobility on Wages and Pensions in Ireland*, 41 BRITISH JOURNAL OF INDUSTRIAL RELATIONS 71, at 74 (2003).
[43] Dobson, *supra* note 35, at 122.
[44] Susana Iranzo & Giovanni Peri, *Migration and Trade: Theory with an Application to the Eastern-Western European Integration*, 79 JOURNAL OF EUROPEAN ECONOMICS 1, at 1 (2009).
[45] Somik V. Lall, Christopher Timmins, & Shouyue Yu, *Connecting Lagging and Leading Regions: The Role of Labor Mobility*, 2009 BROOKINGS-WHARTON PAPERS ON URBAN AFFAIRS 151, at 152-153 (2009).

does not occur such as language barriers, non-recognition of educational requirements, and the persistence of protectionist domestic employment rules.[46] Additionally, Machin states that a lack of information, a lack of job skills, a lack of basic education, and credit constraints likewise inhibit the mobility of workers.[47] Other barriers such as rules on entitlements such as those for social security, health care, and pensions have been identified by Dobson.[48] Unequal taxation across the EU has also been blamed for limiting the free movement of labor.[49] Iranzo and Peri claim that non-legal restrictions on the free movement of workers in the form of insider preferences has also reduced the number of migrant workers.[50] Eger remarks that the three most significant costs associated with migration include the direct costs associated with moving, the loss of social contacts in a worker's home member-state, and the costs associated with making new contacts in the host member-state.[51] Therefore, merely because EU law provides for the free movement of workers across member-state boundaries does not mean there are not limitations that serve as hurdles migrants must navigate.[52]

Siebert has stated that there are four factors dictating the supply of labor in Europe including the common market process itself, rules affecting the wage formation process, the various legal systems found across the member-states, and non-employment income.[53] Lall contends labor migration is due to both "push" and "pull" forces that include economic

[46] Donaghey & Teague, *supra* note 37, at 652.
[47] Machin et. al, *supra* note 30, at 418.
[48] Dobson, *supra* note 35, at 123.
[49] *Id*. at 123.
[50] Iranzo & Peri, *supra* note 44, at 15.
[51] Brucker & Eger, *supra* note 3, at 146.
[52] Konstantinos Tatsiramos, *Geographic Labor Mobility and Unemployment Insurance in Europe*, 22 J. POPUL. ECON. 267, at 267-268 (2009).
[53] Horst Siebert, *Labor Market Rigidities: At the Root of Unemployment in Europe*, 11 JOURNAL OF ECONOMIC PERSPECTIVES 37, at 39 (1997).

opportunity, decline of the agricultural sector, population changes, and the availability of public services.[54] Eger argues that merely so long as the expected economic gains for a migrant worker exceed the costs associated with migration, he or she will migrate to another member-state.[55] Despite the benefits associated with gaining a younger worker population, many member-states have attempted to erect barriers to the mobility of labor.[56] The potential for workers coming from Eastern Europe that might command lower wages has been a controversial issue in Western Europe.[57] The fear associated with the free movement of workers has been voiced often by those opposing the further expansion of the EU.[58] More specifically, the concerns voiced by Western Europeans include that migrant workers from Central and Eastern Europe will threaten both jobs and high wages associated with those jobs.[59] Eger acknowledges that there are both winners and losers associated with the free movement of workers yet on balance free movement principles provide greater gains by winners in comparison to the losses sustained by losers.[60]

Public opinion has been consistent that labor mobility causes job losses, reduces worker protections, and threatens social conditions.[61] Despite the legal barriers noted above, several political sentiments can inhibit the free movement of workers including the belief that social rights are earned and not a human right, xenophobic ideologies, and fears brought on by economic crises and the higher unemployment rates that accompany those crises.[62] The concern

[54] Lall et. al, *supra* note 45, at 152.
[55] Brucker & Eger, *supra* note 3, at 146.
[56] Doneghey & Teague, *supra* note 37, at 653.
[57] GLENCROSS, supra note 34, at 121.
[58] DINNAGE & LAFFINEUR, *supra* note 33, at 943.
[59] *Id*.
[60] Brucker & Eger, *supra* note 3, at 146.
[61] Donaghey & Teague, *supra* note 36, at 657.
[62] Berg, *supra* note 39, at 157.

over the lowering of social conditions has been dubbed "social dumping" by social scientists which includes the general lowering of the standard of living.[63] The concept of social dumping has been associated with the EU's single market.[64] Social dumping has also been identified as including and resulting in higher cost producers being displaced by low-cost producers, firms currently in high-wage member-states will move to low-wage member-states, and member-state governments will attempt to attract firms that will pay lower wages.[65] However, such concerns over social dumping assumes that migrant workers and domestic nationals actually have the same skill sets and that firms will readily hire less expensive migrant workers.[66] To avoid social dumping, many member-states have adopted social charters which establish minimum levels of living standards.[67] Comparatively, the debate on labor mobility is similar to that of the debate in the United States that followed the adoption of the North American Free Trade Agreement in the 1990s.[68] Regardless, these political and cultural ideologies and fears not only serve as hurdles to the free movement of workers among EU citizens but also as barriers to non-citizen workers.[69]

The introduction of 10 member-states from Central and Eastern Europe was one of the biggest democratic changes in Europe since World War II.[70] Both labor mobility and production mobility were concerns of Western Europeans after the accession of 10 new member-states in 2004.[71] There existed in 2004 a significant amount of public sentiment concerning the possibility

[63] Donaghey & Teague, *supra* note 36, at 656-657.
[64] Siebert, *supra* note 52, at 39-40.
[65] Christopher L. Erickson & Sarosh Kuruvilla, *Labor Costs and the Social Dumping Debate in the European Union*, 48 INDUSTRIAL AND LABOR RELATIONS REVIEW 28, at 29-30 (1994).
[66] Donaghey & Teague, *supra* note 36, at 657.
[67] Erickson & Kuruvilla, *supra* note 65, at 29.
[68] *Id*. at 28.
[69] Paul, *supra* note 32, at 122.
[70] *Id*. at 125.
[71] Boyka M. Stefanova, *The Political Economy of Outsourcing in the European Union and the*

of free movement of workers coming from these new member-states and such sentiment was strong enough to defeat an EU-wide constitutional proposal in 2005.[72] Pursuant to the Accession Treaty of 2004, there was limited access to migrant workers from the new member-states if they wished to work in Western Europe for a period of seven years.[73] Regardless of the ability to do so under the Accession Treaty, the United Kingdom, Sweden, and Ireland did not impose any restrictions on the free movement of workers.[74] Additionally, again although able to do so, Sweden did not impost any restrictions on its benefits and welfare systems.[75] There is some evidence that the anti-migrant worker sentiment exhibited in 2004 and also in 2007 when Bulgaria and Romania entered the EU that some member-states took precautions to make sure that non-EU citizen workers would face considerable restrictions.[76] Regardless of the sentiment and restrictions, there has been a steady increase in the mobility of workers over the last couple of decades.[77] However, there is some research that supports the idea that only "regional labor mobility" exists in the EU.[78]

There are several advantages for member-states that support the concept of free movement of labor. Global worker mobility can allow countries that host migrant workers to improve their quality of life and economic competitiveness.[79] The free movement of labor can

East-European Enlargement, 8 BUSINESS AND POLITICS 1, at 1.
[72] *Id*.
[73] Dobson, *supra* note 35, at 122.
[74] Berg, *supra* note 40, at 149.
[75] *Id*. at 149.
[76] Paul, *supra* note 32, at 123.
[77] *Id*. at 124.
[78] Machin et. al, *supra* note 30, at 417.
[79] Michael Czinkota & Charles Skuba, *Sources of New Growth: Marketers Should Be Aware of Converting Economies, Growth Industries and Demographic Segments*, Marketing Management 19, at 17 (2010).

combat labor shortages, reduce unemployment, and support an otherwise aging population.[80] For example, Sweden, with a large demographic gap is more likely to be open to migrating workers from both within, and external to, the EU.[81] Many economists contend that restrictions on the mobility of labor is a significant economic distortion.[82] In other words, the ability of labor to move freely across political boundaries allows countries to close the gap on mismatches concerning demographics and skill sets.[83] The free movement of labor in the EU has been cited as a means for member-states to absorb regional economic shocks.[84] Relatedly, there is some research that the lack of labor mobility and persistence of unemployment in an economic downturn.[85] A lack of labor mobility has been cited as a cause for wage differences and greater income equality that is not desirable for member-states.[86] A link between labor mobility and asset pricing has also been established whereby stock prices are on average higher in countries that maintain a high level of labor mobility.[87] As well, there is some research finding that the high levels of unemployment insurance found in many member-states actually limits the incentive for workers to be mobile despite the fact that unemployment insurance could actually be used in a way that reduces the risk for workers to migrant.[88]

However, the free movement of labor increases competition among governments with the

[80] Dobson, *supra* note 35, at 122.
[81] Berg, *supra* note 40, at 144.
[82] Iranzo & Peri, *supra* note 44, at 2.
[83] Donaghey & Teague, *supra* note 37, at 664.
[84] Tatsiramos, *supra* note 52, at 267.
[85] Olivier Coibion, Yuriy Gorodnichenko, & Dmitri Koustas, *Amerisclerosis? The Puzzle of Rising U.S. Unemployment Persistence*, 47 BROOKINGS PAPERS ON ECONOMIC ACTIVITY, ECONOMIC STUDIES PROGRAM, THE BROOKINGS INSTITUTION 1, at 17 (2013).
[86] Lall et. al, *supra* note 45, at 152.
[87] Andres Donangelo, *Labor Mobility: Implications for Asset Pricing*, 69 THE JOURNAL OF FINANCE 1321, at 1321-1322 (2014).
[88] Tatsiramos, *supra* note 52, at 268.

end goal of attracting talent and good jobs.[89] The costs associated with losing well-educated workers is viewed as significant for countries subject to a possible brain drain.[90] Labor mobility can make tax collection more difficult for member-states.[91] Increasing labor mobility creates challenges to governments that rely heavily on traditional tax sources including income taxes, VAT taxes, and sales taxes.[92] There is some evidence that labor mobility may reduce an EU member-state's overall tax revenues.[93]

Individual firms can benefit from labor mobility but firms can also find that the free movement of workers serves as a source of risk to their operations.[94] The EU's employment sector has been greatly affected by the increasing presence of transnational firms.[95] There are certain costs a firm sustains associated with the free movement of labor such as the constant need to recruit, hire, and train replacements and such human capital costs can affect the way a firm operates.[96] Much akin to individual firms, member-states also must compete for workers that are considered highly-skilled.[97] Those with higher levels of education have greater opportunities for workplace mobility.[98] Highly-educated immigrants will be in growing demand so long as they exhibit flexibility and possess a global mentality.[99] Even in times whereby member-states enact

[89] William F. Fox & Therese J. McGuire, *Special Issue on Mobility and Taxes*, 63 NATIONAL TAX JOURNAL 839, at 839 (2010).
[90] Iranzo & Peri, *supra* note 44, at 2.
[91] Fox & McGuire, *supra* note 89, at 839.
[92] *Id*.
[93] *Id*.
[94] Donangelo, *supra* note 87, at 1321.
[95] O'Connell & Gash, *supra* note 42, at 74.
[96] Deepak Somaya & Ian O. Williamson, *Rethinking the War for Talent*, 2008 MIT SLOAN MANAGEMENT REVIEW 29, at 29 (2008).
[97] Donaghey & Teague, *supra* note 37, at 654-655.
[98] Machin et. al, *supra* note 30, at 418.
[99] Czinkota & Skuba, *supra* note 79, at 17.

greater hurdles to labor migration, well-educated persons have the greatest level of mobility and have the greatest financial incentive to do so.[100] Workers are also likely to move for employment purposes to another member-state and/or another firm if there are opportunities for increases in compensation.[101] So long as there exist income differences between member-states and these differences are reflected in labor productivity, there motive to migrate for the purposes of employment will exist.[102]

II. ARTICLES OF THE TFEU RELEVANT TO THE FREE MOVEMENT OF WORKERS.

There are several Articles found in Treaty on the Functioning of the European Union ("TFEU") that either directly or indirectly address the free movement of workers. Article 18 (ex 12, 6)[103] of the TFEU prohibits discrimination based on nationality and provides the European Parliament and European Council with the authority to draft supporting legislation to combat practices that discriminate based upon nationality.[104] Article 45 (ex 39, 48) of the TFEU specifically provides for the free movement of workers, and like Article 18, directly prohibits discrimination based on nationality when a worker, also an EU citizen, pursues employment in

[100] Iranzo & Peri, *supra* note 44, at 15.
[101] Kimmarie McGoldrick & John Robst, *The Effect of Worker Mobility on Compensating Wages for Earnings Risk*, 28 APPLIED ECONOMICS 221, at 223.
[102] Bruker & Eger, *supra* note 3, at 146.
[103] The Treaty establishing the European Community was renamed the Treaty on the Functioning of the European Union (TFEU) and renumbered in 2007 under the Lisbon Treaty. Due to this change the numbers of specific articles cited in the article may be different than those cited in the cases discussed in this article prior to 2007. However, the language and intent of the articles are consistent with each other, despite the difference in numbering.
[104] Article 18 (ex 12, 6) of the TFEU states: "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination." TFEU art. 18.

another member-state.[105] Article 45 also provides for a right of residency in a member-state not of the EU citizen's nationality when pursuing employment in that other member-state and as well provides for a right to remain in that other member-state following a period of employment.[106] However, the protections within Article 45 do not apply to workers in the public service.[107] The freedom of establishment is enshrined in Article 49 (ex 43, 52) of the TFEU which secures the right of EU citizens to cross national boundaries within the EU for the purpose of establishing business activities including those involving self-employment.[108] Article 56 (ex 49, 59) of the TFEU creates the free movement of services guarantee which is one of the four fundamental freedoms, along with the free movement of labor, capital, and goods, that constitutes the EU's

[105] Article 45 (ex 39, 48) of the TFEU states: 1. Freedom of movement for workers shall be secured within the Union. 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: (a) to accept offers of employment actually made; (b) to move freely within the territory of Member States for this purpose; (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission. 4. The provisions of this Article shall not apply to employment in the public service. TFEU art. 45. TFEU art. 18, Mar. 25, 1955, Official Journal C 326.
[106] *Id*.
[107] *Id*.
[108] Article 49 (ex 43, 52) of the TFEU states: "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital." TFEU art. 49.

common market.[109] The free movement of services guarantee is very much related to the free movement of workers in that it prohibits member-states from implementing restrictions that inhibit services from being offered to citizens of member-states of the EU holding a different citizenship from that of the services provider.[110]

III. PURPOSE OF THIS WORK.

There are four specific purposes to be achieved by this work. First, this work should acquaint the reader with the basic rules, including TFEU Articles, Regulations, Directives, and case law, and the general philosophy supporting the free movement of workers within the 28 EU member-states. Second, the author wishes to convey the basic requirements for an EU citizen to become a protected worker under Article 45 (ex 39, 48) of the TFEU. Third, this work will determine whether the jurisprudence of the European Court of Justice ("ECJ") is meeting the needs of the EU common market in regard to a flexible and mobile labor market. Lastly, the author wishes to provide an analysis for the case law of the ECJ that does not support a flexible labor market.

IV. DECISIONS BY THE ECJ CONCERNING THE FREE MOVEMENT OF WORKERS.

A. PUBLIC SERVICE EXEMPTION.

The free movement of workers provided by Article 48 (ex 39, 48) exempts workers employed in the public sector from the traditional common market right of free movement of

[109] Article 56 (ex 49, 59) of the TFEU states: "Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union." TFEU art. 56.
[110] *Id.*

workers. In *Laurie-Blum v. Land Baden-Württemberg*, a case involving a secondary school teacher, but with ramifications for all employment, the ECJ ruled that a school teacher who would temporarily be a civil servant while engaged in a teacher training program is not employed in the public service so as to be denied admission into the teaching profession of a host member-state.[111] In the instant case, showing the fascinating possibilities of European life, a British national who was born in Portugal, educated in Austria, and married to a German national, sought entrance into a teacher training program in Germany.[112] She was denied entry into the program because of a German regulation requiring those to be employed in the civil service be of German citizenship and equated the teaching profession to that of a civil service post.[113]

In arriving at this decision, the ECJ was forced to answer two issues including (1) whether a teacher trainee is a "worker" under Article 48 and (2) what standard is being used to determine if a worker is exempt from the TFEU rules on the free movement of workers as an employee in the public service.

The ECJ answered the first question in the affirmative since she performing services for a certain period of time, under the direction of a supervisor, and paid a remuneration.[114] Additionally, citing *Levin* (below) on two points, the ECJ held that it did not matter that the teacher trainee was employed on a part-time basis and that the free movement of workers was one of the fundamental principles of the EU entitled to broad interpretation.[115] Also, the ECJ put

[111] Case C-66/85, Lawrie-Blum v. Land Baden-Württemberg, 3 C.M.L.R. 389, at 416 (1987).
[112] *Id.* at 392.
[113] *Id.*
[114] *Id.* at 414.
[115] *Id.*

to rest the German government's argument that teacher training is not an economic activity holding that what was required is remuneration.[116]

Secondly, the ECJ stated that, in defining public service under Article 48, the Article should be narrowly construed to limit the definition of public service to only what is necessary "for safeguarding the general interests" of the member-states.[117] The ECJ held that teacher training did not meet this narrow interpretation and was fearful of a broad interpretation that would allow public service to be defined separately by each member-state's government.[118]

Seven years later, in *Bleis v. Ministere de l'Education*, the ECJ cited *Lawrie-Blum* and *Allue* in holding that secondary teachers are not employees within the public sector and thus member-states cannot limit admission to these professions based on Article 48 (ex 39, 48).[119] In the case at hand, a German national was refused admission into the French secondary teaching corps based solely on her nationality despite the fact that she had completed her academic training in France.[120]

According to the ECJ, the exception found in Article 48 could only be used to limit participation of nationals of other member-states if the position in question involves a "special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bound of nationality" and exercise powers conferred by public law.[121]

There are two further points that should be addressed in *Bleis*. First, The ECJ cited several decisions, including the aforementioned *Laurie-Blum* (above) and *Allue* (below) cases, in

[116] *Id.* at 415.
[117] *Id.* at 416.
[118] *Id.*
[119] Case C-4/91, Bleis v. Ministere de l'Education 1 C.M.L.R. 793, at 801 (1994).
[120] *Id.* at 795.
[121] *Id.* at 801.

a desire to keep EU law on this point consistent.[122] This is unusual since the ECJ's practice and procedure is rooted in the civil law tradition and the ECJ does not have to follow precedent. The second bizarre element of the *Bleis* case is that the French government was attempting to enforce the provisions of a 1983 law in denying Ms. Bleis a secondary teaching position.[123] This point is interesting in light of the fact that Ms. Bleis was a citizen of Germany which, like France, was one of the original members of the EU.

B. CONTRACT LIMITATIONS.

Although, as stated in *Laurie-Blum*, Article 48 (ex 39, 48) is not to be interpreted as to allow a member-state to deny a secondary education appointment to a citizen of another member-state by contending that such employment is exempted under the Article's public service clause, the question remained as to whether a member-state could exempt employment as a foreign language assistant under Article 48. In *Allue v. University of Venice*, the ECJ held that foreign language assistants working in higher education were not considered workers in the public service and thus their employment could not be prohibited nor limited pursuant to Article 48.[124]

In *Allue*, the ECJ entertained a complaint from Spanish and British nationals who argued that the five-year contractual limitation on their employment as foreign language assistants should be found in violation of Article 48 of the TFEU since other workers in other sectors at the University of Venice were not subject to such limitations.[125] Additionally, the claimants argued

[122] *Id.* at 800.
[123] *Id.* at 795. The relevant provisions of the French Act of 83/634 (July 13, 1983) read: No-one may be appointed to the civil service: … (1) If he does not have French nationality.
[124] Case C-33/88, Allue v. University of Venice, 1 C.M.L.R. 283, at 296 (1991).
[125] *Id.* at 292-293.

that they should be covered within the Italian government's social security system.[126] The Italian government countered that the University of Venice should be able to place limitations on the contracts of foreign language assistants and exempt such workers from the social security system because they are workers in the public service.[127] As well, the Italian government contended that such limitations on contract longevity made managerial sense in that the five-year provisions allowed for sufficient turnover in labor so that the foreign language assistants on staff at any one time would be current in their mother tongue and that the limits were an essential tool to make sure that the University had ample financial resources.[128]

Both of the Italian government's contentions were discounted by the ECJ on account that there were other, less restrictive and TFEU-compliant measures that the University could have utilized to maintain their interests instead of imposing limitations on the longevity of contracts such as merely not renewing the contracts of foreign language assistants that are not needed.[129] Indeed, the ECJ found that otherwise the principle of equal treatment among workers of EU citizenship under Article 48 would not be met.[130] Additionally, the ECJ found the foreign language assistants held positions that did not require any form of allegiance to the host member-state as would be necessary for traditional forms of employment within the public service for purposes of Article 48.[131]

Lastly, the ECJ stated that Regulation 1408/71, which dictates that equal treatment be recognized by each member-state in regard to social security system, be applied to the foreign

[126] *Id.* at 293.
[127] *Id.* at 295.
[128] *Id.*
[129] *Id.*
[130] *Id.* at 296.
[131] *Id.* at 294.

language assistant workforce since they are not employees within the public service.[132] Indeed, the ECJ recognized that foreign language assistants are most likely to be nationals of other member-states and that host member-states must reform their social security systems to acknowledge the problems associated with similar employment groups.[133]

In *Spotti v. Freistaat Bayern*, the ECJ held that a "guarantee of uninterrupted cultural exchanges and the prevention of loss of contact with the native country" is not a sufficient objective grounds for limiting the duration of a contract of a member-state foreign language assistant employed in another member-state.[134] Relying heavily on *Allue*, the ECJ found that since the overwhelming majority of foreign language assistants employed by member-state universities are not likely to be citizens of the host member-state, this group of workers would be at a substantial disadvantage in their efforts to seek employment if there were caps placed on their employment longevity.[135] The ECJ reasoned that the concern on the part of an employer is not well founded as such instructors are not likely to lose the ability to speak the language of instruction and that the employing universities may always evaluate the skill set of their foreign language assistants.[136]

While upholding Ms. Spotti's claim that the five-year restriction on her employment contract by the German government was a violation of the right of workers to move from home member-State to host member-state under Article 45 (ex 39, 48), the ECJ dictated that any such limitations on contract duration must meet objective grounds that cover all groups of employees

[132] *Id.* at 296.
[133] *Id.*
[134] Case C-272/92, Spotti v. Freistaat Bayern, 3 C.M.L.R. 629, at 643-644 (1994).
[135] *Id.* at 643.
[136] *Id.* at 643-644.

in order to be compliant with the TFEU.[137]

C. NATIONALITY

Although Article 45 (ex 39, 48) has often been successfully asserted by claimants as a source of protection against discrimination based on nationality, the ECJ has held however, that universities operating in the EU may create rules concerning faculty appointments that are facially neutral in scope.[138]

In *Petrie*, the ECJ entertained a claim brought by three British nationals who had served as foreign-language assistants for an Italian university and challenged a rule developed by the University of Verona allowing only tenured teaching staff and university researchers to fill supplementary courses and temporary teaching vacancies.[139] The three assistants, who held contracts with the University of infinite duration but were part-time employees, argued that their rights pursuant to Article 48 were violated when the University could not find a candidate within the University yet found an Italian national affiliated with another university to fill the vacancy.[140] The claimants further contended that University practice dictated that foreign language assistants perform the same duties as established researchers and tenured faculty and that nothing in the University's rules limited the foreign language assistants to teaching only pronunciation.[141]

According to the University and the Italian government, the British foreign language assistants were denied access to the appointments in question in order to ensure the "optimum

[137] *Id.*
[138] Case C-90/96, David Petrie and Others v. Universia degli Studi di Verona & Camilla, 1 C.M.L.R. 711, at 736 (1998).
[139] *Id.* at 728.
[140] *Id.*
[141] *Id.* at 732.

use of teachers and researchers in teaching structures" and while staffing the questioned vacancies with this group of employees, the University did not have to create a separate contractual relationship.[142] Additionally, the University asserted that no discrimination based on nationality in violation of Article 48 occurred since the ability to obtain a tenured faculty or established researcher post was based on open "competitions" which were essentially a collection of exams.[143]

Making what would otherwise be a fairly easy case problematic was the fact that Italian law until 1994 did facially discriminate based on nationality in regard to the possibility of sitting for the competitions that would enable a successful candidate to achieve the post of tenured faculty or established researcher.[144] The ECJ seemed to strike a balance and found that the University's rules in question were not discriminatory and thus did not violate Article 48, but did find that the British foreign language assistants could recover damages if they show injury due to the application of the facially discriminatory law as it was applied until 1994, but only from the competent national courts.[145] However, the ECJ did warn that if access to such university posts were limited by nationality in any way, Article 45 would be violated, and thus, any criteria for such posts must be justified on objective grounds.[146]

D. QUALIFICATIONS AND NATIONALITY.

In an early case that explored the free movement of persons and workers throughout the EU and is tied to professional qualifications, the ECJ ruled that the TFEU prohibits member-

[142] *Id.* at 732-733.
[143] *Id.* at 731.
[144] *Id.* at 731.
[145] *Id.* at 731, 736.
[146] *Id.* at 735-736.

states from denying nationals of other member-states access to the practice of law.[147] In *Reyners*, the plaintiff was a Dutch national who lived and was educated in Belgium, but was denied access to the practice of law in Belgium because of a domestic law requiring Belgian citizenship.[148] Although the Belgian regulation did allow for exceptions to the nationality rule, the plaintiff was unsuccessful and filed suit arguing that the Belgian rule violated, among other things, Article 52 (ex 43, 52) of the TFEU.[149]

The right of establishment of citizens is guaranteed by Article 49 and allows citizens of the EU to pursue occupational opportunities with firms or through self-employment. Although no longer crucial, but certainly important before the Treaty of Amsterdam as was the case in 1974, the European Council of Ministers was given power to define and implement directives concerning the freedom of establishment by way of Articles 50 (ex 44, 54) and 53 (ex 47, 57).[150]The Belgian government tried to sustain its regulation that members of the Bar must be

[147] Case C-2/74, Reyners v. The Belgian State, 2 C.M.L.R. 305 (1974).
[148] *Id.* at 306. The Belgian Judicature Act of 1967 read: "No one may hold the title of avocat [lawyer] nor practise that profession unless he is Belgian, holds the diploma of docteur en droit, has taken the oath prescribed by Law and is inscribed on the roll of the Ordre or on the list of probationers. Dispensations from the condition of nationality may be granted in cases determined by the King, on the advice of the General Council of the Ordre des Avocats." Reyners had made several unsuccessful attempts at receiving a dispensation.
[149] *Id.* at 324.

[150] Article 50 (ex 44, 54) of the TFEU states: "1. In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives. 2. The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular: (a) by according, as a general rule, priority treatment to activities where freedom of establishment makes a particularly valuable contribution to the development of production and trade; (b) by ensuring close cooperation between the competent authorities in the Member States in order to ascertain the particular situation within the Union of the various activities concerned; (c) by abolishing those administrative procedures and practices, whether resulting from national legislation or from agreements

Belgian nationals based on Article 51 (ex 45, 55) which allows exceptions to the general freedom of establishment espoused in Article 49 where the activity (really occupation) cannot be separated from the official business of government.[151] Specifically, with several other countries intervening in support, Belgium argued that the practice of law should be separated from the freedom of establishment because of the public service nature of the position and its link to the administration of justice which at times is compulsory.[152]

However, the ECJ could not find that this argument was strong enough to exempt an entire profession from the right of establishment.[153] The ECJ argued that most of what lawyers

previously concluded between Member States, the maintenance of which would form an obstacle to freedom of establishment; (d) by ensuring that workers of one Member State employed in the territory of another Member State may remain in that territory for the purpose of taking up activities therein as self-employed persons, where they satisfy the conditions which they would be required to satisfy if they were entering that State at the time when they intended to take up such activities; (e) by enabling a national of one Member State to acquire and use land and buildings situated in the territory of another Member State, in so far as this does not conflict with the principles laid down in Article 39(2); (f) by effecting the progressive abolition of restrictions on freedom of establishment in every branch of activity under consideration, both as regards the conditions for setting up agencies, branches or subsidiaries in the territory of a Member State and as regards the subsidiaries in the territory of a Member State and as regards the conditions governing the entry of personnel belonging to the main establishment into managerial or supervisory posts in such agencies, branches or subsidiaries; (g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union; (h) by satisfying themselves that the conditions of establishment are not distorted by aids granted by Member States." TFEU art. 50.

[151] Case C-2/74, Reyners v. The Belgian State 2 C.M.L.R. at 327-8 (1974). Article 51 (ex 45, 55) of the TFEU states: "The provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may rule that the provisions of this Chapter shall not apply to certain activities." TFEU art. 51.

[152] *Id.*

[153] *Id.* at 329.

do consists of "consultation and legal assistance" in addition to official representation in court and that the domestic judiciary can itself regulate the bar and discipline its members when justified.[154] Thus, the Belgian interest in maintaining a truly Belgian bar was not enough to trump the equal treatment of nationals which is "one of the fundamental legal provisions of the community."[155]

E. NONMEMBER-STATE NATIONALS.

The free movement of workers picture becomes much more clouded when nonmember-state nationals are trying to assert rights under both the TFEU and Regulation 1612/68. In another case involving foreign language assistants, the ECJ held that spouses of member-state nationals, who are themselves not member-state nationals, cannot assert rights of free movement of workers if their spouse has not asserted that right on his or her own.[156]

In *Uecker and Jacquet*, the ECJ heard consolidated cases involving two foreign language assistants, Ms. Uecker of Norway and Ms. Jacquet of Russia, who taught at German universities and both of whom contended that the German law that limited the duration of their contracts violated their general right to treatment under Article 45 (ex 39, 48) and Regulation 1612/68.[157] Although the foreign language assistants were attempting to assert a derivative right due to the fact that their spouses were both German and currently working in Germany, the ECJ held that since their German spouses had never asserted a right to free movement, the foreign language assistants could not do so as well.[158] Therefore, according to the ECJ, the matter at bar was

[154] *Id.*
[155] *Id.* at 325.
[156] Case C-64&65/96, Land Nordrhein-Westfalen v. Uecker and Jacquet, 3 C.M.L.R. 963, at 977 (1997).
[157] *Id.* at 973-974.
[158] *Id.* at 976.

wholly internal and thus governed solely by German law.[159] Perhaps most interesting about this case is that Ms. Uecker, a Norweigan national, could not assert the right of free movement of workers even though she was a national of a country that was part of the EEA.

In 1991, Poland was one of several countries to sign an agreement with the current member-States of the EU that was designed to foster economic and political relations between the several European countries that would eventually lead to Poland's entry into the EU.[160] Article 37(1) of the Europe Agreement provided for the free movement of workers from Poland to the several member-states and prohibited discrimination based on nationality against the worker, his or her spouse, and the worker's children.[161]

In *Pokrzeptowicz-Meyer*, a Polish national living in Germany and working as a foreign language assistant at the University of Bielefeld, filed a claim against the German government arguing that the decision to limit the duration of her contract violated the provisions of the Europe Agreement.[162] German law at the time of the complaint stated that fixed term contracts would govern the relationship between German universities/research institutes and foreign language assistants, but also that perpetual contracts would govern the relationship between the

[159] *Id.* at 976-977.
[160] Case C-162/00, Land Nordrhein-Westfalen v. Pokrzeptowicz-Meyer, 2 C.M.L.R. 1, at 12 (2002).
[161] *Id.* at 1. The relevant provisions of Article 37(1) of the Europe Agreement read: Subject to the conditions and modalities applicable in each Member State: – the treatment accorded to workers of Polish nationality legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals. – the legally resident spouse and children of a worker legally employed in the territory of a Member State, with the exception of seasonal workers and of workers coming under bilateral agreements within the meaning of Article 41, unless otherwise provided by such agreements, shall have access to the labour market of that Member State, during the period of that worker's authorized stay of employment.
[162] *Id.*

German institutions and other teaching faculty.[163]

The ECJ began its analysis by stating that the Europe Agreement cannot be interpreted in a manner that would allow member-states to engage in any direct or indirect discrimination based on nationality.[164] The ECJ thus held that the Polish national plaintiff could assert the protections of Article 37(1) of the Europe Agreement and found that the application of German law was a form of indirect discrimination since foreign language assistants are likely to come from other countries.[165] Therefore, foreign language assistants who are foreign nationals must be treated equally with their domestic and foreign national counterparts who maintain other teaching duties pursuant to a contract with a German university or research institute.[166] Additionally, and very important to keep in mind in reference to new member-states and applicants for membership to the European Union, the ECJ held that Ms. Pokrzeptowicz-Meyer could assert the protections of the Europe Agreement even though her initial contract with the University of Bielefeld was established before the Europe Agreement was signed.[167]

The ECJ imposed a limitation on Article 45 (ex 39, 48) and Regulation 1612/68 stating that the non-EU national spouse of a migrant worker maintains work permit rights only in the member-state in which his or her spouse is employed.[168] In *Mattern v. Luxembourg*, the spouse of a Luxembourg citizen, who was not an EU citizen, was refused a work permit by the Luxembourg government after it became clear that the spouse was working in, and the couple

[163] *Id.* at 11.
[164] *Id.* at 12.
[165] *Id.*
[166] *Id.*
[167] *Id.* at 34.

[168] Case C-10/05, Cynthia Mattern v. Ministre du Travail et de l'Emploi (Luxembourg), ECR I-3162, at ¶¶ 27, 28 (2006).

was living in, Belgium.[169] The work permit was denied pursuant to Luxembourg law which, although fairly general in its language, gave the government the power to deny a work permit to an alien in manual and non-manual capacities pursuant to concerns relating to the organization and evolution of the labor market.[170]

The ECJ made several pronouncements about the protections found within Article 45 and Regulation 1612/68. First, the ECJ stated that any rights guaranteed to the spouse of a migrant worker are linked to the rights enjoyed by the EU citizen-worker under Article 45.[171] Second, a non-EU citizen spouse of an EU citizen-worker does have rights to the labor market but only where the latter person is seeking the status of a worker.[172] Third, the status of a worker should not be narrowly defined by a member-state and that so long as the work performed is real and genuine, and not marginal and ancillary, the status of the worker should be granted.[173] Fourth, and related to Regulation 1612/68, the spouse and children under age 21 of an EU citizen-worker have the right to engage in activities as employed persons in the member-state in which the EU citizen-worker is also pursuing employment even if that spouse and children are not EU citizens.[174]

After deciding the secondary issue that the EU citizen-worker's employment, that of being enrolled in a training program in Belgium, was sufficient employment pursuant to EU law, the ECJ stated that the spouse of the EU citizen-worker was not protected by Regulation 1612/68 in that the spouse was seeking a work permit in a member-state that was not the same member-

[169] *Id*. at ¶¶ 9-12.
[170] *Id*. at ¶¶ 7-8.
[171] *Id*. at ¶ 16.
[172] *Id*. at ¶ 17.
[173] *Id*. at ¶ 18.
[174] *Id*. at ¶ 15.

state by which the EU citizen-worker was employed.[175] Furthermore, the ECJ acknowledged that the non-EU citizen-spouse did not have the same access rights to the labor market as an EU citizen-spouse would have pursuant to EU law and that the non-EU citizen-spouse would only have access rights to the labor market in Belgium, not Luxembourg.[176]

F. RECIPROCITY AND NATIONALITY.

An older case on the issue of professional qualifications, but one with profound implications for the newly admitted member-states and the applicant states, is *Patrick v. Minister of Cultural Affairs*.[177] In *Patrick*, a British national sought entry into the architecture profession in France but was denied by the French government on account of a dated (1940) French law that only allowed for admission to the profession if there was a reciprocal agreement between the French government and the government of the applicant.[178] Bluntly, the French government's position was that since there was no reciprocal agreement with The United Kingdom concerning the recognition of qualifications for architects, Patrick was not eligible for admission despite the fact that Patrick held a certificate from the Architectural Association of his home member-state.[179]

Patrick brought his claim of discrimination based on nationality under Article 18 (ex 12,

[175] *Id*. at ¶¶ 19-21, 24, 28.
[176] *Id*. at ¶¶ 26-27.
[177] Case C-1/77, Patrick v. Minister of Cultural Affairs, 2 C.M.L.R. 523 (1977).
[178] *Id.* at 524-525. The relevant provisions of the French Act of 31 December 1940 read: "Nationals of foreign countries shall be authorized to practise the profession of architect in France subject to the conditions of reciprocity laid down by diplomatic agreements and to production of a certificate equivalent to the certificate required for French architects...Foreigners not covered by the provisions of an agreement may, exceptionally, receive the said authorization."
[179] *Id.*

6).[180] Interestingly enough, the French government countered by arguing that Articles 49 (ex 43, 52) and 53 (ex 47, 57) concerning the right of establishment were in question, but even these Articles did not apply since the European Council had not promulgated directives to enforce the right of establishment in cases such as the plaintiff's.[181]

The ECJ held that despite the lack of directives that specifically address the qualifications of professions across member-state boundaries, Patrick could not be denied entry into the architecture profession in France pursuant to the right of establishment secured by Articles 49 and 53.[182] In a very direct manner, the ECJ stated that the provisions of the TFEU are alone sufficient to sustain the rights of professionals who hold appropriate qualifications in their home member-states and wish to use them in another member-state.[183]

The ECJ also addressed the problem associated with new membership in the EU. The United Kingdom was a new entrant in 1973 and pursuant to an accession treaty which governed relations between several new member-states and the senior member-states.[184] However, Patrick's application for entry into the architecture profession was made and also denied in 1973 partly because the French government stated that no reciprocity agreement existed between it and The United Kingdom.[185] The ECJ took a strong position and ruled that such reciprocity agreements could not be upheld after January 1, 1973, the date of entry by The United Kingdom as a member-state.[186] Indeed, once a professional has recognized qualifications for a particular

[180] *Id.* at 524-525.
[181] *Id.* at 525.
[182] *Id.* at 530.
[183] *Id.*
[184] *Id.*
[185] *Id.* at 524-525, 530.
[186] *Id.* at 530.

profession in one member-state, the host member-state may not deny admission to that profession within its political boundaries.[187]

G. PERSONNEL QUOTAS.

The ECJ has also ruled that the European Commission itself, in addition to employers, may have standing to assert protection for member-State national workers seeking employment in another member-state under, now repealed Article 211 (ex 155), and Article 258 (ex 226, 169).[188] These articles together allowed the Commission actively participate in furthering the goals of the Community and allow the Commission to refer cases to the ECJ when a member-State is in "default" of its legal obligations under the Treaty of Amsterdam.

Specifically, in *French Merchant Seamen*, the ECJ found a French policy requiring a three to one personnel ratio within the French merchant marine (French nationals to non-French nationals) incompatible with the requirements of Article 45 (ex 39, 48).[189]

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[187] *Id.* at 530-531.

[188] Case C-167/73, Re French Merchant Seamen: E.C. Commission v. France, 2 C.M.L.R. 216, at 226 (1974).
Article 211 (ex 155) of the Treaty of Amsterdam stated: "In order to ensure the proper functioning and development of the common market, the Commission shall: -ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied; -formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary; -have its own power of decision and participate in the shaping of measures taken by the Council and by the European Parliament in the manner provided for in this Treaty; -exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter." Treaty of Amsterdam art. 211, Oct. 02, 1997, OJ C 340; Article 258 (ex 226, 169) of the TFEU states: "If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

[189] Case C-2/74, Reyners v. The Belgian State, 2 C.M.L.R. at 230 (1974). Another interesting part of this case involved the issue as to whether Article 45 applied to transport activities. The

Article 34 (ex 28, 30), in conjunction with Articles 101 (ex 81, 85), 102 (ex 82, 86) and 106 (ex 86, 90), have been used to protect a worker's right to free movement within the EU.[190] In

French Government argued that since the European Council had not acted pursuant to Article 100 (ex 80, 84), French regulations would prevail in the area of water transportation. However, the ECJ rejected this argument citing two other Articles of the TFEU, Articles 90 (ex 70, 74) and 38(2) (ex 32(2), 38(2)), which extend the objectives of the TFEU to transportation and agricultural products, respectively; Article 100 of the TFEU states: "1. The provisions of this Title shall apply to transport by rail, road and inland waterway. 2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport. They shall act after consulting the Economic and Social Committee and the Committee of the Regions." TFEU art. 100; Article 90 of the TFEU states: "The objectives of the Treaties shall, in matters governed by this Title, be pursued within the framework of a common transport policy." TFEU art. 90; Article 38(2) of the TFEU states: "2. Save as otherwise provided in Articles 39 to 44, the rules laid down for the establishment and functioning of the internal market shall apply to agricultural products." TFEU art. 38(2).

[190] Case C-179/90, Merci Convenzionali Porto di Genova SpA v. Siderrurgica Gabriella SpA, 4 C.M.L.R. 422 (1994); Article 101 (ex 81, 85) of the TFEU states: "1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void. 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of: - any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings, - any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question." TFEU art. 101; Article 102 (ex 82, 86) of the TFEU states:" Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect

Porto di Genova, the ECJ ruled that an Italian labor law requiring that dock workers be organized into companies and its workers be registered was a violation of the above articles in conjunction with Article 45 (ex 39, 48) the latter of which the ECJ invoked on its own, since the continuing registration of workers was dependent upon the workers being of Italian nationality.[191]

The Italian law was not very forgiving and included almost the entirety of dock work including loading and unloading of all cargo in the port.[192] However, the very fact that the Italian regulation made distinctions based on nationality separate from its inclusiveness, meant it violated the general prohibition on discrimination based on nationality.[193] Continuing, the ECJ found that the dock workers and more specifically those denied access to this trade, were

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trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts." TFEU art. 102; Article 106 (ex 86, 90) of the TFEU states: "1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109. 2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union. 3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States." TFEU art. 106.

[191] Case C-179/90, Merci Convenzionali Porto di Genova SpA v. Siderrurgica Gabriella SpA, 4 C.M.L.R. 422, at 428, 451 (1994).

[192] *Id.* at 428-430.

[193] *Id.* at 449-450.

workers since they were performing services for a certain period of time in return for remuneration.[194]

Articles 34, 101, and 102, which together bar quantitative restrictions on imports and agreements in restraint of trade, played a role in protecting the dock workers from other member-states and the goods that accompany them when entering a port.[195] The ECJ also rested its decision on Article 102 which bars a member-state from creating a public undertaking that grants exclusive rights contrary to the TFEU.[196] Of significance was the statement by the ECJ that Articles 34, 45, 102, and 106 create rights for individuals which national ECJs must enforce.[197]

H. POSSESSION OF REAL ESTATE.

The Commission also directed a case to the ECJ under Article 258 (ex 226, 169) whereby the ECJ found a Greek law in violation of Articles 45 (ex 39, 48), 49 (ex 43, 52), and 56 (ex 49, 59) that imposed real estate use restrictions on foreign nationals.[198] In the present case, a 1927 Greek law barred the sale and lease of property to non-Greek nationals where the property was situated in the designated border areas of Greece (which by the ECJ's estimate consumed about 55% of Greece).[199] Violations of the law could result in criminal penalties for the parties involved including the government official who allowed the transaction to occur and reversal of the transaction.[200]

The ECJ found that the Greek law violated the freedom of movement of workers, the

[194] *Id.* at 450, citing *Lawrie-Blum*, 3 C.M.L.R. 389 (1987).
[195] *Id.* at 450.
[196] *Id.* at 452.
[197] *Id.*
[198] Case C-305/87, Commission v. Greece, 1 C.M.L.R. 611 at 611, 625 (1991).
[199] *Id.* at 620.
[200] *Id.*

right to establishment, and the free movement of services since the law created a system of discrimination evidenced by the fact that these same real estate restrictions did not apply to Greek nationals and would make movement of those who wish to take up residence in Greece for employment purposes, or wished to provide services in Greece, nearly impossible.[201]An interesting element to this case is that the Greek government did not contest the Commission's argument that the dated law was in violation of the TFEU.[202] The case was filed after several letters of correspondence had been exchanged between the Commission and the Greek government which was in the process of amending the law.[203] Greece had only been admitted to the EU for three years before the initial contact by the Commission and this case shows the difficulty that newly admitted states may have in amending their domestic legislation that may contravene the TFEU.

I. COLLECTIVE BARGAINING AGREEMENTS

Perhaps the best articulation of a profession by the ECJ occurred in *Fernandez de Bobadilla v. Museo Nacional del Prado*.[204] Here, the ECJ considered a claim brought by a Spanish national who was denied the permanent position of "restorer of works of art on paper" because she did not meet the educational requirements established between the Prado museum and its workers through a collective bargaining agreement.[205] According to the collective agreement, the position of restorer was reserved for a person who held a professional qualification awarded by a faculty of fine arts or a school of applied arts, or any equivalent

[201] *Id.* at 623.
[202] *Id.* at 614.
[203] *Id.*
[204] Case C-234/97, Fernandez de Bobadilla v. Museo Nacional del Prado, 3 C.M.L.R. 151 (1999).
[205] *Id.* at 173-174.

qualification awarded by the competent governmental body.[206] However, Ms. Fernandez did hold a Bachelor of Arts degree in History of Art from Boston University located in the United States.[207] Despite the fact that she had worked as a restorer of works of art at other museums, her credentials were denied official recognition and was told that in order to obtain the recognition, she would have to sit for a two-part exam covering twenty-four subjects.[208] Ms. Fernandez filed a complaint alleging that the Spanish rules violated Article 48 (ex 39, 48) guaranteeing the right of free movement of workers.[209]

The ECJ annunciated several important points of law that govern both the recognition of degrees and associated qualifications. First, the ECJ did contend that public governmental bodies, such as the Prado museum, do have the right to make employment conditional upon certain qualifications so long as they do not constitute an unjustified barrier in conflict with Article 45.[210] Secondly, public institutions must comply with Directives 89/48 and 92/51, which together create a general system for the recognition of diplomas awarded upon the completion of professional education, and generally list several occupations by which professional qualifications are necessary.[211]

Problematically in this case, the position of restorer of works of art was not regulated in Spain because it was not on the list of professions included in Directives 89/48 and 92/51.[212] However, according to the ECJ, any regulated profession is covered by EU law regardless of

[206] *Id.* at 173.
[207] *Id.* at 173.
[208] *Id.* at 173-174.
[209] *Id.* at 174.
[210] *Id.*
[211] *Id.* at 174-175.
[212] *Id.*

whether it is specifically addressed by the aforementioned directives or by any other body of rules, regulations, or administrative provisions.[213] Most importantly, if the law in question that regulates a profession is a collective bargaining agreement, then the provisions of the TFEU and the above directives convey protection, since it is the collective bargaining agreement that serves as the terms of entry into a profession.[214]

Despite this general rule, the ECJ in *Fernandez* created somewhat of a legal fork in the road concerning the relationships represented in a collective bargaining agreement. According to the ECJ, if the collective bargaining agreement involves a member-state government, or the rules for bargaining are set by the member-state government, and the agreement lays out restrictions on the profession, the TFEU and relevant directives apply.[215] In contrast, if the collective bargaining agreement is between only a single employer and the employees only of that employer, then the TFEU and EU law do not apply.[216] Also, the determination of whether the policy governing the profession is set at the national level or by the employer is left for the national courts.[217] However, if the national court decides that the law is set by the member-state's national government, a national body cannot require that the applicant's qualifications be approved by that national body and the national court must follow the guidelines set under Directives 89/48 and/or 92/51 for the recognition of diplomas and professional qualifications.[218] Equally as important, even if the position is not regulated by law, the host member-state is obliged to grant recognition if the professional qualifications of the applicant are recognized by

[213] *Id.*
[214] *Id.* at 175-176.
[215] *Id.* at 176.
[216] *Id.*
[217] *Id.*
[218] *Id.*

another member-State.[219]

Private agreements, such as those created by an international sporting association and their participants, also cannot restrict the free movement of workers.[220] In *Walrave and Koch*, the ECJ found Articles 45 (ex 39, 48) and 56 (ex 49, 59) to apply to private agreements in addition to regulations that were the result of public law.[221] Therefore, national courts must void employment contracts that interfere with the free movement of workers and the services they provide.[222]

Labor unions in the EU are often recognized by national law, are compulsory in some occupations, and by law can have a substantial impact on the legislation of a member-state. The ECJ has ruled, however, that such a labor organization cannot preclude foreign nationals of member-states, who must become members of the organization, from voting in elections.[223] The Chambre des Employes Prives (hereafter, "Chambre"), is a statutorily created occupational guild recognized by the Luxembourg government and includes all private sector employees except those employed in the liberal professions.[224] The Chambre has the power to submit legislation, for which the Luxembourg Chamber of Deputies must consider, on any issue falling within its jurisdiction.[225] Chambre membership is compulsory for most of the occupations covered, yet by

[219] *Id.* at 176-177.
[220] Case C-36/74, Walrave and Koch v. Association Union Cycliste Internationale, 1 C.M.L.R. 320, at 332-3 (1975).
[221] *Id.*
[222] *Id.* at 321. In Walrave and Koch, two plaintiffs argued that the rules of the Association Union Cycliste Internationale requiring that stayers and pacemakers in bicycle races be of the same nationality violated the TFEU.
[223] Case C-213/90, Association de Souten aux Travailleurs (ASTI) v. Chamber des Employes Prives, 3 C.M.L.R. 621, at 637 (1993).
[224] *Id.* at 626.
[225] *Id.*

its own regulations foreign nationals cannot vote in leadership elections but must pay membership fees.[226]

The ECJ found that the Chambre's policies violated EU law (i.e. specifically Regulation 1612/68/EEC written pursuant to Article 45 (ex 39, 48)) protecting migrant workers from discrimination based on nationality.[227] The ECJ determined that the right of equal treatment for foreign nationals is guaranteed by Article 45, and that the Chambre was not a "public service" organization within the fourth clause of Article 45 that would otherwise exempt the member-State's duty to afford equal treatment.[228]

J. LOCATION OF BUSINESS.

The right to free movement of workers under Article 45 (ex 39, 48) and the free movement of services requirement of Article 56 (ex 49, 59) prohibit a state from requiring a professional to have one place of business within the EU.[229] In *Ramrath*, the Luxembourg government revoked the right of the plaintiff to practice as an auditor after his firm transferred him to a similar position in Germany.[230] A Luxembourg regulation required that auditors have a place of "professional establishment" in Luxembourg in order to practice freely and thus Ramrath lost his place of establishment on a full-time basis when his firm transferred him to another branch office.[231]

The ECJ held that Article 45's provisions also applied to workers seeking employment in another member-state on a part-time basis and that his protection should be afforded to Ramrath

[226] *Id.*
[227] *Id.* at 635.
[228] *Id.* at 636.
[229] Case C-106/91, Claus Ramrath v. Ministre de la Justice, 2 C.M.L.R. 187, at 204 (1995).
[230] *Id.* at 191-2.
[231] *Id.* at 200.

who wished to be able to perform audits in Luxembourg when his firm needed him to do so.[232] Additionally, the ECJ stated that this right cannot be denied, pursuant to Article 56, even if the worker is employed on a full-time basis elsewhere and national legislation cannot act to create a disadvantage when professionals wish to extend their services to another member-state.[233] According to the ECJ, such restrictions will be validated only if justified by the general interest and applied to all persons equally.[234]

In a case similar to *Reyners* and *Ramrath*, the ECJ held that member-states cannot restrict the practice of law by non-host member-state nationals because the national in question wishes to hold offices in both the home and host member-state.[235] In *Paris Bar*, a German national who was already practicing law in Dusseldorf sought admission to the Paris Bar but was refused when the Bar Council discovered that he wished to live and keep an office in Germany.[236] Although Klopp possessed all of the required professional qualifications (e.g., holding a French law degree and passing the professional qualifying exam), his professional desires would have violated Rule 1 of the Paris Bar which would only have allowed him a primary office and a secondary office within the Bar's jurisdiction.[237]

The ECJ was faced with the question of whether Article 49 (ex 43, 52) securing the right

[232] *Id.* at 204.
[233] *Id.*
[234] *Id.*
[235] Case C-107/83, Order Des Avocats au Barreau de Paris v. Onno Klopp (Paris Bar), 1 C.M.L.R. 99, at 115 (1985).
[236] *Id.* at 99,100-101.
[237] *Id.* at 101. Rule 1 of the Rules of the Paris Bar read: 1. An avocat (lawyer) of the Cour de Paris must actually practise his profession. 2. For this purpose he must be registered on the roll or the in-service training list and have his chambers in Paris or in the departments of Hauts de Seine, Seine-Saint-Denis or Val de Marne. 3. Apart from his main office, he may open a secondary office within the same geographical limits.

to establishment was violated by the French law despite the fact that the French law did not prohibit Klopp from practicing in France but merely prohibited him from maintaining offices in both France and Germany.[238] Relatedly, the ECJ had to determine whether the protections of Article 49 extended to persons like Klopp despite the fact that the European Council had not issued Directives pursuant to Articles 50 (ex 44, 54) and 53 (ex 47, 57); the latter of which allows but does not mandate that the Council promulgate rules that make the movement of professionals easier.[239]

The ECJ quickly determined that Article 49 had direct effect and thus member-states had to recognize the free movement of lawyers, as they attempt to establish themselves in the legal profession in another member-state as qualified credential-holders despite the fact that the Council had not issued related Directives.[240] Continuing, the ECJ held that domestic laws that prohibit lawyers or any worker from having one country of establishment are in violation of Article 49.[241] The ECJ found unpersuasive the French government's argument that French courts and Mr. Klopp's French clients should be able to have ready access to him and the only way to insure this was to require Mr. Klopp to have one office in the Community.[242] Injurious to the French government's case, there was evidence that the Paris Bar did authorize some of its members to hold offices in other countries.[243]

In *Gebhard v. Consiglio Dell'Ordine degli Avvocati*, the ECJ perhaps gave its best articulation of the relationship between professional qualifications, the free movement of

[238] *Id.* at 111.
[239] *Id.* at 113.
[240] *Id.*
[241] *Id.* at 113.
[242] *Id.*
[243] *Id.*

workers, the free movement of services, and the right of establishment.[244] In *Gebhard*, the ECJ heard the merits of an appeal brought by a German national lawyer who was sanctioned for practicing law without proper registration and acknowledgment by the Italian government.[245] The original complaint was registered with the Milan (Italy) Bar Council by other members of that Bar who essentially contended that Mr. Gebhard, who held the requisite law degree and possessed a German law license, was holding himself out as a lawyer improperly for over ten years.[246] Mr. Gebhard's practice in Italy originally consisted of hiring Italian licensed lawyers to assist him with German and Italian speaking clients.[247] However, he later began to use the title "avvocato" (Italian for lawyer) on his professional letterhead and created an office which also labeled him as a lawyer.[248]

Directive 77/249 covers the mobility of lawyers across the several member-states and provides that a lawyer who is licensed in one member-state has the ability to use that same professional title in the host member-state as long as the title is in the host member-state's language and the lawyer identifies the professional organization and/or member-state government that authorizes him or her to practice.[249] The Directive does require that the lawyer who wishes to operate in a host member-state recognize the professional rules of conduct in the host member-state and his or her home member-state.[250] The Italian law, drawn by the Italian government to comply with Directive 77/249, provided that lawyers from other member-states

[244] See Case C- 55/94, Gebhard v. Consiglio Dell'Ordine degli Avvocati, 1 C.M.L.R. 603 (1996).
[245] *Id.* at 622-623.
[246] *Id.* at 623.
[247] *Id.*
[248] *Id.*
[249] *Id.* at 624.
[250] *Id.*

could operate within Italy on a temporary basis for virtually all matters but could not establish a full-time office.[251]

The ECJ began its analysis by stating that there are three possible sources of protection that could cover Mr. Gebhard's situation including the free movement of workers, the free movement of services, and the right of establishment.[252] However, the ECJ remarked that these three provisions are mutually exclusive and that since the facts in the case at bar are linked more closely to the right of establishment and the free movement of services, the free movement of workers should not be at issue.[253] Furthermore, the ECJ stated that the free movement of services is subordinate to the right of establishment since the former assumes that the member-state national is already established in at least two member-states.[254] Regardless, the right of establishment according to the ECJ, should be broadly interpreted and should include virtually any collection of activities, including the establishment of subsidiaries, branches, and agencies, save for the exceptions laid out in Articles 49-55 (ex 43-48, 52-58).[255] In contrast, the ECJ stated that the right to provide services in another member-state assumes that the member-state national only wants to provide services in the host member-state on a temporary basis.[256]

Given the above foundation, the ECJ further articulated the right of establishment to mean that when a host member-state does not require qualifications to engage in an economic activity for its own nationals, that same member-state may not impose additional qualifications

[251] *Id.* at 624-625.
[252] *Id.* at 625.
[253] *Id.*
[254] *Id.*
[255] *Id.*
[256] *Id.*

on other member-state nationals.[257] However, when the host member-state does require a professional qualification for its nationals, such as in the case at bar that Italian nationals who wish to practice law in Italy have a law degree and be registered with the local bar association, a member-state national from elsewhere must generally comply.[258] Regardless, any professional qualifications must not have the effect of hindering or making less attractive the ability of the member-state national to establish himself or herself in the host member-state.[259]

To solidify its point, the ECJ articulated a four-part test to determine whether a member-state's professional qualifications have the impact of hindering or making less attractive establishment in another member-state. According to the ECJ, the domestic law or regulation must be applied in a nondiscriminatory manner, must be justified by the general interest, must be suitable to achieve the desired result, and must not go beyond the desired result.[260] Additionally, to determine whether the domestic law passes or fails the annunciated test, the ECJ reminded the reader that member-states cannot ignore the knowledge and skills obtained by the member-state national in their home member-state.[261]

Directive 98/5 creates a system that allows lawyers to freely move from one member-state to another member-state in order to establish themselves and provide services.[262] According to the ECJ's interpretation in *Lawyers' Establishment*, protection under the TFEU is afforded to cross border establishing lawyers who will be self-employed in the host member-state or who

[257] *Id.* at 626.
[258] *Id.*
[259] *Id.* at 627.
[260] *Id.*
[261] *Id.*
[262] Case C-168/98, Re Directive on Lawyers' Establishment, 3 C.M.L.R. 28, at 810 (2002).

will be salaried workers in the host member-state.[263]

Pursuant to Directive 98/5, lawyers who are qualified to practice in the member-state in which they have gained their requisite qualification have the ability to permanently establish themselves in the host member-state and provide advice in four areas of law including international law, EU law, the home member-state's law, and the host member-state's law.[264] Also, Directive 98/5 allows a lawyer from another member-state to seek admission as a full-fledged lawyer in the host member-state if he or she actively pursues the activity of a lawyer for three years in the host member-state without being asked to fulfill an adaptation period of greater than three years.[265] Directive 98/5 also incorporates the degree recognition process of Directive 89/48 allowing a cross border moving lawyer to have his professional credential (i.e. law diploma) recognized upon completion of three years of professional education and training.[266]

In the case at bar, Luxembourg sought to have Directive 98/5 nullified on grounds that the Directive does not treat migrant and domestic attorneys equally in that migrant attorneys do not necessarily have to have specific training to consult clients on issues concerning the host member-state's law even though the domestically trained and educated lawyer does have to have such knowledge, and such disparate treatment violates Article 49 (ex 43, 52) of the TFEU.[267] Also, the Luxembourg government articulated that Directive 98/5 does not adequately protect domestic consumers and interferes with the proper administration of justice.[268]

The ECJ found the second contention by the Luxembourg government without merit

[263] *Id.*
[264] *Id.*
[265] *Id.* at 811.
[266] *Id.*
[267] *Id.* at 813.
[268] *Id.* at 815.

since any lawyer moving from one member-state to the host member-state is required to both fulfill the obligations set forth in the host member-state's rules of professional conduct and to have indemnity insurance of several types.[269] Additionally, the ECJ held that the requirement of Directive 98/5, forcing newly established lawyers to hold themselves out as home member-state professionals also protects the host member-state consumer.[270] In other words, the cross-border moving lawyer must let consumers in the host member-state know how and from where he is credentialed.[271] Perhaps what is most important about the case at bar is that individual member-states are not able to protect specific professions, including those that require a specific credential for entry.

In a more complex case, the ECJ wrestled with the issue of whether a member-state can maintain a residency requirement for managers of businesses registering with that member-state.[272] In *Clean Car*, the Austrian government maintained a policy whereby appointed managers responsible for the primary business operations of a firm must be a resident of Austria or must be a worker employed by the business and dedicated at least half time to the branch office in Austria.[273] Clean Car was denied a permit for operations in Austria when the Austrian government determined that Clean Car's appointed manager was not a resident of Austria (currently a resident of Germany) and thus could not be dedicated to the business even at least

[269] *Id.* at 816.
[270] *Id.* at 814.
[271] *Id.*
[272] Case C-350/96, Clean Car Autoservice Gesmbh v. Landeshauptmann Von Wein, 2 C.M.L.R. 637 (1998).
[273] *Id.* at 641. Paragraph 39 of the Gewerbeordnung (Austrian Trade Code) 1994.

half-time.[274]

An appeal was brought by both the Clean Car firm and Mr. Robert Hanssen, Clean Car's appointed manager, based on Article 45 (ex 39, 48) and the case was referred to the ECJ. Perhaps the most important question arising from this case was whether employers could assert Article 45 rights when they employ workers who are not nationals of the host member-state to which the ECJ answered in the affirmative.[275] The ECJ admitted that Article 45's provisions do not expressly state that employers may derive a right to free movement of workers on behalf of their employees yet the ECJ inferred such a right by arguing that any other interpretation would allow member-states to enact regulations on employers that would indeed injure the workers they seek to employ.[276]

Next, the ECJ attacked the Austrian regulation as a form of indirect discrimination against foreign nationals seeking employment in another member-state.[277] Austria attempted to support its residency requirement on the grounds that there is a public interest in ensuring that managers are able to effectively manage the business and be served readily with notice of process and fines that might be levied against the business.[278] The ECJ articulated that the residency requirement could only be upheld under Article 45 if it is appropriate and does not go beyond what is necessary to ensure the government's interest.[279] The ECJ held that the residency requirement does not ensure that a manager will effectively manage a business by itself and there

[274] *Id.* It should be noted that the Austrian government denied the permit even though Mr. Hanssen, the appointed manager, was in the process of seeking accommodations in Vienna and eventually did move there.
[275] *Id.* at 655, 657.
[276] *Id.* at 656.
[277] *Id.* at 658.
[278] *Id.* at 657.
[279] *Id.* at 658.

are other, less restrictive measures that the Austrian government could take such as requiring that the registered office of the firm within Austria receive notice of process and fines.[280]

K. LANGUAGE FLUENCY.

As one might imagine, language could be a functional barrier for workers moving from one member-state to the next seeking employment. Additionally, as the EU deepens and widens on the European continent many member-states may feel the need to protect elements of their heritage, including language. The ECJ has ruled that under some circumstances a language-fluency requirement could be valid in the face of EU law.[281] In *Groener*, a Dutch national was denied a permanent teaching post at a secondary school as an art teacher because she failed an Irish language proficiency exam required of all secondary school teachers who do not possess a "An Ceard Teastas Gaeilge" or Irish language certificate.[282]

The facts of *Groener* presented many difficult facts for the ECJ including that not all Irish speak Irish, Irish was not required for her position (her field was art), many other secondary school subjects are taught almost exclusively in English, and although the Irish Constitution provides that Irish is the first official language, English is recognized as a second national language.[283] The ECJ nonetheless upheld the Irish language requirement in the face of Article 45 (ex 39, 48) because of the role that teachers play in the everyday lives of schoolchildren and as long as the goal of the language requirement is not disproportionate to the requirement's goal (i.e., in this instance, to foster the national language and culture).[284] More directly, the ECJ stated

[280] *Id.* at 658-9.
[281] Case C-379/87, Anita Groener v. Minister for Education and City of Dublin Vocational Education Committee, 1 C.M.L.R. 401, at 415 (1990).
[282] *Id.* at 403.
[283] *Id.* at 413-4.
[284] *Id.*

that the TFEU does not prohibit member-states from having policies for the protection and promotion of languages.[285]

However, the ECJ did sneak into *Groener* a requirement that if no qualified applicant applied for the position that required fluency in a specific language, the member-state was obliged under EU law to grant an exemption for the position and not to discriminate in granting the exemptions.[286]

L. CRIMINAL PROCEEDINGS.

In *Ministere Public v. Robert Heinrich Maria Mutsch*, the ECJ held that criminal defendants are entitled to proceedings in their native language if the host member-state's traditional language in proceedings is different, and if the host member-state allows for exemptions from the traditional language for its own nationals.[287] *Mutsch* was another case that exemplifies the exciting possibilities of life in the EU. Mutsch, a Luxembourg national working in a predominantly German-speaking municipality of Belgium, was arrested by police after he was involved in a "clash" with the Belgian Gendarmerie.[288] He sought to have the proceedings against him in which he was found guilty in absentia, set aside because they were not in his native language of German (they were in French) citing a provision in Belgian law allowing Belgian nationals to be tried in either German or French.[289]

The question for the ECJ was whether Mutsch could take advantage of the provision

[285] *Id.*
[286] *Id.* at 415.
[287] Case C-137/84, Ministere Public v. Robert Heinrich Maria Mutsch, 1 C.M.L.R. 648, at 663 (1986).
[288] *Id.* at 650.
[289] *Id.* at 650-1.

under Belgian law even though he was a Luxembourg national.[290] The Belgian prosecutor protested Mutsch's assertion of this right since he was not a Belgian national and Mutsch appealed arguing the refusal of the Belgian prosecutor to extend this right constitutes a violation of Article 293 (ex 220) of the Treaty of Amsterdam, since repealed by the TFEU, which required member-states to afford the same protections to citizens of other member-states as they would domestic nationals including proceedings in courts and tribunals.[291] The ECJ on its own stated that this issue was best resolved by an application of Articles 45 (ex 39, 48) and 46 (ex 40, 49) guaranteeing the free movement of workers and giving the European Council the ability to regulate in this area.[292] In ruling that Mutsch had the right to be tried in a proceeding using his native language, the ECJ reasoned that the ability to use one's own native language in criminal proceedings is crucial for the integration of migrant workers (Mutsch was employed as a roofer).[293]

M. FINANCIAL BURDENS ON THE HOST MEMBER-STATE.

The ECJ held in *Kempf v. Staatssecretaris Van Justitie* that a part-time music teacher

[290] *Id.* at 659.
[291] *Id.* Article 293 (ex 220) of the Treaty of Amsterdam stated: "Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: -the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals; -the abolition of double taxation with the Community; -the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries; -the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards." Treaty of Amsterdam art. 293.
[292] See Case C-137/84, Ministere Public v. Robert Heinrich Maria Mutsch, 1 C.M.L.R. 648 (1986).
[293] *Id.* at 662.

who earns a salary of less than the minimum level of subsistence and is dependent upon public assistance is considered a worker and cannot be denied a residency permit pursuant to the TFEU.[294] Relying on its analysis in *Levin* (below) the ECJ reasoned in *Kempf* that it does not matter that the applicant for the residency permit, in this case a German national who moved to The Netherlands to teach twelve one-hour music lessons a week for a low wage, subsisted on funds from the public treasury because the right to free movement of workers is independent of the income produced.[295]

The Netherlands government argued that the combination of part-time work and public assistance did not constitute "effective and genuine work" and thus is not included in the TFEU provisions.[296] However, contending that the definitions of "worker" and "activity as an employed person" are entitled to broad interpretation, the ECJ stated that it is up to the worker to determine what wage is livable, not an individual member-state.[297]

The ECJ has broadly interpreted the terms "worker" and "activity as an employed person" under the TFEU to favor the worker asserting the right to relocate from one member-state to another. In *Levin v. Secretary of State*, the ECJ ruled consistent with *Kempf* (above) that the protections under Article 45 (ex 39, 48) apply to a worker who seeks just part-time employment even if the revenue generated from that employment is below the host member-state government's subsistence level.[298] The ECJ in *Levin* found that a British national who was following her husband (a non-EU national) to The Netherlands could not be refused a residence

[294] Case C-139/85, R.H. Kempf v. Staatssecretaris Van Justitie, 1 C.M.L.R. 764, at 772 (1987).
[295] *Id.* at 770-1.
[296] Note that the test in *Kempf*, "effective and genuine work" differs from the test in *Levin* (below) of "real and actual work." *Id.* at 771.
[297] *Id.* at 772, 771.
[298] Case C-53/81, Levin v. Secretary of State for Justice, 2 C.M.L.R. 454, at 466-469 (1984).

permit even though she was seeking part-time employment that was below the "minimum for subsistence" as defined by the Dutch government and she admittedly had not worked for over a year while residing there before obtaining the part-time position.[299]

In *Levin*, the ECJ provided several statements as to what the freedom of movement for workers required. First, the ECJ could not tolerate host member-state discretion as to what was required for minimum subsistence in that to allow otherwise member-states could define a "worker" outside of the control of EU institutions.[300] Second, the freedom of movement for workers allows member-states to regulate foreign nationals only as they would regulate their own domestic workers.[301] Third, Article 45 requires member-states to allow foreign nationals to seek the work that they desire, regardless if it is low paid work and "regardless of whether they are permanent workers, seasonal workers, or workers who are employed in the framework of a supply of services."[302] According to the ECJ, without these requirements the free movement of workers would not operate as to achieve the beneficial effects of EU law which is to improve the living conditions of the citizens of member-states.[303]

However, the ECJ did hold that member-states can require that the work sought by the foreign national entering into the host member-state is "real and actual work in paid employment."[304]

The ECJ considered another case in which The Netherlands government denied a

[299] Case C-53/81, Levin v. Secretary of State for Justice, 2 C.M.L.R. 454 (1984).The Dutch government was concerned that she could not support herself and denied her residency permit because it would be contrary to the public interest. *Id.* at 455.
[300] *Id.* at 467.
[301] *Id.* at 466-7.
[302] *Id.* at 468.
[303] *Id.*
[304] *Id.* at 469.

residency permit to a worker the government did not consider employed. In *Steymann v. Staatssecretaris Van Justitie*, the Netherlands argued that the denial of the permit was justified since the plaintiff was serving only as a plumber for a religious community and received in return for his services his material needs and pocket money was given to all in the commune.[305]

Interestingly enough, Articles 45 (ex 39, 48) and 46 (ex 40, 49) did not directly play a role in the ECJ's decision although the ECJ did mention that the plaintiff's work "may be within the ambit" of these Articles.[306] Instead, the ECJ rested its decision on Article 2 of the Treaty of Amsterdam, since repealed, which called for various activities on the part of member-states including working towards a harmonious development of economic activities and high level of social protection.[307] The ECJ did find that the plaintiff's work was genuine and effective even if the direct payment of a salary is absent from the employment relationship.[308]

However, the ECJ did agree with the Netherlands government, that the services performed by the plaintiff for the religious commune were not within the framework of Article 56 (ex 49, 59) requiring the free movement of services or Article 57 (ex 50, 60) defining services under the TFEU.[309]

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[305] Case C-196/87, Steymann v. Staatssecretaris Van Justitie, 1 C.M.L.R. 449, at 455 (1989).
[306] *Id.* at 456.
[307] *Id.* at 455. Article 2 (ex 2) of the Treaty of Amsterdam stated: "The Community shall have as its task, by establish a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States." Treaty of Amsterdam art. 2.
[308] Case C-196/87, Steymann v. Staatssecretaris Van Justitie, 1 C.M.L.R. 449, at 455 (1989).
[309] *Id.* at 455-6.

The Netherlands government did prevail in a case where it argued that a foreign national was not entitled to a residency permit as a worker because he was employed through a government program that employed those rehabilitating themselves from drug addiction.[310] In *Bettray v. Staatssecretaris Van Justitie*, the plaintiff appealed the denial of a residency permit, which had been denied to him three times earlier, based on his status as a worker despite the fact that his employment in the Netherlands was the result of a social program to rehabilitate drug addicts and he was paid from public funds.[311]

The Netherlands government not only argued that the denial of the permit could be justified on these grounds, but also that the very nature of the employment relationship between the plaintiff and the government was not enough to qualify as such under the TFEU and that the productivity of the workers was low.[312] Although the ECJ disagreed that worker status was dependent upon the source of the income and the productivity of the worker, the ECJ found that the nature of the relationship between the plaintiff, Bettray, and the Dutch government was not based on the capability of Bettray as a worker, nor did he have to reestablish his ability employment to continue, and therefore Bettray could not be a worker under Article 45.[313]

N. REGISTRATION REQUIREMENTS.

The ECJ has also ruled that host member-states cannot expel foreign nationals who are nationals of another member-state because the foreign national has not properly registered with the host state.[314] In *The State v. Jean Noel Royer*, a French national who had been accused of

[310] Case C-344/87, Bettray v. Staatssecretaris Van Justitie, 1 C.M.L.R. 459, at 477 (1991).
[311] *Id.* at 474.
[312] *Id.* at 475.
[313] *Id.*
[314] Case C-48/75, The State v. Jean Noel Royer, 2 C.M.L.R. 619, at 638 (1976).

several criminal acts but never convicted while living in France, entered Belgium to live with his wife who was employed in Belgium.[315] However, Royer did not comply with the Belgian registration requirements and was expelled from the country. But after a short stay in Germany, he returned to Belgium, was discovered, and was ordered to leave.[316] Royer's case was referred to the ECJ for a determination of whether this second expulsion order was a violation of the TFEU under Articles 45 (ex 39, 48) and 52 (ex 46, 56).[317]

Article 45 provides for the free movement of workers seeking employment throughout the EU for citizens of member-states subject only to the grounds of "public policy, public security, or public health" and exempts a domestic member-state's civil service. Belgium ordered Royer out of the country because he jeopardized the public order due to his lawless conduct which consisted of not properly registering with the Belgian officials twice and ignoring the first expulsion order upon return.[318]

Although, the bulk of the decision by the ECJ rested on the interpretation of Directives issued by the European Council, the ECJ stated:

[315] *Id.* at 634.
[316] *Id.*
[317] *Id.* Article 52 (ex 46, 56) of the TFEU states: "1. The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health. 2. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the coordination of the abovementioned provisions." TFEU art. 52.
[318] Case C-48/75, The State v. Jean Noel Royer, 2 C.M.L.R. 619, at 635 (1976).

> "It follows from the foregoing that the right of nationals of a member-State to enter the territory of another member-State and reside there for the purposes intended by the Treaty--in particular to look for or pursue an occupation or activities as employed or self-employed persons, or to rejoin their spouse or family--is a right conferred directly by the Treaty, or, as the case may be, by the provisions adopted for its implementation. It must therefore be concluded that this right is acquired independently of the issue of a residence permit by the competent authority of a member-State."[319]

Therefore, the very fact that Royer did not meet the proper registration requirements did not make him subject to an expulsion order which if carried out by Belgium would be a violation of the TFEU, and could not be substantiated by a claim that Royer was jeopardizing the public order.[320] However, the ECJ did state that other, less harsh, sanctions could be levied against those in the same position as Royer.[321]

O. RECOGNITION OF YEARS OF SERVICE.

As any observer of the EU might imagine, teachers and professors may wish to teach in different member-states during the course of their career. According to the ECJ in *Oserreichischer Gewerkschaftsbund v. Austria*, a member-state government must recognize the previous service of teachers and teaching assistants in other member-states when calculating employee benefits including pay raises.[322] Additionally, and certainly important for the newly admitted member-states and current applicants, host member-states must recognize the service of teachers and teaching assistants in other member-states which took place even before the host member-state was admitted into the EU.[323]

The plaintiff was an Austrian teachers' union which lodged a complaint against the

[319] *Id.* at 638-9.
[320] *Id.* at 639.
[321] *Id.*
[322] Case C-195/98, Oserreichischer Gewerkschaftsbund v. Austria, 1 C.M.L.R. 14, at 418 (2002).
[323] *Id.*

Austrian government that pursuant to Austrian law did not necessarily recognize the years of service by a teacher or teaching assistant performed in another member-state.[324] According to Austrian law at the time of the complaint, years of service conducted in another member-state by a teacher or teaching assistant currently working in Austria could only be recognized by competent authorities and would only be recognized in full if the service was "of special importance for the successful deployment" of the contractual employee.[325] If the competent authorities did not find that the years of service outside Austria were of "special importance" then only half of the years of service would be recognized.[326]

Obviously, the diminished recognition of the years of service outside Austria would have profound effects on both retirement and pay raises for teachers and teaching assistants who had completed work assignments in another member-state. The union argued that all years of service completed by teachers and teaching assistants should be recognized in full if it was conducted at a comparable educational institution and took place in a member-state of the EU or the EEA.[327] Also, the union contended that the years of service should be recognized if the teaching activities were conducted at public schools, universities, or any institution of higher education.[328]

The ECJ found that the workers' service must be recognized in full since it was settled case law that teachers are not employed in the public service under Article 45 (ex 39, 48) and cited *Laurie-Blum* (above) and *Bleis* (above) as precedent.[329] However, the ECJ immediately switched gears and stated that this case did not concern Article 45 since the teachers were

[324] *Id.* at 411.
[325] *Id.*
[326] *Id.*
[327] *Id.* at 412.
[328] *Id.* at 413.
[329] *Id.* at 415-416.

already employed by the Austrian government and instead the merits of the case should focus on the disparate treatment of teachers and teaching assistants regarding seniority.[330] Therefore, the EU law most pertinent to the case would be both Article 45 Regulation 1612/68 which guarantee the general right of workers to move freely across member-state boundaries and prohibit discriminatory treatment of migrant workers under domestic law.[331] The ECJ stated that the Austrian law would be scrutinized in light of the two-part test to determine whether a member-state's domestic law violates Regulation 1612/68 which includes an analysis of (1) whether the law is likely to affect migrant workers more than domestic workers and (2) whether there is a risk that migrant workers will be placed in a disadvantageous position.[332]

The ECJ easily found that the Austrian law flunked the Regulation 1612/68 test and that the Austrian government's argument that disparate treatment is justified due to the differences in public service sectors across the member-states was unacceptable.[333] Likewise, the ECJ did not give merit to the Austrian government's argument that its classification of years of service was necessary to reward loyalty.[334]

The jurisprudence of the ECJ stayed consistent in *Kobler v. Republik Osterreich*, whereby it held that member-state governments must consider the work experience of university faculty members completed in another member-state when awarding pay increases that are based on length of service.[335] In *Kobler*, a professor at the University of Innsbruck filed a complaint alleging that a pay increase tied to fifteen years of university teaching service at an Austrian

[330] *Id.* at 416.
[331] *Id.*
[332] *Id.*
[333] *Id.* at 417-418.
[334] *Id.* at 417.
[335] Case C-224/01, Kobler v. Republik Osterreich, 3 C.M.L.R. 28, at 1065 (2003).

university served as a violation of Article 45 (ex 39, 48) securing the right to freedom of movement for workers, and Regulation 1612/68 prohibiting discrimination against migrant workers, when the Austrian government refused to acknowledge his prior service in another member-state.[336] According to Professor Kobler, if the Austrian government were to recognize his prior service he would have been eligible for the length of service increment.[337]

The ECJ found the pay increase scheme to be a violation of both the TFEU and the Regulation for two reasons. First, the scheme operated to the detriment of migrant workers who wish to take university teaching posts in Austria yet are nationals from other member-states thus creating a disincentive to move there.[338] Secondly, the scheme impedes the free movement of workers in that Austrian nationals who wish to leave the country and teach in another member-state will not be able to do so if they want to receive credit for their work experience elsewhere.[339] Furthermore, the ECJ, consistent with *Oserreichischer Gewerkschaftsbund* (above), did not accept the Austrian government's defense that the scheme was necessary to reward university professors for their loyalty and was thus justified under the public interest exception under Article 45.[340] In an interesting fashion, the ECJ noted the competitiveness among universities in Austria and across the several member-states for good professors and that, at least domestically in Austria, since most faculty are employees of the Austrian government the pay scheme does not foster an advantage.[341] Additionally, such pay increment schemes partition the market for professors into two sectors including the sector inside Austria and the sector

[336] *Id.* at 1051.
[337] *Id.*
[338] *Id.* at 1063.
[339] *Id.*
[340] *Id.* at 1064.
[341] *Id.*

outside Austria and thus does not meet the requirements of a common market as mandated by the TFEU.[342]

Relatedly, member-states must consider any relevant experience obtained in another member-state when evaluating a member-state national's work experience for a new position.[343] In *Scholz v. Opera Universitaria*, the plaintiff, an applicant for a canteen staff position at the University of Cagliari, brought a complaint alleging a violation of TFEU Articles 18 (ex 18, 6) and 45 (ex 39, 48) prohibiting discrimination based on nationality and securing the free movement of workers, respectively, and a violation of Regulation 1612/68 prohibiting discrimination against migrant workers based on nationality.[344] Ms. Scholz, an applicant of German origin but at the time of her complaint an Italian national through marriage, contested that the University unfairly ignored her comparable work experience in Germany with the state postal service.[345] Important to her case was the fact that the list of candidates for the positions would be drawn based on work experience to which points would be allocated and the top point gainers would be offered positions.[346]

While finding that the University's recruitment policy was a form of indirect discrimination in violation of Article 45 and Regulation 1612/68, the ECJ as well held that there was no discrimination based on nationality since the University's policy did not treat her nationality differently but instead treated her work experience differently.[347]

The ECJ also made clear that similarly to secondary school teachers, professors, and

[342] *Id.*
[343] Case C-419/92, Scholz v. Opera Universitaria de Cagliari, 1 C.M.L.R. 873, at 885 (1994).
[344] *Id.* at 875-76.
[345] *Id.*
[346] *Id.*
[347] *Id.* at 880-882.

foreign language assistants, a physician working for the government of a member-state is also not an employee working in the "public service" pursuant to Article 45.[348] Additionally, the ECJ ruled in *Kalliope Schoning v. Freie*, that member-states must grant seniority for similar work performed by a foreign national in another member-state under Article 45 (ex 39, 48).[349] In the case at bar, a Greek national physician was denied promotion to a higher salary group when the German government did not recognize her years of service to the Greek government in a similar capacity.[350]

The German government tried to substantiate its seniority system arguing that it was needed to promote loyalty in the government health service and that it would be too difficult to create a system that scrutinized similar employment across the member-states.[351] The ECJ however reasoned that such a policy serves as a detriment to migrant workers that have spent some of their careers in other member-states.[352]

In a related case, *Sudmilch AG v. Ugliola,* the ECJ has ruled that Article 45 (ex 39, 48) also protects a foreign national who leaves the member-state in which he works in order to fulfill an obligation of compulsory military duty in his home member-state.[353] Thus, upon return to his civilian job, a foreign national worker cannot be prejudiced by, and must receive seniority credit during his absence for, compulsory military service in another member-state.[354]

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[348] Case C-15/96, Kalliope Schoning-Kougebetopoulou v. Freie und Hansestadt Hamburg, 1 C.M.L.R. 931, at 947 (1998).
[349] *Id.* at 948.
[350] *Id.* at 934-935.
[351] *Id.* at 946-7.
[352] *Id.* at 947.
[353] Case C-15/69, Wurttembergische Milchverwertung-Sudmilch AG v. Ugliola, C.M.L.R. 194, at 201(1970).
[354] *Id.*

P. DOMESTIC APPLICATION.

According to the ECJ in *Moser v. Land Baden-Wurttemberg*, the protections of Article 45 (ex 39, 48) securing the right to free movement for workers only applies to cases whereby a national of one member-state is attempting to work in another member-state.[355] In *Moser*, a German national sought admission to a postgraduate training program in Germany for secondary teachers required of any person wishing to hold such a position.[356] Upon admission to the program, the applicant would immediately become a probationary official within the public service and thus subject to the local government's investigatory process to determine fitness.[357] However, Mr. Moser was not accepted because of his membership in the German Communist Party.[358] Upon receiving notice of his rejection, Mr. Moser filed a complaint in a German court arguing that such restrictions violate Article 45 which according to the plaintiff requires that all domestic legislation be found void if it interferes with the movement of workers into any field of employment regardless of the relationship between the member-State national and the member-state itself.[359] The ECJ quickly rejected Mr. Moser's argument holding that the application of Article 45 at least requires that the member-state national be of another nationality than that of the member-state.[360] Furthermore, the ECJ made it clear that such situations that are wholly internal, such as that of Mr. Moser's scenario, are outside the scope of TFEU law.[361]

Q. INSURANCE

[355] Case C-180/83, Moser v. Land Baden-Wurttemberg, [1984] 3 C.M.L.R. 720, at 728.
[356] *Id.* at 721-722.
[357] *Id.* at 722.
[358] *Id.*
[359] *Id.* at 725, 727-728.
[360] *Id.* at 728.
[361] *Id.*

In a seeming departure from consistency, and certainly an issue related to the free movement of capital within the TFEU, the ECJ has ruled that a member-state can make tax deductions for insurance benefits paid by a worker dependent upon the insurer being located within the member-state without violating Articles 45 (ex 39, 48) and 56 (ex 49, 59) if the member-state can show that there is a need to maintain a cohesive fiscal system.[362] In *Bachmann v. Belgium*, a German national who moved to Belgium to work and had purchased his insurance before moving, was denied the ability to deduct from his taxable income pension and life insurance premiums because his insurer was not located in Belgium, a requirement under Belgian law to take advantage of the tax deduction.[363]The ECJ rejected several of the Belgian government's arguments supporting the difference in treatment before eventually upholding the tax deduction on the need to maintain fiscal regularity.[364] These arguments included the fact that (1) the surrender values of the foreign insurers when paid to the insured are not taxable income, (2) when a foreign national moves to Belgium he has the ability to change insurers, (3) this was the only way to ensure that policy holders in Belgium were protected through regulation, and (4) the real problem was not that Belgium was preferring one group of insurers over another, but rather that there is a lack of tax harmonization across the member-states.[365] Additionally, on its face, the ECJ stated that the Belgian law interfered with an insurer's ability to provide insurance services.[366]

However, the ECJ was sympathetic to Belgium's concern that if the tax exemption were

[362] Case C-204/90, Hans-Martin Bachmann v. Belgium, 1 C.M.L.R. 785, at 810-1 (1993).
[363] *Id.* at 805.
[364] *Id.* at 806-7.
[365] *Id.*
[366] *Id.* at 810.

to apply to non-Belgian insurers, the state could not recoup the lost revenue in any other administratively sound manner.[367] However, it is important to point out that the member-state has a heavy burden to show that the need to maintain a unified tax system outweighs its inherent restrictions on Articles 45 and 56.[368]

R. REMUNERATION, UNEMPLOYMENT, AND SOCIAL SECURITY BENEFITS.

Perhaps the most technical case in this work is *Merida v. Germany* which concerns a provision in Article 45 (ex 39, 48) which prohibits discrimination in regard to remuneration.[369] In *Merida,* the ECJ held that both Article 45 and Regulation 1612/68 are transgressed when a member-state's taxation and social security systems treat workers differently based on their residency.[370] In the case at bar, the plaintiff (Merida) was a "frontier worker" who worked for the French government, was stationed in Germany, but still lived in France.[371] Merida was taxed in France and when his employment ended, he received interim assistance (a form of social security insurance) from the German government.[372] However, while he was employed, his employment was subject to a double taxation agreement between the French and German governments which was designed to prohibit double taxation so after his social security contributions paid in Germany were deducted from his salary each period, he would pay French taxes but in the end would pay less in taxes overall, due to the French tax rates, than a similarly situated person living *and* working in Germany and who also was employed by the French government.[373] Merida

[367] *Id.* at 809.
[368] *Id.* at 811.
[369] Case C-400/02, Gerard Merida v. Bundesrepublik Deutschland (Germany), ECR I-8482 (2004).
[370] *Id*. at ¶ 37.
[371] *Id*. at ¶¶ 9, 24.
[372] *Id*. at ¶¶ 9-10.
[373] *Id*. at ¶ 9.

believed that his rights under Article 45 were violated when it became clear that when determining the amount of interim assistance he would receive, the German government deducted a notional amount equal to *both* the social security contributions he made while employed by also German wage taxes.[374]

The ECJ began its opinion by reminding readers that Article 45 prohibits member-states from discriminatory practices in regard to the way in which workers are remunerated when they seek employment in another member-state.[375] Next, the ECJ stated that Regulation 1612/68 prohibits collective agreements between member-states from maintaining provisions that discriminate against EU workers migrating from other member-state for employment purposes.[376] Moreover, the ECJ stated that Article 45 and Regulation 1612/68, together, prohibit both over and all forms of covert discrimination on nationality grounds.[377] More expressly, and somewhat profoundly, the ECJ stated that the principle of non-discrimination in EU law requires comparable situations be treated similarly but also that non-comparable situations must be treated differently by member-states.[378] Lastly, the ECJ claimed that any national law must be objectively justified, proportionate to the member-state's aims, and not place migrant, EU-citizen workers at a disadvantage.[379]

Specific to Mr. Merida's case, the ECJ found that the tax policy of the German government placed frontier workers in an intolerable disadvantage in the face of Article 45 and

[374] *Id*. at ¶¶ 10, 15.
[375] *Id*. at 18.
[376] *Id*. at ¶ 19.
[377] *Id*. at ¶ 21.
[378] *Id*. at ¶ 22.
[379] *Id*. at ¶ 23.

Regulation 1612/68.[380] According to the ECJ, the German tax system could not be substantiated on grounds that it was necessary in order to avoid financial burdens and possible administrative difficulties.[381] Furthermore, the ECJ did not find a link between the German wage tax assessed on Mr. Merida's interim assistance and the income taxes he would pay in France and even if the German wage tax could be reimbursed, the tax policy was still in violation of EU law.[382]

Perhaps as technical a case as *Merida* was *De Cuyper v. Belgium* which also touched on the issue of social security benefits and unemployment.[383] Article 20 (ex 17, 8) of the TFEU creates EU citizenship for all citizens living in the 28 member-states.[384] Article 20 also provides for a right to move and reside freely within the 28 member-state EU but such rights are also subject to other limitations found within the TFEU.[385] Likewise, Article 21 (ex 18, 8a) of the TFEU creates similar free movement rights but also empowers the European Parliament and

[380] *Id*. at ¶¶ 24, 37.
[381] *Id*. at ¶ 30.
[382] *Id*. at ¶ 33.
[383] Case C-406/04, Gerald De Cuyper v. Office National de L'Emploi (Belgium), ECR I-6971 (2006).
[384] Article 20 (ex 17, 8) of the TFEU states: "1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship. 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (a) the right to move and reside freely within the territory of the Member States; (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State; (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State; (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language. These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder." TFEU art. 20.
[385] *Id*.

European Council to enforce the free movement provisions.[386]

Mr. De Cuyper's case was a challenging one. De Cuyper was a Belgian national who sought an unemployment allowance and declared that he lived in Belgium but a later investigation by the Belgian government revealed that he had in fact lived in France when he made the declaration and when was identified as living in France stated that he returned to Belgium every three months to a furnished room in a commune in Belgium.[387] The Belgian government soon terminated De Cuyper's unemployment allowance and immediately ordered that he repay the previous amounts paid to him.[388] Belgian legislation at the time stated that in order to receive an unemployment allowance, the unemployed worker must have lost his or her employment and remuneration involuntarily and must live in Belgium.[389] However, Belgian law did allow for an exemption if the worker was over the age of 50 and had received more than 312 unemployment allowance payments.[390]

Several provisions of Regulation 1408/71 played a role in the ECJ's decision. Pursuant to

[386] Article 21 (ex 18, 8a) of the TFEU states: "1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. 2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1. 3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament." TFEU art. 21.

[387] Case C-406/04, Gerald De Cuyper v. Office National de L'Emploi (Belgium), ECR I-6971 at ¶¶ 12-15 (2006).
[388] *Id*. at ¶ 16.
[389] *Id*. at ¶¶ 8-9.
[390] *Id*. at ¶ 10.

Regulation 1408/71, an employed or self-employed person is such by definition so long as his or her employment is insured either on a compulsory or optional basis within the social security program of a member-state.[391] The Regulation also prohibits member-states from engaging in discriminatory practices regarding various forms of social security benefits in the form of reductions, modifications, suspensions, withdrawals, and/or confiscations when a member-state resident lives in another member-state other than the member-state which confers the social security benefits.[392] Regulation 1408/71 allows EU citizens to move to other member-states in pursuit of employment and allows the citizen to keep the benefits allotted from the former resident member-state so long as provides notice to the member-state he or she is leaving as well as to the member-state to which he or she is seeking employment.[393] According to Regulation 1408/71, the unemployment allowance can continue for three months after the worker is no longer available to his or her previous employment in the former member-state due to the move to another member-state.[394]

The ECJ held that the Belgian law which provided for a residency requirement and later termination of the unemployment allowance was not violation of Article 21 of the TFEU nor Regulation 1408/71.[395] In the perspective of the ECJ, Regulation 1408/71 only allows member-states to permit a waiver from the residency requirement when EU citizens move to a member-state for the purposes of seeking employment and/or when the EU citizen was actually living in another member-state while working in the member-state granting the unemployment allowance

[391] *Id*. at ¶¶ 3-4.
[392] *Id*. at ¶ 5.
[393] *Id*. at ¶ 6.
[394] *Id*. at ¶ 7.
[395] *Id*. at ¶¶ 38, 48.

of which neither condition applied to De Cuyper.[396] Despite the inapplicability of Regulation 1408/71 to De Cuyper's case, the restrictions placed him by Belgian law were still subject to the objective considerations of public interest and proportionality requirements in regard to Article 21 since the Belgian law did place EU citizens in his position in a disadvantageous condition in regard to a restriction on the freedom of movement.[397] First, the ECJ found that the monitoring requirement utilized by the Belgian government did meet the objective considerations of public interest standard since all EU citizens, Belgian or otherwise, would face the same inspection and thus the process was independent of nationality.[398] Second, and likewise, the ECJ found the inspection and monitoring system used by the Belgian government proportionate to its interests and there did not exist an alternate means to discover any changes in the unemployment allowance recipient's life which might cease the need for the unemployment allowance and that the process was indeed effective.[399] Finding that the Belgian law was both objective and proportionate, the Belgian law was upheld in the face of Regulation 1408/71 and Article 21.[400]

The ECJ's decision in *Vatsouras v. Germany* represents a rare case whereby the ECJ was asked to determine whether EU legislation, here in the form of a Directive, met the requirements of a provision of the TFEU.[401] Specifically, the ECJ was asked by the German referring court to determine whether Directive 2004/08 was compatible with TFEU Articles 18 (ex 12, 6) and 45 (ex 39, 48) in a case involving two Greek migrant workers, both EU citizens, seeking

[396] *Id*. at ¶ 38.
[397] *Id*. at ¶¶ 39-40.
[398] *Id*. at ¶ 41.
[399] *Id*. at ¶¶ 44-45.
[400] *Id*. at ¶ 48.
[401] Cases C-22/08 and C-23/08, Athanasios Vatsouras and Josif Koupatantze v. Arbeitsgemeinschaft (ARGE) Nurnberg 900 (Germany), ECR I-4585 (2009).

unemployment benefits in Germany.[402] Although Directive 2004/38 mimics the rights associated with free movement and residence across member-state borders for EU citizens, the Directive also provides that the right of residence may be limited if the migrant worker seeks residence in a host member-state for a period of more than three months.[403] The same Directive allows for a residency period of greater than three months if the migrant worker is either employed or self-employed and is able to retain the status of worker after becoming involuntarily unemployed within the first 12 months after arrival in the host member-state and has registered with that same member-state as a job seeker yet even in such a case, the status of worker need not exist past six months.[404] Article 14 of Directive 2004/38, however, allows the for the right of migrant workers and their families to reside while in the host member-state so long as the worker and/or his or her family becomes an unreasonable burden on the social system of the host member-state and Article 24 of the same Directive removes from the obligations of a host member-state the mandate of providing social assistance benefits to migrant workers and their families during the first three months of residence in that member-state.[405] The German law in question in this case limited social benefits to those between the ages of 15 and 65, were capable of earning a living, were in need of assistance, and whose ordinary residence was in Germany but excluded assistance to non-Germans who maintained a right of residence due to only the search for employment.[406] However, the German law did provide social assistance benefits to non-EU citizens residing in Germany.[407]

[402] *Id*. at ¶¶ 11-12, 16-18, 21.
[403] *Id*. at ¶ 3.
[404] *Id*. at ¶ 5.
[405] *Id*. at ¶¶ 6-7.
[406] *Id*. at ¶¶ 8-10.
[407] *Id*. at ¶ 10.

At the outset, the ECJ had to determine whether the plaintiffs held the status of workers under the TFEU due to the fact that the questions presented to the ECJ from the German national courts inferred that Vatsouras and Koupatantze had not achieved that status on the grounds that one plaintiff had worked only one month and the other plaintiff worked in a position that was not lucrative enough to sustain a livelihood.[408] However, the ECJ found both plaintiffs to be workers under the TFEU's Article 45 and reminded the German courts that so long as the employment is real and genuine, not marginal and ancillary, and for a certain time period services are performed under the direction of another for remuneration, without regard for the actual amount paid and without regard as to whether a livelihood can be eked out of the remuneration paid in conjunction with a financial subsidy, worker status must be applied.[409]

Despite the fact that the ECJ did find each of the plaintiffs to have secured the status of worker under the TFEU, the ECJ did not find Directive 2004/38's limitations to infringe upon Article 18 or Article 45.[410] While citing several precedents, the ECJ stated that member-states can require EU citizens of other member-states to establish a link between themselves and the host member-state's labor market and may condition social benefits based on the establishment of that link which can be established through a determination of whether financial assistance is merely designed to facilitate access to the labor market and is not social assistance.[411] The ECJ also remarked that it is the province of the national courts to determine whether a link has been established between the member-state's labor market and the migrant worker.[412] Likewise, the

[408] *Id*. at ¶¶ 24-25.
[409] *Id*. at ¶ 26-28.
[410] *Id*. at ¶ 46.
[411] *Id*. at ¶ 45.
[412] *Id*. at ¶ 41.

ECJ held that Article 18 does not preclude a member-state from allowing illegal immigrants and other non-EU citizens access to social assistance whereby EU citizens are excluded since Article 18 only covers the condition whereby an EU citizen of another member-state is discriminated against by the host member-state and is thus treated differently than the citizens of the host member-state.[413]

In *Sarl v. Luxembourg*, the ECJ commented that while member-states have broad discretion in determining ways in which to pursue their goals in the field of employment, and that encouraging the recruitment of workers is certainly a worthwhile enterprise, that same discretion cannot undermine the rights held by EU citizens pursuant to Article 45 (ex 39, 48) of the TFEU relating to the free movement of workers.[414] Specifically in *Sarl*, the ECJ found that Article 45 was violated by the Luxembourg government's policy of granting a recruiting subsidy to employers when hiring unemployed workers who were over the age of 45 so long as the workers are registered as a job seeker in Luxembourg and where the registration was limited to those residing in Luxembourg.[415] The ECJ specifically stated that its prior jurisprudence makes a residency requirement for a migrant or frontier worker to receive an unemployment benefit abhorrent to the TFEU since he or she has already participated in that member-state's labor market and thus has already established a suitable link for the purposes of Article 45 given that such a worker has already paid taxes to that member-state and thus has financially supported various social programs.[416]

[413] *Id*. at ¶¶ 52-53.
[414] Case C-379/11, Caves Krier Freres Sarl v. Directeur de l'Adminitration de l'emploi (Luxembourg), ECLI:EU:C:2012:798, at ¶¶ 51, 52 (2012).
[415] *Id*. at ¶ 55.
[416] *Id*. at ¶ 53.

The Luxembourg legislation in question provided a subsidy to both an employer and the formerly unemployed employee to cover the cost of social security contributions so long as the employee was age 45 or older and had been registered as a job seeker with the Luxembourg government for at least one month.[417] The 52-year-old plaintiff in *Sarl* was a Luxembourg citizen yet lived in Germany with her family yet spent her entire career prior to being recently hired in Luxembourg.[418] When hired by a Luxembourg firm, the plaintiff and the new employer applied for the subsidy which was designed to help get older, long-term unemployed workers back into employment, the application was rejected by the Luxembourg government because she had not been registered with the government as a job seeker.[419]

The *Sarl* case provided an interesting, yet very important, jurisprudential and procedural twist. The plaintiff challenged the Luxembourg legislation not as a breach of Article 45, but instead as unconstitutional in the face of the Luxembourg national constitution.[420] The Luxembourg court found the legislation constitutional, yet referred the case to the ECJ with the belief that the subsidy might violate Article 45's free movement of workers guarantee under the TFEU.[421] As well, the referring Luxembourg court believed that the legislation may not only violate Article 45, but Article 21's guarantee of free movement and residence across the member-states.[422] However, once the ECJ contended that a person who is genuinely seeking work after a prior work relationship has ended maintains his or her status as a worker under Article 45, and also that an employer may rely on the right to free movement of workers pursuant

[417] *Id*. at ¶ 3.
[418] *Id*. at ¶¶ 5-7.
[419] *Id*. at ¶¶ 7-8.
[420] *Id*. at ¶¶ 10-11.
[421] *Id*. at ¶¶ 13-14.
[422] *Id*. at ¶ 24.

also to Article 45, the case at bar would be decided on Article 45 grounds alone.[423]

While finding the Luxembourg legislation to be contrary to the requirements of Article 45, the ECJ made it clear that such an unemployment subsidy regime creates a difference in treatment between EU citizen-workers residing in Luxembourg and those not living in Luxembourg.[424] Therefore, the latter group of workers are at a disadvantage merely because they reside in another member-state.[425] Likewise, the ECJ stated that employers in Luxembourg are also similarly disadvantaged.[426] The ECJ contended that the member-state advocating its legislation has the burden to show that its policy is justified as an appropriate objective and is proportional to that objective, but in the case at bar, Luxembourg had failed to do so.[427]

Equally as important as the holding that Luxembourg's residency requirement for an unemployment benefit contrary to Article 45 of the TFEU, the ECJ also stated that employers may also invoke rights under the TFEU.[428] According to the ECJ, in order for the free movement of workers under Article 45 to be truly effective, employers must be able to rely on the TFEU in order to engage prospective employees without barriers.[429]

S. TAXATION.

The ECJ ruled in *Sopora v. The Netherlands* that a member-state can impose a tax policy that benefits some EU citizen-workers through an administrative convenience so long as the impact is in actuality prejudicial to the non-benefitting EU citizen-workers.[430] In *Sopora*, the ECJ

[423] *Id*. at ¶¶ 26-30.
[424] *Id*. at ¶ 43.
[425] *Id*. at ¶ 44.
[426] *Id*. at ¶ 45.
[427] *Id*. at ¶¶ 49-50.
[428] *Id*. at ¶ 28.
[429] *Id*.
[430] Case C-512/13, Sopora v. Staatssecretaris van Financien (The Netherlands),

was asked whether a tax rule implemented by The Netherlands government that provided migrant workers from another member-state with a commute of greater than 150 kilometers to benefit from a flat-rate rule allowing them to claim a 30% tax exemption with no documentation.[431] According to The Netherlands, the need for the tax exemption was to offset additional expenses that might be incurred by migrant workers that could not commute on a daily basis to The Netherlands such as for additional housing.[432] The 30% flat rate provision would arise at the joint request of the migrant worker and the firm by which he or she is employed.[433] Although migrant workers coming from distances of 150 kilometers or more would be able to enjoy a 30% tax exemption without any proof of actually incurring additional expenses related to their employment, workers that incurred expenses of greater than 30% of their taxable base could enjoy a greater percentage tax exemption with proof of those expenses and a migrant worker commuting within 150 kilometers could also enjoy a tax exemption based on those expenses but would have to show proof of those expenses.[434] Regardless of the geographical status of the "incoming worker," the tax exemption would only apply to workers who maintain skills that are not available or are scare in The Netherlands' labor market.[435]

In the case at bar, Mr. Sopora worked for an employer established in Germany but maintained an office in The Netherlands for which Mr. Sopora was required to report for work.[436] However, Mr. Sopora maintained an apartment in The Netherlands yet principally lived

ECLI:EU:C:2015:108, at ¶¶ 28, 30, 36.
[431] *Id*. at ¶¶ 3-5.
[432] *Id*. at ¶¶ 4, 13.
[433] *Id*. at ¶ 6.
[434] *Id*.
[435] *Id. at ¶ 4.*
[436] *Id*. at ¶ 7.

in Germany but within the 150 kilometer radius which allowed for the 30% tax exemption without documentation.[437] After he and his employer requested the 30% tax exemption without documentation and was rejected by The Netherlands court, Mr. Sopora challenged The Netherlands' rule on grounds that it represented a discriminatory practice in violation of Article 45 (ex 39, 48) of the TFEU.[438]

The ECJ provided several rules in regard to the application of Article 45. First, after restating that Article 45 prohibits member-state rules that discriminate against EU citizen-workers from other member-states on issues concerning employment, remuneration, and other conditions of employment, the ECJ did comment that any national tax provision affecting remuneration would be discriminatory if shown that equal treatment was not guaranteed.[439] More narrowly, the ECJ stated that Articles 26 (ex 14, 7a) and 45 together prohibit member-states from enacting legislation favoring workers residing in their own territory over other EU citizens from other member-states and also prohibits discrimination among EU citizen-workers whereby one group of workers may be favored over another group.[440] Regardless, the ECJ upheld the 150 kilometer rule used by The Netherlands government due to the belief that the document-less 30% flat rate tax exemption was merely an "administrative simplification" and did not amount to a form of discrimination based on nationality in that those EU citizen-workers living within a 150

[437] *Id*.
[438] *Id*. at ¶¶ 8, 11, 18, 36.
[439] *Id*. at ¶¶ 21-22.
[440] *Id*. at ¶¶ 24-25. Article 26 (ex 14, 7a) of the TFEU states: "1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties. 2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties. 3. The Council, on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned." TFEU art. 26.

kilometer radius could still be eligible for a 30% tax exemption but would merely have to show proof of the additional living expenses associated with their commute.[441] The ECJ even acknowledged that migrant workers principally living in the United Kingdom, Belgium, Germany, France, and Luxembourg may not be able to use the document-less 30% flat rate tax exemption.[442] According to the ECJ, the mere setting of a distance radius which determines an administrative simplification is not a form of indirect discrimination nor does it interfere with the free movement of workers.[443] The ECJ made it clear that member-states should have some flexibility to impose rules that are for administrative convenience that attain legitimate objectives.[444] However, the ECJ did warn that if in reality it becomes known that this administrative simplification leads to a situation whereby those eligible to use the document-less 30% tax exemption are overly compensated in relation to those that must show proof of the additional expenses associated with commuting, a case of discrimination violating Article 45 may be found but this reality is for the national courts to determine.[445]

V. COMPELLING THEMES FROM THE CASE LAW ON THE FREE MOVEMENT OF WORKERS.

A. WHO IS A WORKER?

Perhaps the most important theme from the ECJ's jurisprudence on the free movement of workers is the definition of a worker. Any facially discriminatory policy a member-state maintains that requires a particular nationality for a position violates Article 45 if the claimant is an EU citizen.[446] According to the ECJ in *Kempf*, the definition of a worker should be broadly

[441] *Id*. at ¶¶ 28-30.
[442] *Id*. at ¶ 31.
[443] *Id*. at ¶ 34.
[444] *Id*. at ¶ 33.
[445] *Id*. at ¶¶ 34, 35.
[446] Case C-90/96, David Petrie and Others v. Universia degli Studi di Verona & Camilla, 1

construed for the purposes of Article 45 (ex 39, 48).[447] The ECJ's decision in *Laurie-Blum* put forth a simple three-part test to determine if an EU citizen qualifies as a worker pursuant to Article 45 including that the citizen is performing services for a period of time, under the direction of a supervisor, and is paid a remuneration.[448] Specific to the facts in *Laurie-Blum*, the ECJ extended the free movement rights to part-time workers and trainees and making it clear that such persons were engaged in economic activity for the purposes of Article 45.[449] The *Mattern* decision also held that trainees are workers protected by Article 45.[450] The decision in *Ramrath* further strengthened the concept that part-time workers had free movement rights under Article 45 and also extended the right to free movement of services under Article 56 (ex 49, 59) to part-time workers.[451] The *Levin* decision provided that migrant workers had free movement rights even if engaged in seasonal employment so long as the work be "real" and "paid."[452] The ECJ's holding in *Vatsouras* provided migrant workers free movement rights if they worked for as little as one month so long as the work is deemed to be real and genuine, not marginal and ancillary, and for a certain fixed period of time.[453] According to the ECJ in *Clean Car* and *Sarl*, the employers of migrant workers can assert free movement rights on behalf of their employees.[454]

C.M.L.R. 711, at 735-736 (1998).

[447] Case C-139/85, R.H. Kempf v. Staatssecretaris Van Justitie, 1 C.M.L.R. 764, at 771-772 (1987).

[448] Case C-66/85, Laurie-Blum v. Land Baden-Wurttemberg, 3 C.M.L.R. 389, at 414 (1987).

[449] *Id*. at 414.

[450] Case C-10/05, Cynthia Mattern v. Ministre du Travail et de l'Emploi (Luxembourg), E.C.R. I-3162, at ¶¶ 19-21, 24, 28 (2006).

[451] Case C-106/91, Claus Ramrath v. Ministre de la Justice, 2 C.M.L.R. 187, at 204 (1995).

[452] Case C-53/81, Levin v. Secretary of State, 2 C.M.L.R. 454, at 469 (1982).

[453] Cases C-22/08 and C-23/08, Athanasios Vatsouras and Josif Koupatantze v. Arbeitsgemeinschaft (ARGE) Nurnberg 900 (Germany), ECR I-4585, at ¶¶ 24-28 (2009).

[454] Case C-350/96, Clean Car Autoservice Gesmbh v. Landeshauptmann Von Wein, 2 C.M.L.R. 637, at 655, 657 (1998); Case C-379/11, Caves Krier Freres Sarl v. Directeur de l'Adminitration

Those who are citizens of candidate countries and wish to become migrant workers across the EU are also provided rights under Article 45.[455]

Concerns that member-states might have in regard to a migrant worker's ability to become self-sustaining and not a burden on the host member-state's social system were extinguished in the ECJ's holdings in *Kempf* and *Levin*. In these decisions, the ECJ held that member-states cannot require a minimum level of subsistence for migrant workers who are also EU citizens nor can a member-state prohibit the free movement of workers if a migrant worker is dependent upon public assistance.[456] More narrowly in *Levin*, member-states were told that Article 45 prohibits the exclusion of EU-citizen migrant workers who have been out of the work world for a year.[457] The ECJ's decision in *Steymann* further dropped the acceptable financial floor for migrant workers holding that such workers only remunerated in the form of material needs and pocket change are entitled to free movement rights under Article 45.[458]

There are, however, some limits associated with the free movement of workers whereby member-states can place restrictions. According to the ECJ's decision in *Merida*, a limit on free movement rights can be implemented by a member-state if the restriction is objectively justified, is proportionate to the aim of the member-state's policy, and does not place migrant workers at a disadvantage.[459] The ECJ held in *Bettray* that an EU citizen enrolled in a drug rehabilitation

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de l'emploi (Luxembourg), ECLI:EU:C:2012:798, at ¶ 28 (2012).

[455] Case C-162/00, Land Nordrhein-Westfalen v. Pokrzeptowicz-Meyer, 2 C.M.L.R. 1, at 32 (2002).

[456] Case C-139/85, R.H. Kempf v. Staatssecretaris Van Justitie, 1 C.M.L.R. 764, at 770-771 (1987); Case C-53/81, Levin v. Secretary of State, 2 C.M.L.R. 454, at 467 (1982).

[457] *Id.* at 465, 466-8.

[458] Case C-196/87, Steymann v. Staatssecretaris Van Justitie, 1 C.M.L.R. 449, at 455 (1989).

[459] Case C-400/02, Gerard Merida v. Bundesrepublik Deutschland (Germany), ECR I-8482, at ¶ 23 (2004).

program in another member-state did not have free movement rights since a workplace relationship did not exist.[460] Spouses of EU citizens have free movement rights only if the other spouse has already exercised those rights.[461] More narrowly, a non-EU citizen spouse also does not have free movement rights unless the citizen spouse has exercised those rights.[462] Interestingly enough, a member-state can provide benefits to non-EU citizens without giving the same benefits to EU citizens without violating Article 45.[463] Returning to the *Steymann* decision, a migrant worker may have free movement rights even if he/she is being compensated minimally through the provision of material needs and pocket change that worker does not enjoy protection under Articles 56 and 57 providing for the free movement of services.[464]

B. DISCRIMINATION BASED ON NATIONALITY.

The second significant take away from the ECJ's decisions in this work was the prohibition against discrimination based on nationality. As one might imagine, a member-state might have an interest in protecting some professions from participation by migrant workers. However, in *Gebhard*, although the ECJ recognized the ability of a member-state to create qualifications for a profession, a member-state cannot impose additional qualifications for citizens of other member-states who wish to engage in a specific profession.[465] The *Gebhard*

[460] Case C-344/87, Bettray v. Staatssecretaris Van Justitie, 1 C.M.L.R. 459, at 475 (1991).
[461] Case C-10/05, Cynthia Mattern v. Ministre du Travail et de l'Emploi (Luxembourg), ECR I-3162, at ¶ 17 (2006).
[462] Case C-64&65/96, Land Nordrhein-Westfalen v. Uecker and Jacquet, 3 C.M.L.R. 963, at 976 (1997).
[463] Cases C-22/08 and C-23/08, Athanasios Vatsouras and Josif Koupatantze v. Arbeitsgemeinschaft (ARGE) Nurnberg 900 (Germany), ECR I-4585, at ¶¶ 52-53 (2009).
[464] Case C-196/87, Steymann v. Staatssecretaris Van Justitie, 1 C.M.L.R. 449, at 455-6 (1989).
[465] Case C- 55/94, Gebhard v. Consiglio Dell'Ordine degli Avvocati, 1 C.M.L.R. 603, at 626 (1996).

decision also reminded member-states that although they could set qualifications for a profession, even those qualifications cannot be so onerous that it restricts the right to establishment pursuant to Article 56 and member-states cannot ignore the skills and experience an EU citizen develops in another member-state.[466] Similarly, a member-state must recognize the years of service acquired in another member-state for the purposes of pay raises and other benefits.[467] Relatedly, the *Kobler* decision made clear that the without a member-state being required by Article 45 to recognize a citizen's work experience in another member-state, there would be a disincentive to move across member-state borders for employment.[468] The ECJ also held that member-states must recognize a citizen's work experience for the purposes of job applications.[469] The recognition of service in another member-state was also extended to seniority systems by the ECJ in *Kalliope Schoning*.[470] The recognition of military service in another member-state must also be recognized by member-states.[471]

The ECJ in *Reyners* and *Patrick* placed significant limitations on a member-state's ability to restrict admission professions holding that citizenship cannot be required for membership into a profession and admission to a profession cannot be based on reciprocity with another member-state.[472] The ECJ also held in *Patrick* that member-states must treat all EU citizens equally when

[466] *Id*. at 627.
[467] Case C-195/98, Oserreichischer Gewerkschaftsbund v. Austria, 1 C.M.L.R. 14, at 418 (2002).
[468] Case C-224/01, Kobler v. Republik Osterreich, 3 C.M.L.R. 28, at 1065 (2003).
[469] Case C-419/92, Scholz v. Opera Universitaria de Cagliari, 1 C.M.L.R. 873, at 885 (1994).
[470] Case C-15/96, Kalliope Schoning-Kougebetopoulou v. Freie und Hansestadt Hamburg, 1 C.M.L.R. 931, at 947 (1998).
[471] Case C-10/69, Wurttembergische Milchverwertung-Sudmilch AG v. Ugliola, C.M.L.R. 194, at 201 (1970).
[472] Case C-2/74, Reyners v. The Belgian State, 2 C.M.L.R. 305, at 329 (1974); Case C-1/77, Patrick v. Minister of Cultural Affairs, 2 C.M.L.R. 523, at 530 (1977).

it comes to professional qualifications.[473] In *Bobadilla*, the ECJ went one step further and stated that member-states must recognize the academic credentials held by citizens of other member-states.[474] The use of ratios in the form of domestic workers to non-domestic workers (both groups would consist of EU citizens) was prohibited by the ECJ in *French Seamen*.[475] The ECJ banned residency requirements for managers, found to be a form of indirect discrimination, in *Clean Car*.[476] Residency requirements are highly questionable according to the ECJ once the worker has established himself or herself in the host member-state and the ECJ also commented that employers should have to worry about the burdens associated with residency requirements when recruiting employees.[477] In *Porto di Genova*, the ECJ addressed the most blatant form of discrimination based on nationality and held that a member-state cannot require workers to be of a specific nationality.[478]

The ECJ has charged the national courts of the various member-states with voiding any contracts that discriminate based on nationality and limit the free movement of workers.[479] Labor organizations cannot restrict access to a position or membership to only citizens of the host member-states even when the labor organization is established by the national law of the

[473] *Id*.
[474] Case C-234/97, Fernandez de Bobadilla v. Museo Nacional del Prado, 3 C.M.L.R. 151, at 176 (1999).
[475] Case C-167/73, Re French Merchant Seamen: E.C. Commission v. France, 2 C.M.L.R. 216, at 230 (1974).
[476] Case C-350/96, Clean Car Autoservice Gesmbh v. Landeshauptmann Von Wein, 2 C.M.L.R. 637, at 658-659 (1998).
[477] Case C-379/11, Caves Krier Freres Sarl v. Directeur de l'Adminitration de l'emploi (Luxembourg), ECLI:EU:C:2012:798, at ¶ 28 (2012).
[478] Case C-179/90, Merci Convenzionali Porto di Genova SpA v. Siderrurgica Gabriella SpA, 4 C.M.L.R. 422, at 428, 451 (1994).
[479] Case C-36/74, Walrave and Koch v. Association Union Cycliste Internationale, 1 C.M.L.R. 320, at 332-3 (1975).

member-state and membership in the labor organization is required for the position.[480]

Much like the reality associated with the definition of a worker, the ECJ has allowed for some limitations on the general right not for workers not to be discriminated against based on nationality. In *Moser*, the ECJ held that the right of free movement of workers only applies when a worker crosses an international (EU) boundary for the pursuit of work and does not apply to acts of discrimination that are wholly within a member-state's borders.[481] In *Sopora*, the ECJ stated that it is acceptable for a member-state to have in place a tax benefit system that makes it easier for citizens of that member-state to claim a tax exemption so long as the home member-state is not favoring its own citizens.[482] The ECJ in *Vatsouras* stated that member-states can require a link between the migrant worker and that member-state's labor market and the suitability of this link is to be evaluated by the national courts.[483] Employers and member-states can require fluency in a particular language without violating Article 45's guarantee of free movement of workers.

C. PRIVATE AGREEMENTS AND CONTRACTS.

Governments of the 28 EU member-states cannot discriminate against migrant workers based on nationality when the workers are citizens of other member-states. The ECJ has extended the abolition of discrimination based on nationality to private agreements and contracts between non-member-state parties. In *Bobadilla*, the ECJ held that employment agreements

[480] Case C-213/90, Association de Souten aux Travailleurs (ASTI) v. Chamber des Employes Prives, 3 C.M.L.R. 621, at 637 (1993).
[481] Case C-180/83, Moser v. Land Baden-Wurttemberg, 3 C.M.L.R. 720, at 728 (1984).
[482] Case C-512/13, Sopora v. Staatssecretaris van Financien (The Netherlands), ECLI:EU:C:2015:108, at ¶¶ 28, 30, 36.
[483] Cases C-22/08 and C-23/08, Athanasios Vatsouras and Josif Koupatantze v. Arbeitsgemeinschaft (ARGE) Nurnberg 900 (Germany), ECR I-4585, at ¶¶ 41, 45 (2009).

between workers and employers cannot allow for discrimination against employees from other member-states.[484] In *Spotti*, the ECJ stated that any contract provisions between employers and employees must apply equally to all workers and contract provisions cannot single out workers from another member-state and place those workers in a disadvantageous position.[485] As stated above, the *ASTI* decision by the ECJ prevents labor organizations from prohibiting membership for citizens of other member-states.[486] The *Walrave* decision stands for the premise that national courts must void all contracts that discriminate against workers from other member-states.[487]

D. FREE MOVEMENT OF WORKERS AND THE LINK TO OTHER TFEU ARTICLES.

Although Article 45 is the primary Article within the TFEU that protects the free movement of workers, the ECJ has identified several other Articles that are both ancillary to the free movement of workers but also support the basic concept of free movement of workers. Perhaps the most supportive Article other than Article 45 in regard to the free movement of workers is Article 49 which provides for the right to establishment. In both *Patrick* and *Paris Bar*, the ECJ held that when a member-state sets requirements for the admission to professions, such requirements will be scrutinized under both Article 45 and Article 49.[488] In these two cases, the ECJ made clear that professionals who are EU citizens may freely practice their profession

[484] Case C-234/97, Fernandez de Bobadilla v. Museo Nacional del Prado, 3 C.M.L.R. 151, at 176 (1999).
[485] Case C-272/92, Spotti v. Freistaat Bayern, 3 C.M.L.R. 629, at 643-644 (1994).
[486] Case C-213/90, Association de Souten aux Travailleurs (ASTI) v. Chamber des Employes Prives, 3 C.M.L.R. 621, at 637 (1993).
[487] Case C-36/74, Walrave and Koch v. Association Union Cycliste Internationale, 1 C.M.L.R. 320, at 321 (1975).
[488] Case C-1/77, Patrick v. Minister of Cultural Affairs, 2 C.M.L.R. 523, at 530 (1977); Case C-107/83, Order Des Avocats au Barreau de Paris v. Onno Klopp (Paris Bar), 1 C.M.L.R. 99, at 115 (1985).

across member-state boundaries pursuant to both the free movement of workers and the right to establishment.[489] The ECJ commented in *Lawyer's Establishment* that right of establishment applies to self-employed professionals and salaried workers.[490]

According to the ECJ's decision in *Porto di Genova*, a member-state's requirement that workers in a particular profession be of the same nationality as that member-state could violate the free movement of workers pursuant to Article 45, Article 34's free movement of goods guarantee, the antitrust and fair competition provisions of Articles 101 (81, 85) and 102 (ex 82, 86), and the anti-monopoly provisions of Article 106 (ex 86, 90).[491] However, it should be mentioned that the expansiveness of the decision in *Porto di Genova* was likely due to the fact that the Italian government was regulating the nationality of dock workers.[492] Member-states also cannot restrict the sales of real estate to citizens of the home country member-state without violating Article 45's guarantee of free movement of workers, Article 49's right to establishment provisions, and Article 56's free movement of services requirements.[493] Likewise, the *Ramrath* decision states that a member-state's attempt to require a professional to have one location for business violates Articles 45, 49, and 56.[494] The ECJ"s decision in *Gebhard* clarified matters a bit as the ECJ commented that the right to establishment should be broadly interpreted while the

[489] Case C-107/83, Order Des Avocats au Barreau de Paris v. Onno Klopp (Paris Bar), 1 C.M.L.R. 99, at 113 (1985).

[490] Case C-168/98, Re Directive on Lawyers' Establishment, 3 C.M.L.R. 28, at 810 (2002).

[491] Case C-179/90, Merci Convenzionali Porto di Genova SpA v. Siderrurgica Gabriella SpA, 4 C.M.L.R. 422, at 451 (1994).

[492] *Id.* at 428, 449.

[493] Case C-305/87, Commission v. Greece, 1 C.M.L.R. 611 at 625 (1991).

[494] Case C-106/91, Claus Ramrath v. Ministre de la Justice, 2 C.M.L.R. 187, at 204 (1995).

free movement of services guarantee concerns matters that are more temporary.[495]

One limitation on the compilation of many Articles of the TFEU working together to support the free movement of workers is found in the ECJ's holding in *Sarl*. Once an EU citizen crosses over member-state boundaries for the purposes of employment and is deemed a worker pursuant to Article 45, the ECJ will evaluate the matter under only Article 45 and not Article 21 (ex 28, 8a) which provides for the free movement of citizens.[496] Presumably, such a worker gains the rights associated with Article 45 and sacrifices the protections of Article 21. However, such an analysis goes beyond the scope of this work.

E. THE PUBLIC SERVICE AND PUBLIC INTEREST EXCEPTIONS.

Article 45 does provide for a member-state to craft limitations on the free movement of workers based on concerns for public policy and for those employed in the public service. According to the ECJ, teachers and teacher trainees are not part of a member-state's public service and thus a member-state cannot restrict the free movement rights of those who wish to move from one member-state to another for the purpose of pursuing the teaching profession.[497] However, although the ECJ made these pronouncements in *Laurie-Blum* and *Bleis* cases, the ECJ used a different test to determine what workers should be included in a member-state's public service. In *Laurie-Blum,* a worker in the public service is one who is considered necessary for safeguarding the interests of the member-state.[498] The ECJ stated in *Bleis* that a worker in the

[495] Case C- 55/94, Gebhard v. Consiglio Dell'Ordine degli Avvocati, 1 C.M.L.R. 603, at 626 (1996).
[496] Case C-379/11, Caves Krier Freres Sarl v. Directeur de l'Adminitration de l'emploi (Luxembourg), ECLI:EU:C:2012: 379, at ¶¶ 26-30 (2012).
[497] Case C-4/91, Bleis v. Ministere de l'Education [1994] 1 C.M.L.R. 793, at 801. Case C-66/85, Laurie-Blum v. Land Baden-Wurttemberg, 3 C.M.L.R. 389, at 416. (1987).

[498] Case C-66/85, Laurie-Blum v. Land Baden-Wurttemberg, 3 C.M.L.R. 389, at 416 (1987).

public service is one who maintains a special relationship of allegiance to the member-state.[499] Likewise, the ECJ has stated that foreign language assistants, attorneys, and physicians are not in the public service.[500]

Outside of specific professions, and on a broader note, a member-state cannot have a general residency requirement for managers in the public interest.[501] In *Clean Car*, the ECJ stated that there are other, less restrictive means, such as the requirement that a firm maintain a registered office in the regulating member-state, to ensure proper management.[502] The ECJ also did not find favor with the lack of recognition of a migrant worker's years of work experience in another member-state base on a general public interest exception to Article 45.[503]

The ECJ did endorse a member-state's ability to monitor a migrant worker who was also a potential social security recipient to determine eligibility for the associated benefits whereby eligibility for a residency permit was conditioned upon the eligibility for benefits.[504] In *De Cuyper*, the ECJ stated that a residency permit conditioned upon eligibility for social security benefits was justified since residency is in the public interest, a residency requirement is a proportionate measure to determine of a migrant worker needs the allowance, and there was no discrimination since both domestic and migrant EU citizens were monitored.[505]

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[499] Case C-4/91, Bleis v. Ministere de l'Education 1 C.M.L.R. 793, at 801 (1994).
[500] Case C-4/91, Bleis v. Ministere de l'Education 1 C.M.L.R. 793, at 801. Case C-2/74, Reyners v. The Belgian State, [1974] 2 C.M.L.R. 305, at 329 (1994). Case C-15/96, Kalliope Schoning-Kougebetopoulou v. Freie und Hansestadt Hamburg, 1 C.M.L.R. 931, at 947 (1998).

[501] Case C-350/96, Clean Car Autoservice Gesmbh v. Landeshauptmann Von Wein, 2 C.M.L.R. 637, 658-659 (1998).
[502] Id. at 657-9.
[503] Case C-224/01, Kobler v. Republik Osterreich, 3 C.M.L.R. 28, at 1064 (2003).
[504] Case C-406/04, Gerald De Cuyper v. Office National de L'Emploi (Belgium), ECR I-6971, at ¶ 41 (2006).
[505] *Id*. at ¶¶ 8-9, 16.

F. PUBLIC FINANCE CONSIDERATIONS.

There are two cases, in addition to the *De Cuyper* case (above) which addresses social security benefits, that touch on the concerns a member-state might have in regard to its public finances. First, in *Bachmann*, the ECJ stated that in order to maintain a cohesive fiscal system, a tax deduction for a worker can be limited to EU citizens working in the same member-state as an insurance firm selling a form of insurance that can lead to the tax deduction.[506] Here, the ECJ agreed with the Belgian government that there was no other way in which to recoup lost revenue.[507] However, in *Merida*, the ECJ stated that a member-state's social security system cannot treat people differently based on residency and any potential double taxation agreement cannot interfere with the free movement of workers pursuant to Article 45.[508] The ECJ did not accept the German government's financial and administrative purposes justification.[509]

VI. THREATS TO LABOR MOBILITY AND THE FREE MOVEMENT OF WORKERS IN THE EU.

The free movement of workers guaranteed by Article 45 (ex 39, 48) is considered one of the four fundamental freedoms that create the EU's common market. This work has showcased some remarkable judicial policy from the ECJ as it has interpreted Article 45 and several other, supporting Articles of the TFEU in an attempt to make clear the fundamental freedom of workers to cross member-state borders to pursue employment. Regardless of this body of case law, there are several threats to the free movement of workers. This section will discuss five legal threats to and one political threat to the strong jurisprudence of the ECJ on the issue of free movement

[506] Case C-204/90, Hans-Martin Bachmann v. Belgium, 1 C.M.L.R. 785, at 810-811 (1993).
[507] *Id*. at 809.
[508] Case C-400/02, Gerard Merida v. Bundesrepublik Deutschland (Germany), ECR I-8482, at ¶ 17 (2004).
[509] Id. at ¶¶ 30, 33.

of workers. The author of this work wholly admits that all of the aforementioned risks are related.

The political threat to the free movement of workers may indeed be the most significant threat to the ECJ's jurisprudential work since the founding of the Treaty of Rome in 1957 and that is the current political climate in Europe at the time of this writing. As this work is being completed, and as stated above, the United Kingdom is in the process of leaving the EU in part because domestic, political anti-migrant worker sentiment in that country. Ironically, the United Kingdom would like to stay within the confines of three of the fundamental freedoms – those of free movement of goods, capital, and services – but withdraw from the free movement of workers requirement but this is unlikely to be acceptable to the remaining EU member-states.[510] Currently, the United Kingdom government is planning on leaving the EU in 2019.[511] The risk to the free movement of workers doctrine, in political terms, is that this anti-migrant worker fervor spread to legislatures of other member-states and even to the EU governmental institutions. Although perhaps remote, such momentum could lead to other member-states exiting the EU. Worse, yet more likely, the EU political institutions, including the ECJ, could weaken the free movement of workers doctrine through a series of Regulations, Directives, and ECJ opinions interpreting the TFEU.

The next five risks are legal risks are linked by the one reality that the ECJ is not bound by its precedent.[512] In contrast to American courts, there is no stare decisis doctrine with which

[510] *Mind Your Step*, *supra* note 25.
[511] Jenny Gross & Nicholas Winning, *U.K.'s Theresa May Pledges To Set EU Divorce In Motion By End Of March*, WALL ST. J. (October 2, 2016 11:19pm), available at: http://www.wsj.com/articles/u-k-s-may-plans-to-trigger-article-50-by-end-of-march-1475401597 (last visited Dec. 21, 2016).
[512] T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN UNION LAW 70 (7th ed. 2010).

to follow although it should be mentioned that the ECJ almost always follows its own precedent.[513] However, the ECJ has changed its precedent from time to time based on changing circumstances, changing opinions by the ECJ's Judges, the opinions of the Advocates General, and the opinions of academic writers.[514] The first of these legal risks to the free movement of workers doctrine is found collectively in the various tests espoused by the ECJ in the case law presented in this work. The ECJ is a judicial body charged with interpreting the TFEU's Articles when cases are referred to it by either the member-state national courts or by the European Commission. The ECJ has provided two different tests to determine if an EU citizen is a migrant worker for the purposes of Article 45. In *Vatsouras*, a worker maintained free movement rights if his or her work was real and genuine, not ancillary and marginal, and for a fixed duration of time.[515] In *Laurie-Blum*, a worker possessed free movement rights if the work in question included performing services for a period of time, under another person's direction, and for remuneration.[516] For each element of these two tests, despite the amount of confusion they create currently, the ECJ could reevaluate in future case law and provide member-states with greater discretion to limit the free movement of workers across member-state borders. In *Merida*, the ECJ put forth a three-part test to determine whether a restriction on the free movement of workers was justified including that the restriction is objectively justified, proportionate to the member-state's policy aim, and the migrant worker is not placed at a disadvantage.[517] Similarly to the reality whereby the ECJ could change its interpretation of the

[513] *Id.*
[514] *Id.*
[515] Cases C-22/08 and C-23/08, Athanasios Vatsouras and Josif Koupatantze v. Arbeitsgemeinschaft (ARGE) Nurnberg 900 (Germany), ECR I-4585, at ¶¶ 26-28 (2009).
[516] Case C-66/85, Laurie-Blum v. Land Baden-Wurttemberg, 3 C.M.L.R. 389, at 414 (1987).
[517] Case C-400/02, Gerard Merida v. Bundesrepublik Deutschland (Germany), ECR I-8482, at

elements associated with the two tests to determine whether an EU citizen is a worker, the ECJ could change its interpretation of the elements of the test put forth in Merida to provide member-states with a greater discretion on migrant worker matters. Likewise, the four-part test in *Gebhard* to determine if a member-state's professional qualifications violate tenets of the free movement of workers and the right of establishment, including that the regulation be applied in a non-discriminatory manner, it is justified by the general interest, it is suitable to achieve the desired result, and that it does not go beyond the desired result, could be reinterpreted by current or future members of the ECJ in future cases again making it easier for a member-state to engage in restrictions on the free movement of workers.[518] As is the case with any corpus of case law, it consists of qualitative terms that can be reevaluated at a later date. Related to the political threat posed to the free movement of workers cited above, the ECJ, either pressured to do or acting independently, in either case without a mandate to follow precedent, could interpret future cases involving the free movement of workers in a way that provides member-states with greater control over migrant workers in an effort to preserve the EU.

Third, and certainly related to the potential for reinterpretation, is the ECJ's holding in *Mattern* whereby the ECJ limited the rights of spouses of EU citizens to only situations whereby the EU citizen has already exercised those rights.[519] Although it is beyond the scope of this work to determine how many member-states would actually choose to make this limitation, it serves as a significant limitation for those workers in marriages whereby at least one member of the

327 (2004).
[518] Case C- 55/94, Gebhard v. Consiglio Dell'Ordine degli Avvocati, 1 C.M.L.R. 603, at 627 (1996).
[519] Case C-10/05, Cynthia Mattern v. Ministre du Travail et de l'Emploi (Luxembourg), ECR I-3162, at ¶¶ 27, 28 (2006).

marriage is an EU citizen. In such an instance, although the test for worker status pursuant to Article 45 comes in two varieties, one test in *Vatsouras* and another in *Laurie-Blum*, if the test is not met by a worker seeking protection, then his or her spouse is also limited in regard to the free movement of workers unless he or she qualifies independently. Because of this reality, ironically, the *Mattern* decision may create a disincentive to marry to either an EU citizen or a non-EU citizen.

Fourth, the risk of reinterpretation in the *Sopora* decision is much like that of the aforementioned *Mattern* decision. In *Sopora*, on grounds that member-states could have a tax policy whereby those with varying commutes to work could have varying tax deductions based on the length of that commute.[520] However, the ECJ did not limit the application, nor set constraints, of that tax deduction. The *Sopora* decision is troubling in that it allowed those with longer commutes to have an easier time gaining the tax deduction whereby the reality is that most commuters would not have a daily commute of greater than 150 kilometers. In other words, it is likely that The Netherlands government realized that making the tax deduction easier to get for longer commutes would affect virtually no one in that member-state. Although the language supporting the tax deduction was facially neutral, and the ECJ endorsed it because it did allow workers of all nationalities to take advantage of it regardless of where they were working and The Netherlands was merely benefitting from an administrative simplification, without limitations, such facially neutral tax regulations could be abused by member-states.

The ECJ's decision in *Vatsouras*, once again but aside from the test to determine worker

[520] Case C-512/13, Sopora v. Staatssecretaris van Financien (The Netherlands), ECLI:EU:C:2015:108, at ¶¶ 28, 30, 33, 36.

status under Article 45, represents the next legal threat to the free movement of workers within the EU. The ECJ held in *Vatsouras* that member-states could provide benefits to non-EU migrant workers while denying those same benefits to citizens of the EU who are migrating across member-state boundaries. The risk here is that member-states might make it very attractive to firms to hire non-EU citizens when workers are needed and there do not exist sufficient ranks of domestic workers. Presumably, without further knowledge of an individual member-state's domestic law, the member-state will have greater control over non-EU citizen workers and would thus have greater discretion to remove the non-EU citizens when work assignments are complete, the season is over which required seasonal work, and/or when there is a downturn in the economy and workers are laid off from their positions. The decision in *Vatsouras* did not stake out any limitations on what benefits could be afforded to non-EU citizens and/or whether those benefits could be provided to firms that hire non-EU citizens. The openness of *Vatsouras* has the potential to limit the free movement of workers for those who are EU citizens as they may become less desirable by employers due to potential benefits afforded to non-EU citizens and firms.

The *De Cuyper* decision presents the last legal threat to the free movement of workers. The *De Cuyper* decision allows member-states to monitor those in receipt of social security benefits in order to determine continuing eligibility.[521] Although once again the ECJ was presented with a facially neutral member-state regulation, the member-states might be able to make greater use of monitoring and eligibility rules to remove EU citizens migrating to that

[521] Case C-406/04, Gerald De Cuyper v. Office National de L'Emploi (Belgium), ECR I-6971, at ¶ 41 (2006).

member-state for the purposes of employment. Fortunately, the ECJ has put forth a low subsistence level for migrant workers pursuant to Article 45 in the *Kempf*, *Levin*, and *Steymann* decisions that could serve as a form of immunity from greater monitoring activity by member-state governments.

VII. CONCLUSION.

The benefits for allowing for worker migration are numerous both in the EU and around the globe. In the EU, the free movement of workers is not only one of the four fundamental freedoms along with the free movement of goods, capital, and services, that constitutes the EU's common market (not to mention the EEA's common market), but also the free movement of workers is necessary for full market integration. As stated in the Introduction section of this work, labor mobility, as a concept, is also a necessity for the proper functioning of efficient labor markets.

In addition to Article 45 of the TFEU which specifically enumerates the free movement of workers, over a dozen other Articles of the TFEU have been cited by the ECJ that help support the free movement of workers. The right of an EU citizen to exercise free movement rights is largely dependent upon the ECJ's definition of a worker to which the ECJ maintains a fairly broad definition. Regardless of the many provisions of the TFEU promoting the ability of EU citizens to move throughout the EU in search of employment, the free movement of workers has lagged in implementation in comparison to the free movement of goods. This lagging is somewhat due to the aforementioned barriers including language deficits, education hurdles, lack of job skills, health care systems, pension systems, taxation systems, and social security schemes.

The danger to the free movement of workers within the EU following the United Kingdom's decision to leave the 28-member-state bloc is significant. The political climate

perhaps poses an even greater risk in comparison to the legal challenges identified in this work. The political climate poses such a risk that the free movement of workers and persons throughout the EU is in jeopardy. One could imagine that the EU's version of a common market be reduced to the free movement of goods, services, and capital and the free movement of workers becomes dependent upon a series of reciprocity agreements between member-states akin to the issues addressed in the *Patrick* case. Worse, even if the four freedoms remain intact, the free movement of workers could be threatened if the ECJ chooses to expand upon the requirement developed in the *Vatsouras* case whereby a member-state can require a link between the worker's activity and the member-state's labor market. This precedent is especially challenging to the free movement of workers concept since the ECJ has provided with national courts the discretion to determine if this link exists.

Generally, the purpose of this work was to provide the reader and practitioners with a working knowledge of the free movement of workers guarantee as it exists in the EU. It is the hope of this author that the ECJ resists expanding the *Vatsouras* decision and/or is willing to take a hard line with member-states and their national courts which attempt to expand that same decision and that the member-states can find a political route to maintaining the free movement of workers as a fundamental freedom indefinitely.