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Discussion Paper

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Free Movement of Workers in the EU
Legal Aspects of the Transitional Arrangements

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Introduction

There are four fundamental freedoms which lay the foundation of the European Union. Those are the free movement of goods, free movement of capital, free movement of services and free movement of persons. They guarantee the existence and effective functioning of an area without internal borders within which goods, capital, services and people move freely.

Despite the pivotal importance of these freedoms, there are cases where some freedoms can be partially or fully restricted within the territory of some member states or the Union as a whole. This thesis is going to analyze the restrictions of one of these freedoms: the free movement of persons, resulting from the arrangements applying to new member states. The focus will be the free movement of workers from new to old member states for a transitional period following the date of accession.

Theoretically, the transitional arrangements are flexible provisions which offer two-way protection, to both old and new member states. Despite the fact that they are imposed by the old members and their economic justification is questionable, they also protect the vital interests of new member states. Particular instruments for this protection are the standstill and safeguard clauses. The standstill clause guarantees that old member states will not apply to new member states stricter regimes than the ones in force at the date of signing of the accession treaties. Thus, the standstill clause protects new members guaranteeing them a minimum standard of treatment. The safeguard

clause envisages the opportunity for old member states which remove the restrictions before the end of the transitional period to reintroduce them, if serious disturbances on their labor markets occur. Thus, old member states are protected in the event of undesired developments.

However in practice, these provisions do not function perfectly. New member states possess very weak leverages to influence the negotiation and imposition of transitional arrangements and old member states often abuse the restrictions and use them for domestic political purposes. The protection which theoretically exists in both directions in practice functions better in one of them.

This thesis will study the theoretical foundation and justification of the transitional arrangements. Its aim is to ascertain whether the discrepancy claimed above actually exists and whether transitional arrangements favor old member states to the detriment of new member countries. Through a study of the theoretical foundation and the actual state of affairs, the validity of the hypothesis will be assessed.

As a beginning, the fundamental freedoms as such and the free movement of persons in particular will be examined. The overview of the historical development will be followed by the economic and political justification of the transitional periods, as well as the migration predictions in the context of enlargement. Special attention shall be given to the evaluation of the actual migration flows in comparison with the initial projections and the impact of migrants on the host country. Furthermore, two country cases from 2011 will be analyzed. The case of the Netherlands exemplifies the dubious use of the standstill clause and the case of Spain sets a precedent with the activation of the safeguard clause. As a result of this analysis, the provisions of the accession treaties will be discussed in a new light and the hypothesis stated above shall be proven or dismissed.

1. The Fundamental Freedoms of the EU – Historical Overview

The creation of a common market (which after the coming into force of the Treaty of Lisbon is renamed *internal market)* is one of the fundamental goals of the European Union. It is laid down in Article 3 (3) of the Treaty on European Union (TEU), which states that "(t)he Union shall establish an internal market"[1]. Title 1 of Part Three of the Treaty on the Functioning of the European Union (TFEU) provides more specific information on the core of the internal market and its essential properties. Article 26 (2) of the TFEU stipulates that the internal market is "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"[2]. These four freedoms, the free movement of goods, persons, services and capital, form the very foundation of the internal market, for which reason they are referred to as the Fundamental Freedoms. This thesis is going to look at restrictions applying to one of these fundamental freedoms, namely the free movement of persons. However, in order to be able to thoroughly analyze the arrangements restricting the freedom and fully comprehend their significance, a brief historical overview of the development of the free movement of persons is in order.

The first provisions relating to the free movement of persons date back to the Treaty Establishing the Coal and Steel Community. Its Article 69 (1) reads that "Member states undertake to remove any restriction based on nationality upon the employment in the coal and steel industries of workers who are nationals of Member states"[3]. Even though the scope of the freedom was strictly limited to the coal and steel industry, this provision laid the foundation of the free movement of persons within what was to become the European Union. The Treaty Establishing the European Economic Community (1957) elaborates on the free movement of workers and extends it to the right to

1 Treaty on the European Union, Article 3 (3).
2 Treaty on the Functioning of the European Union, Article 26 (2).
3 Treaty Establishing the Coal and Steel Community, Article 69 (1).

move in order "to accept offers of employment actually made"[4] as well as "to move about freely for this purpose within the territory of Member States"[5]. This is a substantial step forward and marks a tendency to broaden the scope of the provision, extending it not only to actually employed persons but also to ones pursuing employment. Even though there are certain derogations from this right, it is made explicitly clear that all "discrimination based on nationality between workers of the Member States, as regards employment, remuneration and other working conditions"[6] shall be abolished. For the achievement of these purposes a number of secondary legislative acts were adopted, the most significant being Council Regulation (EEC) 1612/68 (adopted on 15 October 1968) and Council Directive 68/360 (adopted on 15 October 1968). These acts are of pivotal importance, especially Regulation 1612/68, which prohibits any EU national to "be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work"[7]. These legislative acts will be analyzed with more details further.

By the time the Single European Act was signed in 1987, the rights to free movement had been extended to self-employed persons. However, the status of posted workers who temporarily held a position in another member state was significantly clarified later by the Council Directive 96/71 of 16 December 1996.[8]

After the coming into force of the Single European Act in 1987, an area without boundaries was officially announced and this was a significant step forward in the development of the fundamental freedoms. The pivotal change brought about by the Treaty of Maastricht (1992) was the creation of EU citizenship, which encompassed the right to move and reside freely within the

4 Treaty Establishing the European Economic Community, Article 48 (3) a.
5 Treaty Establishing the European Economic Community, Article 48 (3) b.
6 Ibid, Article 48 (2).
7 Regulation (EEC) 1612/68, Article 7 (1).
8 Baldoni, Emiliana, "The Free Movement of Persons in the European Union: A Legal-historical Overview", PIONEUR Working Paper, No. 2, Florence: 2003. Online at: http://www.obets.ua.es/pioneur/bajaarchivo_public.php?iden=40.

Internet resources, last date of access: November 2012.

EU. The amended Article 6, contained in the Treaty of Amsterdam (1997), reaffirms the respect for human rights and fundamental freedoms. What is more, a procedure is envisaged in case a member state infringes the founding principles of the Union, so that the protection is observed. The Treaty of Nice (2001) enhanced the protection through the addition of a prevention mechanism. The provisions refer to the "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law"[9]. Despite the fact that this article does not specifically refer to free movement of persons, we could extend the scope of protection to include it as well.

The Treaty of Lisbon did not introduce dramatic changes with regard to the fundamental freedoms. The free movement of goods is regulated by Articles 28 through 37 of the TFEU, free movement of persons – by Articles 48-54, freedom to provide services – Articles 56-62, and free movement of capital – Articles 63-66. The regime itself has not been changed.

The specific provision relating to the free movement of persons within the EU is Article 45 of the TFEU. It stipulates that all discrimination on grounds of nationality regarding employment, remuneration and other conditions of employment shall be abolished. The secondary act corresponding to this primary law provision is Regulation (EEC) 1612/68. Due to the numerous amendments made to this regulation, it was codified in 2011"in the interests of clarity and rationality"[10] by Regulation (EU) 492/2011. It lays down in detail the concrete rights that the free movement of workers confers to individuals.

Section I of the Regulation stipulates the right of EU citizens to undertake employment anywhere within the EU, to receive the same assistance as the country's nationals when seeking employment and their equality with regard to the entry requirements which apply to them and a country's own nationals.

9 Treaty of Amsterdam, Article 6.

10 Regulation (EU) of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (codification).

Section II of the Regulation deals with the right of workers from other member states to be treated in the same way as citizens of the host member state with regard to the conditions of employment, membership in trade unions, rights and benefits concerning social security and housing, including the right to claim housing assistance.

However, at the time of signing the accession treaties, the legislative act in force was Regulation (EEC) 1612/68. For this reason I will refer to it when discussing the transitional arrangements despite its subsequent codification by Regulation (EU) 492/2011.

The provisions regulating the fundamental freedoms are directly applicable and refer to citizens of the EU member states. They require a transboundary element to be evoked and can be defended in front of the Court of Justice of the EU.

The Court of Justice of the EU (or also Court of Justice in preceding stages of its development) has played a vital role in the enhancement of the fundamental freedoms. Its judgments have persistently extended their scope and confined the grounds for limitations. Following amendments made in the Treaty of Amsterdam, the Court was empowered to decide whether an institution had committed a violation.[11] In the subsequent development of the EU, the CJEU has continued to take a restrictive stance on the limitation of fundamental rights and freedoms of EU citizens and to give them a broad interpretation.

11 European Commission, Fundamental rights and non-discrimination, 2011. Online at: http://europa.eu/legislation_summaries/institutional_affairs/treaties/amsterdam_treaty/a10000_en.htm.

2. Transitional Arrangements as Derogation from the Free Movement of Persons

2.1. Nature of the Transitional Arrangements

The free movement of persons can be subdivided depending on whether we refer to natural or legal persons. Here only the free movement of workers will be examined as part of the more general fundamental freedom of movement of persons. Following the case law of the Court of Justice, a worker is a person who is engaged on a permanent basis, who is subject to orders and receives remuneration for their labor.

As stated in the previous part, the Court of Justice of the EU has adopted a narrow approach towards any restriction of the fundamental freedoms. This certainly applies to the free movement of workers. However, there are arrangements which make it legally possible for member states to impose restrictions on the free movement of workers over a period of time. These are the transitional arrangements, which apply to newly acceded member states. In some cases they also extend to the freedom to provide services however their general application regards the free movement of workers from new to old member states.

Transitional arrangements were first introduced during the Mediterranean enlargement of the EU in the 1980s, Greece joined the EU in 1981 and Spain and Portugal followed in 1986. Due to the geographical proximity and large differences in wage levels, old member states feared a massive influx of migrants to their labor markets. Even though these fears proved unjustified, the transitional arrangements were reapplied in the 2004 enlargement of the EU and later on in the 2007 enlargement. They allow for a limited derogation from the principle of free movement of workers for a maximum of seven years. This period is divided into three phases, during which the restrictions diminish in scope and it becomes increasingly more difficult for member states to justify them. The so-called “2+3+2” formula determines the length of application of the varying regimes.

During the first two years after accession, member states apply national measures to new members which results in “legally different regimes for

access to the labor markets"[12]. During this stage some member states have opened their labor markets completely (e.g. Sweden for both waves of enlargement), or have introduced stringent restrictions (e.g. Austria, Denmark, Belgium and France for both waves of enlargement).

The second phase of the transition period is essentially an extension of the first for member states that notify the Commission before the first stage has expired. In case they fail to do so, all restrictions drop off and EU law on free movement of workers fully applies.

The end of the second phase is in principle the end of transitional arrangements. However, it is envisaged that member states which maintain restrictions in force during the second phase and which experience or expect serious disturbances on their labor markets, may prolong the restrictions for an additional and final two-year period. Prior to doing so, they need to notify the Commission.

The seven-year period for member states which acceded in 2004 expired on 30 April 2011. The seven-year period which is running for Bulgaria and Romania will expire on 31 December 2013. Below I will examine in detail the specificities which apply to the countries of the two enlargements, compare them and examine the reasons behind them.

It is important to note that every country applying restrictions towards new member states can decide to remove them at any time after the expiration of the initial period of two years. Further, any country which has removed the restrictions towards the free movement of workers can apply the so called "safeguard clause" to member states during the transitional period in "urgent and exceptional cases"[13]. In August 2011 Spain became the first state to rely on this clause and reintroduced restrictions towards Romanian workers, after having liberalized access to its labor market in 2009. I am going to look into the specificities of this case in Part 5.

12 European Commission, Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty (period 1 May 2004–30 April 2006), Brussels, 2006.

13 Act of Accession of Romania, Annex VII Part 1, Paragraph 7, third Subparagraph, 2005.

However, there are certain restrictions on the application of transitional arrangements. First of all, they only refer to workers within the meaning of Article 45 of the TFEU. They do not apply to self-employed people and posted workers. Furthermore, they only concern *access* to the labor market – once a person is legally employed, there can be no discrimination with regard to the conditions of employment. This refers to remuneration, working conditions, social and tax advantages. Last but not least, even when transitional arrangements are in force, the citizens of EU member states to which they refer, should be preferred for employment over third-country nationals coming from outside the EU.

These conditions guarantee that the barrier of the transitional arrangements aims to solely restrict access to the labor markets of certain member states. Once the barrier is passed, no differentiation whatsoever on the grounds of nationality is permitted.

2.2. Reasons for the Implementation of Transitional Arrangements

There are essentially two types of reasons for the introduction of transitional arrangements. On the one hand, there are economic considerations related to the free movement of production factors and their impact on the economy of the countries and the welfare of their citizens. On the other hand, there is the public fear that this might have an overly negative effect on nationals of the member states towards which the production factors (here - labor) move. Popular fears have become a political justification for the introduction of transitional arrangements. Supported or suggested for economic reasons, politicians have often preferred to opt for more stringent and popularly more acceptable policies, thus imposing restrictions on the free movement of workers from new member states.

The economic grounds relate to factor market integration which occurs once all obstacles to the free movement of production factors are removed. This can be seen if we take the example of two countries which have different labor forces and different marginal products of labor, which is the "increase in output due to a small increase in the amount of labor used"[14]. We presume

14 Hagen von, Jürgen, "Class notes", Bonn, 2010.

that old member states are Country A, which have higher marginal product of labor (and thus higher real wages) and the newly acceded member states, with a lower marginal product of labor (and real wages), are country B. We also presume that the supply of labor in Country B is more abundant than the supply of labor in Country A. When markets are opened completely, what happens is that workers from Country B migrate to Country A, attracted by the higher real wages there. The supply of labor in the destination country, Country A, increases and the real wage is driven down. The opposite happens in Country B, the country from which workers migrate. There, the supply of labor decreases and therefore the real wages soar. This process continues until the establishment of equilibrium, i.e. when the real wage in Country A equals the real wage in Country B.

All in all, this process leads to higher combined output of the two economies and the redistribution of income and capital between them. It is considered that while this process is profitable for workers and capital owners in the country of migration, Country B, it is to the disadvantage of workers and capital owners of the destination country, Country A.

However, this scenario would develop differently if capital market integration takes place *before* labor market integration is allowed for. If this happens, investments cause the economy of Country B to modernize and increase its efficiency. Thus, there is a fairly high likelihood that real wages in both economies equalize before the labor markets integrate. This will remove the stimulus for workers from Country B to migrate to Country A and will prevent unwanted redistribution effects that this movement would inflict upon Country A. Thus, if migration from Country B is restricted for a certain period of time, capital market integration will have time to take effect and prevent unwanted high levels of migration from new to old member states.

This is the economic justification for the imposition of transitional arrangements. Relying on this economic model, old member states feared that if labor markets are integrated right away, this may lead to uncontrolled waves of migration from new member states. As seen above, this would have had undesired results on the real wages and workers in old member states. Thus a Transitional period was arranged, during which capital market

integration had time to take effect and remove the incentives for workers to move from new to old member states.

The second justification for the establishment of the transitional arrangements was public opinion which shaped political opinion. Stemming from the reasons listed above, the citizens of the old member states had considerable fears that the accession of new and poorer member countries would lead to mass migration to the old member states, which would negatively affect their income and employment situation. These concerns were aggravated by the large number of countries that were to join in 2004, an unprecedented 10 new member states. Clearly, public opinion is a strong driver of political action. The politicians of the old member states could not afford to ignore the opinion of their voters and this is the second reason why the transitional period was established.

These are the grounds from which transitional arrangements stem. Whether their economic justification was convincing or whether public fears where well grounded will be examined in the following sections.

3. The Experience of Applying Transitional Arrangements

3.1. First Application of Transitional Arrangements – the Mediterranean Enlargement

Transitional arrangements as such, were first applied towards countries which joined the EU in the 1980s. Greece, Spain and Portugal were the first countries subjected to restrictions to the free movement of workers. However, there are some crucial differences between the context of application of restrictions towards them and the context in which the free movement of workers is restricted for states of the 2004 and 2007 enlargements. First of all, the concept of EU citizenship was not fully developed at the time of the Mediterranean enlargement. Second of all, the project of the internal market was far from completed and the free movement of workers is a cornerstone of the internal market. Both factors "increase the political significance of not extending the right of free movement of labor to the east European

societies"[15]. Of more importance was that when considering the application of restrictive regimes towards the 2004 and 2007 enlargements, old member states already had the experience of the previous enlargements which had disproved fears of large migration flows. At the time of accession, all countries of the Mediterranean enlargement had significantly lower wages in comparison with the rest of the EU and experienced high levels of unemployment. Despite these facts, the expectations of a large influx of migrants towards old member states was not fulfilled and as the Commission concluded in 2001, Spain and Portugal actually experienced net immigration.[16]

3.2. The Experience of the 2004 Enlargement

3.2.1. Predictions of Migration Flows Prior to Enlargement

In spite of the experience of the Mediterranean enlargement which had proven concerns to be unjustified, the 2004 enlargement posed additional challenges. It involved the accession of an unprecedented number of countries, some of which were ex-communist and all of them with significantly lower living standards and real wages than the rest of the EU. This revived fears that mass migration to the "richer West" would occur after accession. A debate was triggered and a number of studies were produced aiming to predict the developments following enlargement. It is important to note that despite their abundance, the studies failed to reach a single unambiguous conclusion. This is due to their different methodologies and whether they focus on migration as such (including economically inactive actors such as students and pensioners), or limit themselves to workers. The two basic types of methodology are surveys and quantitative models. Surveys record intentions and desires and thus fail to depict actual movements. Model-based studies rely on a number of assumptions and determining factors, which again results in a high level of

15 Bohle, Dorothee and Dóra Husz, "Whose Europe Is It? Interest group action in accession negotiations: the cases of competition policy and labor migration", L'HarmattanPolitique européenne, Vol. 15, Paris, 2005: 85-112.
Online at: http://www.cairn.info/revue-politique-europeenne-2005-1-page-85.htm.

16 European Commission, Information note, The Free Movement of Workers in the Context of Enlargement, Brussels, 2001.

uncertainty.[17] The differences are illustrated by Table 1 of the publication and show the variation of predictions. Due to space limitations, I will not go into the details of each particular study, but will instead summarize their main findings and the trends they outline.

The majority of researchers predict relatively modest numbers of workers from new member states migrating to old member states, if the free movement of workers is fully allowed. These researchers predict an initial sharp migration flow, which will decline over time. However, even in the initial period of higher migration, the numbers of work migrants is projected to be well under the absorption capacity of the host countries.

A representative study for this type of conclusion is the study conducted by Tito Boeri and Herbert Brücker, "Eastern Enlargement and EU-Labor Markets: Perceptions, Challenges and Opportunities"[18]. They use the standard Heckscher-Ohlin-Samuelson (HOS) model to build their predictions about the impact of enlargement on employment and wages in the European Union. They also examine the channels through which labor markets can be affected, namely trade, foreign direct investment and migration. For the purposes of this paper, I will only outline their findings regarding migration.

The researchers concluded that levels of migration depend on factors such as differences in per capita income and employment rates in the sending and destination countries. According to their estimations, the number of citizens of the Central and East European Countries (CEEC) residing in the EU may increase from 0.85 to 3.9 million after the enlargement, as about one third of migrants are expected to be employees. These figures correspond to about 4% of the population of CEEC and 1% of the population of the old member states. Even though the authors concluded that the migration flows would not be negligible, they also admit that they would not be as large as feared. Another important conclusion concerns the unequal distribution of migration, i.e. some member states are more likely to receive migrant workers than

17 Ibid.

18 Boeri, Tito and Herbert Brücker, "Eastern Enlargement and EU-Labor Markets: Perceptions, Challenges and Opportunities", World Economics, Vol. 2, No. 1, 2001. Online at: http://www.eabcn.org/research/documents/boeri_brucker.pdf.

others. This particularly refers to Germany and Austria, which absorbed about 80% of the overall migration from CEEC prior to accession and which were the strongest proponents of transitional arrangements. However, it should be stressed once again that "the impact of migration on the labor market performance of natives is much smaller than widely believed"[19].

The overall conclusion is that despite being larger, in comparison with previous enlargements, migration following the accession of CEEC would not have the disastrous effects public opinion predicted. On the contrary, due to the aging population of Europe, migration is needed in order to preserve a sustainable ratio between workers and dependents.[20] Therefore, in the long term migration should actually be encouraged instead of restricted.

Other studies come to similar conclusions, that there would be negligible negative effects on the host countries in terms of wage dumping and unemployment. Despite a general conclusion that enlargement is a win-win game, some researchers have suggested that any negative effects will be borne by the sending country and the blue-collar workers in the receiving country. An example for this is the study of Hubertus Hille and Thomas Straubhaar "The Impact of the EU-Enlargement on Migration Movements and Economic Integration: Results of Recent Studies"[21]. It applies the method of extrapolation and uses the findings following the Mediterranean enlargement for its estimations. As a result, the authors conclude that the expected effects of the Eastern enlargement are far from the catastrophic fears of public opinion. These conclusions are supported by the research paper of Fritz Breuss "Macroeconomic effects of EU enlargement for old and new

19 Ibid.

20 Replacement Migration: Is It a Solution to Declining and Ageing Populations?, United Nations, Population Division, New York, 2001.
Online at: http://www.un.org/esa/population/publications/ReplMigED/Cover.pdf.

21 Hille, Hubertus and Thomas Straubhaar, "The Impact of the EU-Enlargement on Migration Movements and Economic Integration: Results of Recent Studies", in: Migration Policies and EU Enlargement: The Case of Central and Eastern Europe: OECD, 2001: 79-100.
Online at: http://www.oecd-ilibrary.org/docserver/download/fulltext/8101041e.pdf?expires=1344926046&id=id&accname=ocid53021578&checksum=BB729753B80C2E69AB4983A0A18F49FC.

members"[22]. On the basis of the developed simulations, the author concludes that for both the EU and the CEEC, the "EU enlargement is a win-win situation"[23]. Despite the varying distribution of benefits, it is clearly a situation with no outright losers.

These conclusions are furthered by a number of other studies and despite variations in the models and the details of the findings, they clearly ascertain that the opening of the labor markets of the old member states for the new ones does not have dramatic negative consequences for any of the parties.

3.2.2. Transitional Arrangements in the Accession Treaty

Despite the evidence given above, that there is no actual ground for concern regarding a massive inflow of labor migrants, a political decision was taken to introduce restrictive regimes. Its biggest proponents were Germany and Austria, which absorbed the highest levels of migration prior to enlargement and felt that a transitional regime would make the Eastern enlargement publicly more acceptable. As a result of that, there were clauses in the accession treaties of the Central and East European countries, regulating the transitional arrangements.

The transitional arrangements constitute derogation from fundamental freedoms and are laid down in the accession treaties of the new member states. The legal basis in the Treaty of Accession 2003 is found in Part Four Temporary Provisions, Title I Transitional Measures. Article 24 stipulates that: "The measures listed in Annexes V, VI, VII, VIII, IX, X, XI, XII, XIII and XIV to this Act shall apply in respect of the new Member States under the conditions laid down in those Annexes."[24] The transitional arrangements

22 Breuss, Fritz, "Macroeconomic effects of EU enlargement for old and new members", WIFO Working papers, No. 143, 2001.
Online at: http://fritz.breuss.wifo.ac.at/Breuss.PDF.

23 Ibid.

24 Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, Article 24, Official Journal of the European Union, 23 September 2003.

applied to all new member states except Malta and Cyprus, which due to their specific geographical endowments were not perceived as potential sources of huge labor migration. The specifics of the arrangements applying to member states are laid down in detail in country-specific annexes.

Even though there are certain variations among the annexes applying to different countries, the arrangements regulating the restrictions are absolutely identical. Having this in mind, I will use Annex V, referring to the Czech Republic, as a means of analyzing the restrictions contained in all of them.

The provisions regulating the transitional arrangements applying to the free movement of persons are contained in Part I of the Annex. It begins with listing the legal basis, which regulates the free movement of workers. Following, in Paragraph 2, the Annex refers to the secondary legislative act which governs the technicalities of the application of the free movement of workers. As already noted, this is Regulation (EEC) 1612/68. Its Articles 1 through 6 shall not apply for a two-year period. Instead, national measures or the ones resulting from bilateral agreements shall govern the access of new member states to the labor markets of old member states. At the end of the initial period of two years, the application of national measures can be extended for an additional period of three more years. However, this derogation does not apply to nationals of new member states who were legally employed in an old member state for an uninterrupted period of 12 or more months prior to the coming into force of the accession treaty. These nationals retain access to the labor market of the state where they were employed and are not affected by the suspension of Articles 1 through 6 of Regulation (EEC) 1612/68. However, this right is only confined to the labor market of the member state in question. It does not extend to the labor markets of other old member states. The voluntary leaving of employment by the workers automatically entails cessation of the right. Employment of less than 12 months would not provide ground for the right at all.

Paragraph 3 of Annex V regards a report which the Commission is obliged to prepare at the end of the initial two-year period. On the basis of this report, the Council shall review the functioning of the transitional arrangements. Following this revue any state that wishes to continue the application of

restrictive measures, needs to inform the Commission of their intention before the expiration of the initial two years. A failure to do so would lead to the automatic application of Articles 1 through 6 of Regulation (EEC) 1612/68 from the date after the end of the two-year period.

The newly acceded member states can also demand a further review, as stipulated by Paragraph 4 of the Annex. The Commission is then obliged to prepare a report stating the grounds for the review within six months after the receipt of the request. The procedure described above shall apply.

The application of restrictions during the third and final period of the transitional arrangements is governed by Paragraph 5, which envisages the opportunity to extend the restrictive regime for a maximum of two more years after the expiration of the initial five years. However, it is explicitly stated that this can only be done "in case of serious disturbances of its labor market or threat thereof"[25]. In order to do this, the member state wishing to extend the transitional period needs to inform the Commission beforehand. The final date until which restrictions can apply is the end of the seventh year after accession. After this date, Article 45 of the TFEU and Articles 1 through 6 of Regulation (EEC) 1612/68 shall apply in their entirety.

If old member states have already begun to apply the provisions of Articles 1 through 6 towards new member states but have a system of issuing working permits for monitoring purposes, they will continue its application automatically.

However, certain protection is envisaged for member states which open their labor markets right away or lift the restrictions earlier. If their labor markets are seriously disrupted or there is a reason to anticipate such a disruption, the member states in question can evoke the so-called "safeguard clause", contained in Paragraph 7, second sub-paragraph. The procedure for its application requires that the member state which wants to evoke it needs to supply all relevant information to the Commission and the other member states. After receiving the request and the supporting information, the Commission shall decide on the suspension of Articles 1 through 6 of

25 Annex V, Paragraph 5 (1).

Regulation (EEC) 1612/68 by the requesting member state with regard to the new members. Only urgent cases justify the suspension of these articles before the notification and decision of the Commission. It is interesting to note that the safeguard clause can be activated both by old towards new member states and among new member states themselves. This means if a country from the 2004 enlargement experiences or foresees disruptions on its labor market, caused by another country from the 2004 enlargement, it can evoke the safeguard clause with regard to it.

The further paragraphs of the Annex refer to the right of the family members of the worker to have access to the labor market of the receiving country under certain conditions (Paragraph 8). It is envisaged that the new member states, which are in a transitional period, may apply the restrictions reciprocally towards the old member states.

It is essential to note that according to Paragraph 12 of the Annex, any member state may decide to apply "greater freedom of movement than that existing at the date of accession, including full labor market access"[26]. In case such a decision is not taken at the date of accession, member states may decide to liberalize access to their labor market at any time after the second year of accession.

At the special insistence of Germany and Austria, a list of sensitive areas in which the freedom to provide services may be restricted is included in all annexes to the Accession treaty of 2003. Derogation from the free provision of services is again preceded by notification of the Commission and member states to which it applies can respond with reciprocal measures. Importantly, the measures achieved as a result of these restrictions can by no means be more stringent than the ones applying on the date of accession of the new member states. This clause, also known as the "standstill clause" will be analyzed in detail in Section 4.

The second subparagraph of Paragraph 14 states that even in the case when transitional arrangements apply with regard to a certain member state, its workers should be given preference to workers from outside the EU. Workers

26 Annex V, Paragraph 12 (1).

and their families which legally reside and work in another member state should be given at least the same treatment as third-country nationals residing in the same country.

These provisions regulate in detail the application of the transitional arrangements towards new member countries. Several important conclusions can be made. First of all, the division of the transitional period into phases gives the opportunity of member states to change the regimes in force with regard to the conditions on their labor markets. The changes can be in both directions, meaning that they can liberalize the access or rely on the safeguard clause in order to reintroduce restrictions. The safeguard clause is a valid option both for old and new member states. Secondly, the new member states have the opportunity to apply reciprocal measures towards the member states which are restricting access to their labor markets. Even though the practical effect of reciprocal treatment is doubtful, it gives a sense of justice for the countries in transitional periods. Thirdly, the family members of legally employed workers also enjoy the right to access the labor markets of the host state. Last but not least, it is important that even in the event of activation of the safeguard clause, workers cannot be treated in a stricter way in comparison with the initial period of the transitional arrangements. This is essential in order to avoid the possibility of applying excessively stringent restrictions to new member states at later stages of the transition period.

3.2.3. Fears and Reality – Were the Initial Concerns Justified

After a detailed analysis of the transitional arrangements, it is necessary to examine their effect in practice and compare it to the initial predictions and fears. The most encompassing sources of relevant information are the reports prepared by the Commission at the end of the first stage of the transitional period.

The Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty was issued on 8.2.2006. It studies the period from 1 May 2004 to 30 April 2006. On the basis of national statistical data, the Commission concluded that “mobility flows between the EU-10 and the EU-15 are very limited and are simply not large enough to affect the EU labor

market in general"[27]. Moreover, there was no drastic increase in the percentage of EU-10 citizens as a part of the EU-15 population before and after enlargement. The only exceptions to this general conclusion were the UK, Ireland and Austria. However in Austria, the number of labor migrants stabilized in 2005. The report goes on to outline that no direct link was found between the transitional arrangements in place and the migration flows. Following a detailed discussion of the various determinants of migration, the Commission stated that factors related to the supply and demand of labor are much more important to labor mobility than transitional arrangements.

The report addressed the fears of old member states prior to enlargement, that the full liberalization of their labor markets may have strong negative effects. The empirical evidence demonstrated that there was no negative effect on the labor markets – on the contrary, several positive effects were observed. First of all, the EU-10 nationals included in the labor force contributed to the better overall performance of the host countries. Enlargement helped formalize the underground economy and thus improved the public finances of receiving countries. Instead of substituting, workers from the EU-10 complemented workers of the host country, thus dispelling the fears that national workers would be left unemployed due to an influx of foreigners. Last but not least, workers of EU-10 have helped to alleviated skill bottlenecks and "contribute to long-term growth through human capital accumulation"[28].

On the whole, the Report shows that fears associated with the liberalization of the labor markets were largely unjustified. Furthermore, the limited migration flows from new to old member states was found to have largely positive effects on the latter. On this basis, the Commission "recommends that the Member States carefully consider whether the continuation of these restrictions is needed, in the light of the situation of their labor market and of the evidence of this report"[29].

27 European Commission, Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty (period 1 May-30 April 2006), Brussels. 2006.
28 Ibid.
29 Ibid.

Following the publication of the report, several member states liberalized their regimes applying to EU-10 nationals. In 2006, labor markets were opened in Greece, Spain, Portugal, Finland and Italy. In 2007 Luxembourg and the Netherlands followed and in 2008 France removed all restrictions.

Two years after this report, several member states availed themselves of a right conferred to them by Paragraph 4 of Part I of the Annexes V, VI, VIII, IX, X, XII, XIII and XIV. This provision gives member states, to which transitional arrangements apply the right to request the Commission to prepare a further report and the Council to perform another review. The report was issued on 18.11.2008 and once again confirmed that serious disruptions on the labor markets caused by EU-10 nationals was highly unlikely. What is more, evidence showed that migration had already peaked and that further increases were not expected. The Commission stated again its earlier finding that the migration flows are rather driven by labor demand and supply than by the restrictive regimes in place. More importantly the preservation of these regimes can actually be harmful to the member states imposing them, as it may delay necessary labor market adjustments. The final conclusion of the Commission was that "the overall impact of post-enlargement mobility has been positive"[30]. Recalling that the free movement of workers is one of the fundamental freedoms under the EC Treaty and considering the political significance of the removal of restrictions, the Commission recommended that member states "consider whether they need to continue applying restrictions"[31]. Even the serious economic situation, in which the report was prepared, in the view of the Commission, was not a serious reason to maintain restrictions. It simply made reference to the safeguard clause and reminded member states that they can rely on it until the end of the seven-year period following enlargement.

In 2009 two more member states – Belgium and Denmark – ended the restrictions applying to member states from the 2004 enlargement. Hungary,

30 European Commission, Report on the first phase (1 January 2007-31 December 2008) of the Transitional Arrangements set out in the 2005 Accession Treaty and as requested according to the Transitional Arrangement set out in the 2003 Accession Treaty, Brussels, 2008.

31 Ibid.

which was applying reciprocal measures, also removed the restrictions. In this way, only two member states – Germany and Austria – continued to apply restrictions until the end of the seven-year period, which expired on 31 April 2011. Since then, all member states which joined the EU in 2004 have enjoyed full free movement for their workers within the territory of the whole EU without restrictions.

3.3. The Experience of the 2007 Enlargement

3.3.1. Predictions of Migration Flows Prior to Enlargement

Similarly to the 2004 enlargement, prior to the 2007 enlargement there were numerous studies on prospective migration trends. The methodology used varies widely, starting from extrapolation of the trends observed in previous enlargement waves and stretching to research into the desires of people to move and the practical steps taken in that direction. However, to summarize the various studies into two broad categories, they would be research into the migration trends of Bulgaria and Romania as part of the broad scope of Central and East European Countries, and individual country studies. The research of both types reveals different aspects of the migration projections, which is why I will look into the details of both categories.

Initially, with the research of possible migration flows in the 1990s, there was some uncertainty about the particular countries which were going to be included in the first accession wave. For that reason, some of the researchers took a broader stance and researched the countries in the whole region of Central and East Europe. What is more, although far from homogeneous, those countries exhibited some common trends. Depending on the methodology used, researchers predicted migration amounting to between 2% and 5% of the population of the new member states in the long run.[32] Within this range, Boeri et. al. (2007) predicted that the highest levels of migration

32 Boeri, Tito/Brücker, Herbert/Iara Anna, et. al., "Labor mobility within the EU in the context of enlargement and the functioning of the transitional arrangements", European Integration Consortium, Nürnberg, 2009.
Online at: ec.europa.eu/social/BlobServlet?docId=2509&langId=en.

were expected from Romania, Bulgaria and Poland.[33] However, there were some extreme predictions for migration flows of up to 7% of the population[34], but they were rather the exception, not the rule.

The studies pointed out that there were various pull and push factors relevant to migration, such as differences in living standards, wages, chances for employment, etc. It was difficult to give an accurate estimation of the migration flows because there was no record of free movement between East and West after the Second World War, having in mind the decade-long separation of the continent by the Iron curtain.[35] Moreover, all estimations relied on a wide range of assumptions, which contributed to the high degree of uncertainty they exhibited. Last but not least, even when researchers relied on direct interviews of citizens from member states, the difference between intentions and actual migration should be kept in mind.

The second group of studies, those which looked into specific countries, could give more accurate information as to the migration flows to be expected after the 2007 enlargement. Attempts to project migration from Bulgaria and Romania began as early as 1992. Layard et al. used the migration waves from previous enlargements for their estimations. The figure which they arrived at was 49 000 short-term migrants (from a few weeks to a few years) from Bulgaria and 131 000 from Romania.[36] Even though they estimated these numbers as negligible compared to the total population, we should say that Bulgaria, Romania and Poland were the countries from which the highest

33 Boeri, Tito and Herbert Brücker, "Eastern Enlargement and EU-Labor Markets: Perceptions, Challenges and Opportunities", IZA Discussion Paper, No. 256, Bonn, 2001. Online at: http://ssrn.com/abstract=265635.

34 Flaig, Gebhard, „Die Abschätzung der Migrationspotenziale der osteuropäischen EU Beitrittsländer", in: Beiheft der Konjunkturpolitik/Applied Economics Quarterly Supplement, No. 52, Ifo Institute for Economic Research, München, 2001: 55-76. Sinn, Hans-Werner/Werding, Martin, „Immigration Following EU Eastern Enlargement", in: Chang Woon Nam (Hrsg.), CESifo Forum, Vol. 2, No. 2, 2001: 40-47.

35 Kahanec Martin and Klaus Zimmermann, "Migration in an enlarged EU: A challenging solution?", European Commission, Economic Papers 363, Brussels: 2009.

36 Blanchard, Olivier/Dornbusch, Rüdiger/Krugman, Paul/Layard, Richard/Summers, Lawrence, "Reforms in Eastern Europe", Cambridge MA, MIT Press, 1992.

numbers of migrants were expected. Bauer and Zimmermann (1999)[37] quoted a study by the International Organization for Labor, which ranked Bulgaria and Romania among the top seven countries in Central and East Europe whose citizens had stated that it was "very likely" or "likely" they would go and work abroad after their countries joined the EU. As already noted, the difference between intentions and actual migration should be taken into account. However, the same study revealed that Bulgaria and Romania were again in the top seven countries whose citizens had taken actual steps in preparation to migrate (e.g. language courses, application for jobs). This meant that not only did people intend to work abroad, but they also took practical steps in that direction. This was a reason to expect that the flows of work migrants from Bulgaria and Romania would be among the highest in the region.

A comprehensive volume "Labor mobility within the EU in the context of enlargement and the functioning of the transitional arrangements" (2007) featured country studies of 15 old and new member states, among which were Bulgaria and Romania. The studies examined the labor market in each country, the economic background, stock and characteristics of potential migrants. The Bulgarian study stated that after the fall of communism in 1989, between 500 000 and 700 000 people had left the country.[38] However, there was a tendency for a decrease in the number of people wishing to work abroad between 2001 and 2006 – according to the National Migration and Integration Strategy, the intentions for long-term migration had declined by about 50%. At the same time, the potential for short-term immigration was still relatively high at 12.1%. The research for Romania suggested that there was a strong tendency for increase of migration flows after 1990. A quoted OSCD study estimated that the annual inflow of Romanian nationals in the

37 Bauer, Tomas and Klaus Zimmermann, "Assessment of Possible Migration Pressure and its Labor Market Impact Following EU Enlargement to Central and Eastern Europe", IZA Research Report, No. 3, 1999. Online at: http://www.iza.org/en/webcontent/publications/reports/report_pdfs/iza_report_03.pdf.

38 Beleva, Iskra, Country Study: Bulgaria. Labour mobility within the EU in the context of enlargement and the functioning of the transitional arrangements, Deliverable 8, European Integration Consortium, Institute of Economics with the Bulgarian Academy of Sciences, 2007. Online at: http://doku.iab.de/grauepap/2009/LM_BG.pdf.

OSCD countries had been steadily increasing, peaking at 202 000 in 2004. The tendency for an over-proportional increase of migrant workers was more than evident and persisted over time. More importantly, there was a clear preference for certain destination countries for Romanian migrant workers, mostly Spain and Italy. In 1999 there were 10 000 Romanians in Spain but their number surged to 192 000 by 2005.[39] This illustrates the general tendency and is especially relevant to the topic which will be discussed in Part 5.

A final study states that 17% of Bulgarians and 26.1% of Romanians intended to live and work in the EU.[40] This ranked the countries among the top potential sources of work migrants and is important to understand the attitudes towards Bulgaria and Romania on the eve of the enlargement.

This overview is especially relevant, within the context of the transitional measures, as they aim to restrict the flows of migrant workers. On the whole, Bulgaria and Romania were expected to account for significantly larger migration flows in comparison with the countries of the 2004 enlargement. This became a powerful argument during the debate about transitional arrangements. However, in order to present the discussion in its entirety, a few more aspects need to be considered. There were other important differences between the 2004 and 2007 enlargements which contributed to the increased reluctance of the old member states to allow free movement of workers from Bulgaria and Romania.

The first important difference is the larger gap in living standards and real wages between Bulgaria and Romania and the EU than the Central and East European countries and the EU. In the 2004 enlargement, the variations between the GNP per capita as a percentage of the EU-15 varied within the

39 Iara, Anna, Country Study: Romania. Labour mobility within the EU in the context of enlargement and the functioning of the transitional arrangements, Deliverable 8, European Integration Consortium, The Vienna Institute for International Economic Studies, 2007. Online at: http://doku.iab.de/grauepap/2009/LM_RO.pdf.

40 Krieger, Hubert, et. al., “Migration trends in an enlarged Europe”, Luxembourg: European Foundation for the Improvement of Living and Working Conditions, 2004.

range of 11% (Latvia) to 42% (Slovenia).[41] The gross wages and salaries were between 10% (Latvia) and 46% (Slovenia) from the EU-15 average.[42] In comparison, the GNP per capita for Bulgaria was estimated at 6% of the EU-15 average and for Romania – at 7%.[43] The gross wage in Bulgaria was 6% of the EU-15 and in Romania – 9%.[44] These huge differences meant a greater stimulus to migrate in pursuit of higher wages, which certainly was an undesired development for old member states.

The second argument to be considered is that after the 2004 enlargement, some countries, in particular the UK and Ireland, received far more migrants than expected. In combination with internal political reasons, this was an important motivation for them to consider transitional arrangements. It should not be forgotten that in 2006 a number of states removed the restrictions for countries from the 2004 enlargement. Naturally, the expected numbers of work migrants from the 2004 accession were fewer than from the 2007 one and this was an additional stimulus for old member states not to open the labor markets immediately.

Another very important motive is related to the overall situation of the acceding countries in 2007. As compared to the 2004 countries, the reforms and adjustments in Bulgaria and Romania had proceeded at a slower pace. Corruption, the inefficient functioning of the judicial system, the grey economy and the privatization of state owned assets were problems which had persisted during the whole negotiation process. They were not fully overcome before the actual accession and even now continue to be criticized by the Commission. The accession of Bulgaria and Romania is widely perceived to have been a political decision instead of recognition of the actual progress of the countries. This was a reason for older member states to be more cautious and explains their desire to erect protective barriers between themselves and the two countries despite their accession to the EU.

41 Boeri, Tito and Herbert Brücker, “Eastern Enlargement and EU-Labour Markets: Perceptions, Challenges and Opportunities”, World Economics, Vol. 2, No. 1, 2001 and IZA Discussion Paper 256. Online at: http://ssrn.com/abstract=265635.
42 Ibid.
43 Ibid.
44 Ibid.

All these aspects, in combination with economic considerations and projections for future migration flows were vital when negotiating the accession of Bulgaria and Romania. Eventually, transitional arrangements were included in the 2005 Accession treaty. In comparison with the 2004 enlargement, the UK and Ireland also imposed restrictions to access to their labor markets. What is more, many of the countries which joined in 2004 also imposed a transitional period. The formula was again "2+3+2" and the specificities of the arrangements will be analyzed below.

3.3.2. Transitional Arrangements in the Accession Treaty

The transitional arrangements applying to Bulgaria and Romania are stipulated in Annexes VI and VI to the Accession treaty.[45] The fundamental freedom of movement for workers is laid down in Article III – 133 of the Treaty establishing a Constitution for Europe and later incorporated in the Treaty of Lisbon as Article 45. The relevant secondary acts which elaborate on the details of the application of the free movement of workers are Directive 96/71/EC and Regulation (EEC) No 1612/68, later replaced by Regulation (EU) 492/2011.

Essentially, there is no difference between the transitional arrangements applying to countries from the 2004 enlargement and the transitional arrangements applying to Bulgaria and Romania. The only two variations concern the relevant treaty articles regulating the free movement of workers and the specific definition of the family of the worker given in the Annexes for Bulgaria and Romania. The regulation of the transitional period is

45 Treaty between the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union, Official Journal of the European Union, Vol. 48, 21 June 2005.

identical for the two countries. This is why for convenience I will analyze only Annex VI referring to Bulgaria as applying for both.

According to Annex VI, for a transitional period Articles 1 through 6 of Regulation (EEC) 1612/68 shall not apply. Instead, national measures or ones resulting from bilateral agreements between Bulgaria and Romania and the old member states shall apply. However, an exception is made for workers from the two new member states who were previously employed or given access to the labor markets of the EU-25 for a period longer than 12 months. Those workers shall enjoy full freedom of movement irrespective of the restrictions applying to their country of origin. This provision gives clear preference to workers who were active on a long-term basis on the labor market of an old member state. This right, however, shall be taken away if they voluntarily leave the labor market of the country where they are employed.[46]

At the end of the first two-year phase of the transitional period, the Commission shall prepare a report on the functioning of the transitional arrangements, on the basis of which the Council shall review them. Following this review, the old member states shall decide whether to extend the application of restrictions until the end of the five-year period or not. If they wish to avail themselves of this right, they need to notify the Commission before the end of the initial two-year phase and the absence of such notification shall mean that the suspended Articles 1 through 6 of Regulation (EEC) 1612/68 apply in their entirety.[47]

Bulgaria and Romania can request one further review, which follows the procedure described above.[48]

The application of the restrictive measures by an old member state can be extended for a further and final period of two years, following the expiration of the initial period of five years. However, this should be justified by

46 Paragraph 2, Annex VI.
47 Paragraph 3, Annex VI.
48 Paragraph 4, Annex VI.

"serious disturbances of the labor market of its labor market or threat thereof"[49]. This extension requires prior notification to the Commission.

If a member state applied Articles 1 through 6 of Regulation (EEC) 1612/68 during the Transitional period but still issues work permits for monitoring purposes, it can continue doing so automatically.

A member state which has already abandoned the application of transitional arrangements with regard to Bulgaria and Romania can avail itself of a mechanism to protect itself in the event of serious disturbances on its labor market, or risk of such. The "safeguard clause" is laid down in Paragraph 7, which envisages that until the end of the seven-year period and in the circumstances stated above, a member state can suspend the application of Articles 1 through 6 of Regulation (EEC) 1612/68. This can be done if it notifies the Commission and the other member states and provides them with the relevant information justifying the decision. The Commission decides on the duration and scope of the suspension. In "urgent and exceptional cases"[50] a member state can suspend the application of the articles prior to the notification of the Commission. It is important to note that the protection of the safeguard clause is not only reserved for old member states. Bulgaria and Romania can also avail themselves of it under the conditions listed in Paragraph 7.[51]

Paragraph 8 settles the issue of family members of workers from Bulgaria and Romania employed in member states which apply the transitional arrangements. It stipulates that the suspension of Articles 1 through 6 of Regulation (EEC) 1612/68 does not prevent the application of Article 23 of Directive 2004/38/EC. According to it, the family members of a union citizen who have the right to reside in a country shall also have access to the labor market of the country of residence. Despite the restrictions, the transitional arrangements apply only to the *access* of Bulgarian and Romanian nationals to the labor market. Once a person is legally employed, they cannot be

49 Paragraph 5, Annex VI.
50 Paragraph 7 (2), Annex VI.
51 Paragraph 11, Annex VI.

discriminated in any way with regard to the conditions of employment. The family members of the worker also avail themselves of these rights.

It is important to note that whenever a transitional arrangement is applied to Bulgaria and Romania, they can treat the restricting states in a reciprocal manner.[52]

Member states are free to decide whether to apply transitional arrangements or not. However, even if they do not decide to open their labor markets completely at the date of accession of new member states, they can do so at any time after the second year of membership of Bulgaria and Romania.[53]

Paragraph 13 of Annex VI contains special provisions referring to Germany and Austria and addresses their concerns about the freedom to provide services in some sensitive areas. Restrictions to this freedom require prior notification to the Commission and new member states can respond with reciprocal measures.

Despite the various restrictive regimes which can result from the transitional arrangements, none can be stricter than what was in force at the date of accession. Moreover, the nationals of these two states should be given preference in comparison with third country nationals. Bulgarian and Romanian citizens and their families shall also not be treated more restrictively than the nationals of countries outside the EU. Once having legally entered the labor market of a member state, Bulgarian and Romanian workers cannot be discriminated against with regard to the conditions of employment whatsoever.

To summarize, the goal of the transitional arrangements is to erect barriers preventing the free access of Bulgarian and Romanian nationals to the labor market of the old member states. The old member states have the opportunity to apply regimes resulting from bilateral agreements, transitional arrangements as laid down in the Annexes, or open their labor markets completely. Even if they do so, they have the opportunity to reintroduce restrictions, in case the situation on their labor markets drastically changes.

52 Paragraph 10, Annex VI.
53 Paragraph 12, Annex VI.

This is essential with a view to the issue to be discussed in Part 5. Bulgaria and Romania, on their part, are free to apply reciprocal measures towards countries which restrict their citizens. Interestingly, neither country has decided to do so. They can also apply the safeguard clause towards each other in case of necessity. Last but not least, Bulgarian and Romanian nationals should be given preference in comparison with third country nationals and once employed, should not work under conditions different from those for citizens of the host member state.

We can thus conclude that despite the fact that the transitional arrangements are restrictive towards the new member states, they give some protection in both directions, e.g. through reciprocal treatment and the two-way application of the safeguard clause. However, in reality this attempt fails to achieve fairness, as the conditions are determined by the old member states and the actions which Bulgaria and Romania can take in response to them are disproportionate.

3.3.3. Fears and Reality – Were the Initial Concerns Justified

As presented in part 3.3.1., the expectations of flows of migrant workers from Bulgaria and Romania were very diverse. This was due to the different methodologies used for the estimations and the scarcity of available data. The estimation of actual migration flows is difficult and ambiguous. The Commission states in its report of 2008 that the estimation of the number of migrants is difficult due to insufficient data and largely open borders between the member states. However, I will refer to the findings of a few reports in an attempt to give as thorough a picture of the post-accession developments as possible.

The Commission reports that the number of Bulgarian and Romanian citizens residing in the old member states rose from 690 000 at the end of 2003 to 1.8 million at the end of 2007. This was an increase from 0.2% of the population of EU-15 to 0.5%.[54] Both countries exhibited high mobility rates, amounting

54 European Commission, Report on the first phase (1 January 2007-31 December 2008) of the Transitional Arrangements set out in the 2005 Accession Treaty and as requested according to the Transitional Arrangement set out in the 2003 Accession Treaty, Brussels, 2008.

to 1.7% of the working age population of Bulgaria and 2.5% of the Romanian working age population.[55] This ranks among the highest mobility rates demonstrated by new member states. Similarly, as in the 2004 enlargement, migration is not evenly distributed within the EU. However, in contrast, the main destination countries for Bulgarian and Romanian citizens are Spain and Italy. Greece ranks third for Bulgarian workers, followed by Germany. This tendency began well before accession and continued afterwards. Brücker[56] reports 360 000 migrants from Bulgaria and Romania went to Spain between 2000 and 2005, which he describes as "striking". Kahanec and Zimmermann[57] also conclude that the enlargement had a serious impact on migration from new to old member states.

However, despite the different estimations of post-enlargement migration, all researchers conclude that it is negligible when measured as part of the population of the EU-25. What is more, the Commission states that there is only a modest chance that the number of migrant workers increases in the future. According to its estimations, due to agreements signed before the accession of Bulgaria and Romania, the flows have already peaked.

Apart from the absolute numbers of the work migrants, it is crucial to analyze their impact on the labor markets and the economy of the host countries as a whole. Here all researchers are unequivocal that migrant workers have largely had a positive impact on the destination countries. This effect has been manifested through an increase in the GDP of the receiving countries. The Commission notes that as a result of the enhanced mobility following the 2007 enlargement, the GDP of the enlarged EU increased with 0.5% in the short term and 0.27% in the long term.[58] The effect on unemployment is also

55 Ibid.

56 Brücker, Herbert, "Labor Mobility After the European Union's Eastern Enlargement: Who Wins, Who Loses?", The German Marshall Fund of the United States, Washington: 2007.

57 Kahanec, Martin and Klaus Zimmermann, "Migration in an enlarged EU: A challenging solution?", European Commission, Economic Papers 363, Brussels: 2009.

58 European Commission, Report on the first phase (1 January 2007-31 December 2008) of the Transitional Arrangements set out in the 2005 Accession Treaty and as requested according to the Transitional Arrangement set out in the 2003 Accession Treaty, Brussels: 2008.

reported to be minor and negligible, as well as the impact on the welfare systems of the receiving countries. One of the major concerns of the old member states, that they would get huge inflows of welfare tourists, was also not justified. Moreover, the employment rates of migrant and domestic workers were found to converge, as their labor was more complementary than substitutive. All these findings reveal that despite a larger numbers of work migrants, the labor markets of the receiving states were not disrupted, but on the contrary, that these inflows had largely positive effects for their economies.

A further issue which needs to be addressed is what is the relationship between the large numbers of work migrants and the transitional arrangements? Why is it that despite the transitional arrangements there is a larger-than-expected influx? The answer is twofold. On the one hand, long before the accession of Bulgaria and Romania, their citizens were free to work in old member states on the basis of bilateral agreements (e.g. Spain). To a large extent this explains the substantial migration waves prior to enlargement. On the other hand, labor migration is driven by factors other than restrictions imposed by the transitional arrangements, namely the general demand and supply of labor. The Commission also states this in its report and concludes that the labor markets are able to regulate themselves and that the demand for labor would decrease in the downturn of the business cycle, as an answer to the concerns of some member states that they would receive a high influx in difficult economic times.

To this end, the effect of the transitional arrangements is doubtful. Due to bilateral agreements, various pull factors and special clauses for certain types of workers, they do not manage to significantly restrict migration flows. Member states themselves create special categories of migrants in order to circumvent the limitations they have imposed, an example of these are British “blue cards”. In this way old member states “pick and choose” only certain kinds of work migrants. At the same time, the mere existence of transitional arrangements clearly limits one of the fundamental freedoms of the European Union and thus creates a “second class” Union citizenship. This is an issue with legal, political and symbolic significance which needs to be addressed. This is especially relevant now that the concept of Union citizenship is fully

developed and the Charter of Fundamental Rights is an integral part of the Treaty of Lisbon.

4. The Standstill Clause and its Functioning in Practice – the Case of the Netherlands

The standstill clause is a protective mechanism for new member states guaranteeing them treatment at least equal to that in force at the date of accession and by no means stricter. The standstill clause however can also be used in the reverse way. This occurs when a more liberal regime is replaced by a stricter one until it reaches the minimum guaranteed by the standstill clause. This does not violate the provisions of the accession treaties as it does not go below the set minimum. However, in practice it gives old member states the opportunity to limit the fundamental freedoms of new member states to the standard in force at the date of signing the accession treaties, i.e. prior to accession. In this way the new members of the European Union can be deprived even of already restricted freedoms, thus removing a significant aspect of EU membership.

The standstill clause for Bulgaria and Romania is stipulated in Paragraph 14 of Annexes VI and VII to the Accession treaty of 2005.

In April 2011 a situation as the one described above was created. On 12 April 2011 the Netherlands announced their intention to start issuing work permits to Bulgarian and Romanian citizens only in "exceptional cases"[59], thus reversing the regime back to its state at the moment of signing of the Accession treaty in 2005. The measure was announced by the Social Affairs Minister Henk Kamp and supported by the Dutch government. Despite the controversial welcome it received, the decision entered into force on 1 July 2011. Since then, no work permits have been issued to Bulgarian or Romanian citizens.

59 EurActiv, "Netherlands curbs Bulgarian, Romanian workers", Brussels, 2011. Online at: http://www.euractiv.com/enlargement/netherlands-curbs-bulgarian-romanian-workers-news-504028?utm_source=EurActiv%20Newsletter&utm_Campaign=cb5bca8c3b-my_google_analytics_key&utm_medium=email.

Until the change, the access of Bulgarians and Romanians to the Dutch labor market was already restricted as workers from these countries were subject to the obligatory acquisition of a work permit prior to employment. This was the system of the transitional arrangements which the Netherlands applied to Bulgaria and Romania. The introduced changes effectively excluded Bulgarian and Romanian workers from the Dutch labor market and put them on an equal footing with third country nationals. While the restoration of the regime in force at the date of accession does not contradict the provisions of the Accession treaty, the lack of preference for Bulgarian and Romanian workers clearly contradicts the second subparagraph of Annexes VI and VII, which requires that the nationals of the countries in a transitional period receive preferential treatment.

On 28 April 2011 the Commission announced that it would investigate the legality of the actions of the Dutch government. Matthew Newman, spokesman for EU fundamental rights commissioner Viviane Reding, said that "The European Commission will check whether the new rules proposed by the Netherlands for access to its labor market are in line with European legislation that ensures the free movement of people"[60]. No further news on the development of the investigation was delivered.

In pursuit of accurate and actual information on the issue, I researched and discovered that the unit which is working on the issue is B/4 *Free Movement of Workers; Coordination of Social Security Schemes* of DG Employment, Social Affairs and Inclusion. In response to my inquiries I was sent a letter with the official position of the Commission by the head of the unit. The letter was sent on 29.09.2011 and has the Reference number (2011)1030257.[61] The Commission states its opinion that the Netherlands has not violated EU law as they are availing themselves of an instrument legally conferred to them. The reference to the standstill clause once again emphasizes the right of the Dutch

60 “EC to Probe New Dutch Rules for Bulgarians, Romanians”, in Novinite News Agency, Sofia: 2011. Online at: http://www.thebulgariannews.com/view_news.php?id=127711.

61 Morin, Jackie, Head of Unit B4, Free Movement of Workers Coordination of Social Security Schemes at DG Employment, Social affairs and Inclusion at the European Commission, personal communication, 29.09.2011.

government to return to the regime valid at the date of signing of the Accession treaty. Moreover, the transitional arrangements applying to Bulgarian and Romanian nationals have prevented the full application of the free movement of workers following the accession of the two countries. However, the Commission admits that the practice of the national institutions in the Netherlands has changed since 1 July 2011 and has become significantly stricter. Importantly, the Commission states that it finds the actions of the Netherlands in compliance with EU law and is not in the process of investigating their actions.

This is important not only because it differs from the initial announcement and statements, but also because it reveals the attitude of the Commission towards the application of the standstill clause. Even though in this situation it introduces more stringent treatment, its application closely follows the prescriptions of the Accession treaty and the Annexes to it. This is why a conclusion that there was no violation needs to be made.

However, in its letter, the Commission reveals that an investigation has been launched against the Netherlands on a similar matter. The grounds for the investigation is the government paper entitled "Action on labor migration from Central and Eastern Europe", presented by the Social Affairs Minister Henk Kamp to the Dutch parliament. The Commission is concerned that some of the measures envisaged in this paper might constitute infringements of EU law. The Commission is "in contact" with the Dutch authorities on the matter. However, due to the ongoing nature of the investigation and the sensitivity of the issue, no further information was divulged by the Commission.

The letter is a clear example of the role of the Commission as guardian of the Treaties. It strictly monitors their application and observes that member states avail themselves only of the instruments conferred to them by the Treaties. However, if a member state goes beyond the realm of its powers and threatens to infringe a treaty provision conferring rights to individuals, the Commission takes action to clarify the nature of the measures.

With regard to the free movement of workers, the usage of the standstill clause has a dual effect. On the one hand, it is used as a legal instrument available to member states, to return to the initial regimes they applied to new

member states. On the other hand it puts into question the standstill clause, which was intended to guarantee minimum treatment for the nationals of new member states. It shows that the standstill clause can also be used to reduce the privileges that such nationals have available, to the point where they have equal rights only with non-EU citizens. This is even more important considering the fact that the Charter of Fundamental Rights is incorporated into the Treaty of Lisbon, thus giving it the same legal value. In fact, the actions of the Dutch government remove the substance of EU membership in this particular aspect for Bulgarian and Romanian nationals.

The result of the Commission investigation with regard to the proposed Dutch paper is yet to be seen.

5. The Safeguard Clause and its Functioning in Practice – the Case of Spain

The transitional arrangements from both the 2004 and 2007 enlargement include a so-called safeguard clause. It can be found in Paragraph 7 of Annexes V, VI, VII, VIII, IX, X, XI, XII and XIII to the Accession Treaty of 2003 and Paragraph 7 of Annexes VI and VII to the Accession Treaty of 2007. The safeguard clause stipulates that if a member state has decided to apply Articles 1 through 6 of Regulation (EEC) 1612/68 to a new member state before the end of the seven year period following accession, it can reintroduce restrictions within this time-frame. This can be done if the member state in question experiences or has valid reasons to predict serious disturbances on its labor market. In such a case, it needs to inform the Commission and the other member states of its intention to reintroduce restrictions. The member state in question needs to present all relevant evidence in support of its demand. The Commission has the discretion to decide on this request, as it can suspend wholly or partially the application of Articles 1 through 6 of Regulation (EEC) 1612/68. The Commission also determines the period for which the application of the articles is suspended as well as the scope to which it refers. The decision should be notified to the Council and within two weeks of its adoption any member state can request the Council amend or annul it.

There is an exception to the rule of prior notification of the Commission, namely in "urgent and exceptional cases", where the affected member state can suspend the application of the articles and subsequently notify the Commission of its reasons to do so.

The safeguard clause gives an incentive to member states applying restrictions to reconsider their decision and remove them. Knowing that they can reintroduce limitations in case of undesired changes on their labor markets, member states feel more protected and thus are more willing to lift the barriers before the expiration of the full Transitional period. Until 2011, none of the member states had resorted to the safeguard clause.

However, 2011 brought a change in this respect. Spain became the first state which successfully activated the safeguard clause. What is more, the country availed itself of the procedure applicable in urgent cases and suspended the application of Articles 1 through 6 of Regulation (EEC) 1612/68 prior to the notification of the Commission and the other member states. This was done on 22 July 2011. The reasoned explanation followed on 28 July 2011. After carefully considering the country's motivation, the Commission issued a decision on 11 August 2011 in which it recognized the legitimacy of the actions of Spain.

The reasons why Spain availed itself of the safeguard clause are twofold. The first reason is the extremely high unemployment rate in the country, which has persisted over an extended period of time. The country has the highest unemployment rate in the EU at 21.2%, as announced by Eurostat in July 2011.[62] In addition, it also holds the highest ranking for youth unemployment with 46.2% of people under 25 being unemployed.[63] The second reason is the economic situation in the country. Spain suffered badly from the economic crises and still cannot recover. Their GDP growth lag behind the average of the Eurozone and in the first quarter of 2011 was only 0.3% in comparison with an average of 0.8% for the Eurozone. Furthermore, the country is faced

62 Eurostat, "Euro area unemployment rate at 10.0%", *Eurostat Newsletter,* 2011. Online at: http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-31082011-BP/DE/3-31082011-BP-DE.PDF.

63 Ibid.

with the urgent need to introduce further budgetary constraints, which will not encourage the recovery of its economy and growth of employment rates.

This economic background also saw a tendency for a growing inflow of labor migrants. The number of Romanian nationals resident in Spain increased from 388 000 in 2006 to 823 000 in 2010. Furthermore, despite low labor demand, the inflow of Romanian citizens continued, thus resulting in more than 30% unemployment rate among them. Against the background of slow economic recovery and high unemployment rates, this posed a considerable burden on the Spanish social security system and seriously distorted the labor market.

These were the reasons for Spain to activate the safeguard clause. Fearing that the time span between the request to the Commission to suspend the application of Articles 1 through 6 of Regulation (EEC) 1612/68 and the actual enforcement of the decision would allow for even more unemployed persons to register as jobseekers, Spain used the urgent procedure provided for in Paragraph 7 of Annex VII. The Commission's decision confirmed the legality of Spain's actions and allowed it to keep the restrictions in force until 31 December 2012.[64]

However, there are some limitations to the reapplication of restrictions. They do not affect Romanian citizens who are already employed in Spain or registered as jobseekers at the time of entry into force of the decision.[65] Moreover, the application of the Decision is subject to the transitional arrangements laid down in Annex VII of the 2005 Accession Treaty.[66] Spain is obliged to closely monitor its labor market and prepare reports on a quarterly basis, the first report due by 31 December 2011.[67] If there are any developments on the labor market, the country shall promptly inform the Commission. If the changes are significant enough or the measures prove to be more restrictive than intended, the Commission has the right to amend or

64 European Commission, Commission Decision of 11 August 2011 authorizing Spain to temporarily suspend the application of Articles 1 to 6 of Regulation (EU) No. 492/2011 of the European Parliament and the Council on freedom of movement for workers within the Union with regard to Romanian workers (2011/50/EU), 2011.

65 Ibid, Article 2.

66 Ibid, Article 3.

67 Ibid, Article 4.

repeal its decision.[68] Spain shall also inform the Commission of the effect of the steps taken within a period of two months.[69]

With these actions Spain creates a precedent in the history of the transitional arrangements. Never before has a member state which had lifted the restrictions towards new member states relied on the safeguard clause in order to reintroduce them. The specific economic situation in Spain in particular and Europe as a whole as well as the continuing migration flows have made this step necessary for the country. However, in Paragraph 14 of its decision the Commission states that the imposition of restrictions on union citizens is derogation from the fundamental right to free movement and should be interpreted restrictively. This is indicative of the overall approach of the Commission and its attitude towards the transitional arrangements in general.

The revocation of the safeguard clause illustrates the protection that old member states enjoy during the seven-year period after the accession of new member states. Even if they have removed all restrictions, they can still rely on this clause in cases of serious disruptions. From the point of view of the imposing member state, this may offer a temporary relief and a chance to restore its labor markets to normal, by removing the threat of a certain group of foreign workers. From the point of view of the restricted country, this is a limitation of a fundamental freedom, deviating from the concept that labor markets are able to self-regulate and even leads to the creation of a second-hand citizenship of the EU. The precise effect of the safeguard clause is unclear. While it may serve to achieve the initial goal, it may also delay needed structural changes on the labor markets. What the exact result will be is yet to be seen.

68 Ibid, Article 5.
69 Ibid, Article 6.

Conclusion

As seen, the transitional arrangements are not a new phenomenon in the history of European integration. Being first implemented towards Greece, Spain and Portugal, they were later applied in the 2004 and 2007 enlargement waves. The disturbing lack of a sufficient economic foundation has not been an obstacle for older member states to restrict one of the fundamental freedoms of new entrants. The evidence shows that the initial fears were unjustified and that the impact of enlargement has been largely positive.

Against this background, there is a consistent tendency for applying transitional arrangements in every new enlargement wave. The actual reason rests in political considerations, which are hardly a legitimate reason for the restriction of the free movement of workers throughout the union. The actions of the Netherlands and Spain prove the hypothesis that the primary function of transitional arrangements is to serve the interests of old member states and the two-way protection envisaged by the Treaties is only an illusion.

The issue of insufficiently grounded restrictions is even more serious after the Treaty of Lisbon, which incorporated the Charter of Fundamental Rights and made it a primary source of Union law. The legal, political and symbolic significance of any limitations is thus comparably greater. The sensitivity of the issue is growing and it should be treated with extreme caution.

However, the last two months demonstrated that states applying the transitional arrangements are determined to use all available legal instruments in order to protect their interests. The Netherlands and Spain applied the standstill and safeguard clauses respectively, thus bringing the free movement of Bulgarian and/or Romanian workers to an absolute minimum. This tendency is alarming, as we now see a practice of consistently limiting one of the fundamental freedoms is being established. On an even graver note, the future does not promise to bring positive developments in this respect. The limitation of the free movement of workers is likely to continue, thus questioning not only the core of EU membership but the foundation of the EU as a whole.

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