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‘The Unfinished Enlargement’

Report on
Free movement of people in EU-25
Updated version

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Contents

Background note to the new version	3
Introduction	5
1. Has there been an influx of jobseekers from new Member States?	6
2. Freedom of movement in the context of Europe’s “new borders”	11
2.1 The Schengen Agreement and its extension to the 10 new Members States	11
2.2 The problem of the border region minorities	15
3. Derogations from the free movement principle allowed for by the Accession Treaty	18
3.2 Community provisions	18
3.2 Derogations allowed by the Accession Treaty	19
4. Conclusions and recommendations	29
Information sources useful for the citizen	32

Background note to the new version

Since its establishment in 1991 ECAS has always been preoccupied with ‘popularisation’ and the defence of European free movement rights. Its first hotline launched back in 1993, when the internal borders of the EU should have disappeared, proved to be a catalyst for pressure to speed up the process of just application and spread of free movement rights. Today, in the reality of an enlarged Union, this objective has not changed significantly.

In the run up to the historic date of 1 May 2004 ECAS decided to re-launch its hotline in order to collect evidence about what actually happens in the area of free movement of people, as a result of enlargement. New European citizens should be free to move anywhere around the Union on an equal basis with citizens of the old Member States and should be welcomed as equal first class Europeans. However, are they?

On 19 May 2004 ECAS published a first version of this report, which was met with interest and positive feedback not only from the press but also ECAS’ colleagues from the NGO sector.¹ Most importantly however, it managed to achieve its primary aim - to draw the attention of policy makers at both national and European level.

On 29 July 2004 ECAS received a letter from the Commission’s Directorate General Justice and Home Affairs², which expressed not only a keen interest in the ECAS paper, but commented on many of the issues raised in the report and provided the researchers with particular answers. The author of the report would like to express her sincere gratitude for this contribution.

Special thanks is also owed to Mr Nikiforos Diamandouros, the European Ombudsman, who in his letter sent to ECAS on 7 July 2004³ stressed the importance of the problem areas raised in the report. Free movement of citizens and residence will be one of the points on the agenda of the next liaison meeting of the European Ombudsman with his national colleagues, which is scheduled for September 2005. He also encouraged ECAS to bring the report to the particular attention of the European Parliament. This encouragement together with that of MEPs has been followed by ECAS without hesitation and has resulted in a meeting in the European Parliament on 14 September 2004.

In preparation for this September meeting in Strasbourg, as well with an aim of ensuring what is actually happening on the EU borders after May 2004, ECAS has continued its ‘Enlargement Hotline’ throughout the summer months, clearing the uncertainties, answering questions and gathering testimonies from EU citizens. Information provided by all of them has constituted the basis for the updated version of this report and therefore, sincere thanks to all those who contacted ECAS and shared with us their problems and concerns. Particular gratitude is owed to our colleagues from the EUMAP –

¹ Full account may be found on ECAS’ website www.ecas.org

² Available on ECAS’ website www.ecas.org - Hotline – Positive feedback

³ Available on ECAS’ website www.ecas.org - Hotline – Positive feedback

EU Monitoring and Advocacy Program, who provided the researchers with useful links and reference material as well as Mr Balázs Széchy from the Government Office of the Hungarians Abroad.

ECAS has also contacted several consulates of the new Member States in countries associated with the highest migration levels from individual new EU countries; travel agencies; partner citizens' advice services and other non-governmental organisations. Advice provided by all of them and knowledge shared as the research progressed was extremely valuable. Special credit is owed here to Sue Lockey, Statistician at Association of European Airlines as well as the International Airports Council.

Lastly, the hotline and the report would not be possible without the help of a team of 6 people at ECAS. The author would also like to express her gratitude to them for all the contributions made.

Introduction

On 1 May 2004 the European Union welcomed 10 new Member States. 75 million citizens of the former Soviet block countries as well as Malta and Cyprus became part of the EU free travel zone. It was a day on which the whole of Europe united in joyful and welcoming festivities.

A spectacular welcome party was hosted by the Irish Presidency. Dances and singing were seen and heard from Finland in the north to Malta in the south, Portugal in the west to Estonia in the east. Beethoven's 'Ode to Joy' was sung along with the national anthems of the ten new Member States with emotion all over Europe and spectacular fireworks lit up the skies of all EU 25. On this particular day words of welcome and thanks were innumerable even in those European states that had been afraid most of EU enlargement.

Shortly after midnight a crowd of Poles led by their German neighbours 'entered the EU' through a border crossing in Zgorzelec. The following morning they sat at one breakfast table set out on one of the bridges, which as an official border between the two countries, was not accessible to anyone only 24 hours earlier. Trains packed to capacity with hundreds of people taking advantage of a one-time opportunity to travel throughout the region regardless of the country, met at the Polish-Czech-German border. Elsewhere, passengers boarded a special, historic train taking them from German Schwarzenberg to the Czech town of Karlovy Vary without stopping at the German-Czech border. At another Czech - Austrian crossing in Bystrice/Grametten hundreds of cyclists took a trip over the border 'down the EU road'. Similarly many Poles with slight disbelief rode their bikes through the Polish - Lithuanian crossing 'to see how it is to travel in the enlarged Union.'

On many border crossings of the new EU Member States the enlargement was welcomed with the sound of car horns, toasts and the symbolic removal of border barriers, for example at the Polish - Slovakian crossing in Łysa Polana. The symbolic wedding of a Czech boy called Honza and an Austrian girl called Gretchen was held at the border crossing between the two countries. It ended with a sacramental: 'What the European Union has joined, let no man tear apart.'⁴

The festive mood continued throughout this commemorative May weekend, but as a journalist of the Guardian newspaper⁵ wrote, the atmosphere of the celebrations had a lot in common with that of a New Year's Eve – expectations, hopes and fears about what will happen next. How welcome will the new EU citizens really be once 'the party' finishes? The image of Europe without barriers was very much a picture created by the festive mood and does not necessarily mirror day-to-day reality.

⁴ Quoted after article 'Czechs celebrate EU accession in various ways' available at [\[http://www.ceskenoviny.cz/news/index_view.php?id=64681\]](http://www.ceskenoviny.cz/news/index_view.php?id=64681)

⁵ Issue of 1st May 2004 'Press review – Accession day'

1. Has there been an influx of jobseekers from new Member States?

The other side of the picture is that for many west Europeans the issue of migration from Eastern Europe merges with the issue of immigration in general. In 2000, when the negotiations of the chapter on freedom of movement of people were to commence, the Commission conducted its last Eurobarometer study that was particularly concerned with people's feelings and views about immigration. It would be worth updating this study to see if attitudes have changed. However, back in 2000, 45 % of EU citizens were convinced that there were too many foreigners living in the territory of the Union. 52 % of Germans and 50 % of Austrians (the two largest recipient countries) shared this opinion. On the other hand free movement rights were perceived as a primary benefit of the EU membership by 54 % of Poles and for the majority of the population aged 18-24, which constitutes the largest migration potential, immediate implementation of free movement rights was the absolute priority.

The scenarios, according to which millions of Eastern Europeans were waiting for enlargement as an opportunity to take advantage of western European labour markets and exploit some of the most generous welfare systems, have been presented on many occasions in the run up to 1 May. The controversy over this subject started back in the late 1990s and since then numerous studies, taking different methodological and ideological approaches, have tried to measure the possible migration flows from Central and Eastern Europe, which could result from enlargement. The outcomes varied and whilst some researchers showed the expected migration to be at the level of 200.000 persons per year, others sought to prove that the number of migrants would not exceed 41.000.

The latest study prepared by the EU Foundation for the Improvement of Living and Working Conditions⁶ shows that the most probable volume of 'intended' migration from the 10 new Member States over the next five years should be equal to about 1% of the population of these countries. Such results confirm the conclusion of the Eurobarometer study published last February, which also measures the Central and Eastern Europeans' intention to migrate at the level of 1% of the population. The results of both of these studies concur also with figures produced by the Commission's econometric study mentioning the number of 1.1 million migrants over the period of 5 years after accession. Moreover, the research concludes that, not only is migration most likely to be of a short-term nature, but also the largest migration potential is among the young, well educated and mainly unmarried citizens of the new Member States. In a more rational climate, old Member States would be competing for such workers and concerns would be expressed by the new Member States, which may prove to be in danger of suffering from the 'brain drain' effect.

Unfortunately, before 1 May 2004 available research was too often treated solely as mere speculation rather than as a reliable estimation and did not manage to put at ease fears expressed by the majority of the EU-15 population. Today, four months after that historic

⁶ Publication in the first quarter of 2004

date the exact numbers of new Member State citizens, who have moved to another Member State since their country's accession to the EU, have not been compiled. Nevertheless, it may be said with full confidence that the expected flood of migrants has not come.

As reported shortly after 1 May throughout the EU-15, only a handful of Eastern Europeans disembarked at the airports and international coach stations of major Western European cities like London, Hamburg or Brussels. Even so, there is no evidence to prove their intention of settling down there. Many Czechs, Poles, Slovaks and Hungarians interviewed by the media with regard to their intentions to leave their own country, replied that they were particularly upset by what they saw as ignorant and offensive presentations made by the West European media.⁷ According, to a study published in July 2004 by the Institute for Economic Development set up by the Warsaw School of Economics, only 7.6% of Poles (the nation characterised by the highest migration potential) are interested in taking up employment in one of the old EU Member States within the last 12 months. 43.7 % of the respondents would absolutely not take the possibility of working abroad into consideration and another 28.1 % did not express any interest in relocation.

Consultation with 12 different consulates of the new Member States located in 5 different old EU Member States that have traditionally been primary migration destinations of Central and Eastern Europeans, confirms that the 'threat of the flood' has turned out to be a trickle. In general, none of consulates contacted by ECAS has observed a particular increase in migration and even in those cases where a 'slight increase' has been noted, the numbers are too insignificant to substantiate any notion of an influx of 'hoards.'

According to data provided by airline operators connecting EU-15 with EU-10 (among them Air Baltic, Estonian and Lithuanian Airlines etc.), when compared with May 2003, about a 20 % increase in the number of passengers travelling in May 2004 was observed. However, this increase may not be directly connected with the enlargement of the EU, but possibly the growing 'popularity' of air travel, and the decrease in airline ticket prices. The same phenomenon has equally been observed in recent months by operators servicing routes within the EU-15.⁸

More substantial increase in passenger levels has been observed by coach line operators (e.g. Eurolines) especially on routes between Poland and the UK. However, as reported by several travel agents, while a sudden increase in demand for outward tickets was observed in May 2004, already in June and July, demand for outward tickets had returned to its pre-accession levels. In the meantime extra services had to be put in place in order to satisfy the demand for return journeys – the pattern which concurs with information obtained from the Consulates.

⁷ The lead in promotion of 'black case' scenarios took British press, with 'Sun' mentioning 'tens of thousands' and 'Daily Express' 1.6 million Eastern Europeans heading solely to the UK.

⁸ As reported by BA (British Airways) by late July 2004 the numbers of passengers traveling by plane has reached and even outnumbered the passenger levels of period proceeding 11 September 2001.

Consular workers contacted by ECAS, although recognising an increase in the number of Poles coming to the UK, Slovaks coming to Austria or Czechs registering with the Irish Personal Public Service (PPS), admit that particularly in the latter cases the increase is only slight. Moreover, the majority, being unskilled migrants, were often badly informed and poorly resourced, not able to speak the language of the destination country, could not find employment and have already returned home. (*cf. Case-Box 1 below*) Considering the strict application of its transitional measures by Austria, this return home is hardly surprising. However it needs to be stressed that the same pattern applies equally to the UK or Ireland, which do not apply such restrictions. According to UK Home Office press release of 7 July 2004⁹ just over 24.000 applications to Workers Registration Scheme were made by new Member States nationals in May and June. A similar number of applications for PPS numbers was noted by the Irish Department of Social and Family Affairs. However, of these, the majority of applications came from those already residing in the host country prior to May 2004 and who decided to legalise their residence only after the date of enlargement. For example, in the case of the UK, approximately 14,400 of all applications (i.e. 60 %) were from new Member State nationals with prior residence in the UK.

A couple of Polish national contacted ECAS in order to share with us their experience of travel in the enlarged EU:

Remaining unemployed in Poland and seeing no chance of changing this situation, a couple left Poland on 1 May with an aim of finding employment abroad. They originally aimed to settle down in Denmark, but after an interview at the Labour Office in one of Danish major cities, they discovered it will be very complicated, hence decided to travel further to the UK.

On 5 May they were already in England. With an aim of finding a 'simple job e.g. in catering, but with accommodation' they contacted the Job Centre. Not being able to speak English they had to communicate with a help of a Polish interpreter. After they filled in all necessary forms an interview was set for them to take place in two weeks time.

Their financial resources were very constrained and they had problems with finding accommodation. They did not know where to turn for help.

After spending two nights on the street they finally decided to contact the Polish Consulate in London, which has finally lent them money for a return journey home.

Case-Box 1: Testimony of unsuccessful job seekers.

Drawing on the experience of past EU enlargements, neither the accession itself nor the expiry of the transitional periods produced a break in the trend and migration flows from the new Member States remained small. It is true that models of previous enlargements may only be partially reliable. However, at the moment it seems that history will repeat itself. It is highly probable that rising economic trends and correspondingly brighter prospects for the future in one's own country will outweigh the costs of migration. These include social isolation caused by the language barrier, loneliness resulting from separation from one's family and cultural roots or loss of personal contacts and connections already established. Such 'profit and loss calculation' multiplied by the

⁹ 'New EU citizens working and contributing to the UK economy' available at http://www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/news/press/new_eu_citizens_working.html

burden of obstacles faced by citizens of the new Member States is likely to be enough of an incentive to stay at home. It is one thing to think about a short spell studying or working abroad in the EU, quite another to leave one's country more permanently.

The public debate that arose round the issue of migration and its possible threats in connection to the EU's fifth enlargement, very often played on common prejudices and national sensitivities. The debate was one sided and did not take into account the many obstacles to migration, which influence the decisions of individuals and families.

As shown by a study conducted by Research Institute of Labour and Social Affairs (RILSA) in the Czech Republic, there is a range of reasons both personal as well as economic level which do determine the potential migration pressure in a significant way. These include:

- Economic factors. The majority of studies 'predicting' an influx of migrants from Central and Eastern Europe were based on the assumption that given a real choice, workers will always opt for an option giving them nominally higher wages. Nevertheless, the results of such studies as well as 'stories' i.e. that cabbage harvesters earn EUR 900 a month (three months salary for many Eastern Europeans!) need to be compared to higher living expenses that are a common characteristic of all Western European states. It is true that the opportunity of higher earnings is a frequent motivation to work abroad. However, a nominally higher wage does not necessarily mean 'more money in the pocket.' The majority of migrants do realize that. Those who do not are often brutally confronted with reality very quickly. Not being able to afford the high cost of living in the host country during the period when they are looking for job, many migrants will quickly decide to return home. (*cf. also Case-Box 1 above*) One has to remember that the economic situation of the new Member States may be worse than that of many of the old EU-15, however, not as bad as to force potential migrants to seek residence abroad at all cost and especially that of lower living standards.
- Socio-cultural factors.
 - Language and cultural barriers. These play a significant role when making the decision to migrate. The majority of migrants do need to work very hard in order to be integrated in the mainstream society and culture of the host country. As shown by the ECAS Enlargement Hotline, many migrants with no language skills had problems not only finding employment, but also finding accommodation, opening a bank account etc. The financial constraint associated with not having work and the 'psychological effects' associated with being dependent on other compatriots able to communicate in a foreign language, force many to come back home even earlier than expected.
 - Personal circumstances. Migration has always been a challenge that requires a lot of courage on the part of the citizen, but also on the part of his/her family, which plays a major role in the decision making process. By definition, decisions about the change of one's country of residence are much more complex in case of marriages or partnerships, where both

partners are economically active. The decisions made need to take into account not only the willingness, but also the potential employment possibilities of both partners.

- Ties of property. Central and Eastern Europeans share particularly strong feelings of being tied to their property. Therefore, the decision about selling or letting a house, which in many cases has been inherited from generation to generation, will not be one that is taken easily.
- Administrative ‘red tape.’ Here the EU and national authorities can do more to eliminate the obstacles: the difficulty of knowing where to find the information to get started, the lack of confidence about pensions and other social entitlements or the risk of professional qualifications and experience not being recognised in the host country have proven to be a major obstacle for those taking the decision to migrate. (*cf. Case-Box 2 below*) The requirement to apply for a work permit does also prove to be a constraint, which occasionally citizens decide to overcome by opting for a ‘black-market job.’ (*cf. Case-Box 3 below*) Long waiting time for a work permit application to be process as well as in many cases, lack of any kind of deadline attached to it do tend to discourage many of the potential migrants.

A Polish national who has just graduated from a Musical Conservatory in Poland, applied and secured the post of a ‘trainee violinist’ in the German Radio Orchestra. She has applied for all necessary documents authorising her right to reside and work in Germany. However, her application for a work permit has been refused on the grounds that she did not qualify in Germany and therefore, on the basis of German law, may not take up the traineeship position in that country. After a long and laborious exchange of correspondence with the German authorities, followed by an unsuccessful complaint action at the national level, the citizen decided to contact the ECAS hotline.

The case being a clear example of discrimination on the basis of nationality was referred to SOLVIT which is currently dealing with it. At the time of writing this report it is still uncertain whether the action launched will be ‘quick enough’ to allow the citizen to take up the post offered.

Case-Box 2: Discrimination on the basis of nationality.

An employer from one of the old EU Member States contacted the ECAS Hotline enquiring where he can advertise for Polish employees. He was re-referred to the Polish Labour Office, normally the institution competent to deal with queries of that kind. However, after a short conversation it appeared that the employer is looking for Poles who would be in a possession of ‘German passports.’ As the enquirer explained, the procedure for obtaining work permits for those employees who do not have double nationality is too long and complicated. Therefore, many smaller businesses decide to go for an easier option, getting around the inconvenient legislation.

Case-Box 3: Inconvenient administrative requirements

There is clearly a need for a much more informed debate about patterns of intra-EU migration and the impact of enlargement. There has to be more explanation about the fact that although people are genuinely interested in the opportunities created by the EU’s single market rights, when it comes to decisions about moving to another country on a more than temporary basis, there is often a gap between intentions and actual actions. As stated in the above quoted study by RILSA, in over 70% (!) of cases, migration potential is confined to a purely theoretical idea. That is why new, post-enlargement migration studies are necessary. They would not only help pave the way to real evidence-based policy and perception of EU migration issues, but also reduce many unfounded fears.

2. Freedom of movement in the context of Europe's 'new borders'

The debate about the concept of 'free movement of persons' opened in the 1980s has never really been concluded. Back then it resulted in a situation, whereby five of the Member States who signed the Schengen Protocol abolished their border barriers, while others decided to remain outside the 'free movement zone'. Since then *Schengen* has been extended to nearly all EU countries and has become part of the EU *acquis*. However, even today and especially in the light of the recent enlargement, the debate initiated at the time still continues.

The postcard picked up a year ago, featuring the map of Europe, in which 15 states to the west side of the continent are marked red, with no border lines between them making an impression of one big entity and the other 10 are marked in yellow with borders clearly painted in white, has not lost its validity, despite the fact that as from 1 May all these countries constitute one enlarged territory of the EU. Physical borders between the 'old' and 'new Europe,' at which citizens need to prove their identity with a valid identity document have not disappeared. Moreover, their disappearance is unlikely to be achieved within the next few years. The symbolic removal of border barriers mentioned in the introduction of this paper, remains very much only symbolic.

2.1 *Schengen* Agreement and its extension to the 10 new Member States

The provisions of the *Schengen Agreement*, which provides for the abolition of all border controls on persons, are not as yet fully applicable to the ten new countries that joined the EU on 1 May 2004. New Member States, and especially countries like Poland, the Eastern border of which will constitute the longest part of the future EU external border belonging to one country, or Hungary, which has the highest number of neighbours, many of whom remain outside the EU, need to prove first that they can stand up to the task of protecting the territory of the enlarged EU from such dangers as illegal immigration or cross-border crime.

The full implementation of the *Schengen acquis*, leading to unification of the western and eastern parts of the European continent, will be conducted in two phases. As Article 3 of the Act on Accession indicates, the *Schengen acquis* is binding on the new Member States as from the date of enlargement. However, it is only the part of the *acquis* listed in Annex 1 i.e. the rules that relate to external border controls, illegal immigration, criminal law cooperation, and certain aspects of police cooperation that apply to the new EU members immediately upon enlargement. As regards the full application of the remaining part of the *Schengen acquis*, including provisions on the abolition of internal border controls, visa policy, freedom to travel, Schengen Information System (SIS) and core aspects of police cooperation, this is subject to the Council's unanimous decision taken at a later date, after completion of applicable Schengen evaluation procedures and consultation of the European Parliament.

For a majority of new EU citizens only the abolition of internal borders will be a true symbol of their belonging to the Union (*see case-box 4 below*). Therefore, governments of all new Member States have particularly devoted themselves to introducing all necessary changes and adaptations leading to the country's improved administrative and technical capacity to guard the EU's external borders by 2006, according to the initially proposed deadline. Their efforts are matched by EU financial support. On the basis of Article 35 of the Act of Accession, by the year 2006 nearly 900 million EUR should be made available to seven new Member States, who will be responsible for the EU external borders, in the form of a specially introduced 'Schengen Facility' instrument.

A Polish national complained about the long queues still present in the arrival terminal of Warsaw Airport. He was under the impression that since the date of enlargement passports and identity cards of persons coming from another EU country should no longer be checked. He contacted the ECAS hotline to express his regret that despite the fact the Poland is 'said to be an EU member' it gives the impression of still being outside.

The citizen was advised that since Poland is not a member of the Schengen zone as yet, passport controls on all its borders cannot be abolished, even with reference to EU citizens travelling only in the territory of the EU.

Case-Box 4: Queues on Polish airports

However, intensified efforts on the part of the new Member States will not be enough. As stated in the Note on 'Process leading to the implementation and application of the *Schengen acquis*...' (15440/02 of 10th December 2002) cooperation on both sides has been 'efficient and successful.' Despite that, the initial deadline of 2006 has already been postponed several times. According to the recent note of the Schengen Evaluation Working Group (7162/04 of 16th March 2004) the evaluation of new Member States, which in terms of Article 3 of the Accession Treaty should lead to the Council's decision for full application of the *Schengen acquis* to the new Member States, will most probably not be taken before 2007. This is connected to the fact that such evaluation processes must be linked to an assessment of how the Schengen Information System (SIS), the second generation of which is still under construction, operates.

The first generation of SIS was created back in the early 1990s for only five countries, which, subject to an intergovernmental agreement, decided to abolish border controls that in their understanding of the free movement of persons principle, constituted a barrier. In 1997 the provisions of the Schengen Protocol were incorporated into the Treaty of Amsterdam and when subsequently cooperation was extended to cover a total of 13 EU countries – the exceptions being Ireland and the United Kingdom - plus three EEA countries: Norway, Iceland and Lichtenstein, the technical possibilities of SIS I do not allow for its extension to the additional ten new Member States. Therefore, in 2001 as stated in a Commission's communication to the European Parliament and the Council (COM (2001) 720) 'the setting-up of the second generation SIS is an absolute prerequisite for the involvement of the future Member States in the area without internal frontiers.' SIS II is needed not only to increase the capacity of the system, which according to the Commission's estimations at the end of 2003 was already storing about 2,3 million records on specific individuals, vehicles and lost or stolen objects. It also needs to cope

with the increased number of requests (i.e. searches into the database by the border control), which once the system is fully operational in the enlarged *Schengen zone*, are expected to rise from 340 million per year to 1.020 million.

It appears that the core of the system is to retain its location in Strasbourg with back-up facilities created in Salzburg. Nevertheless, the decision concerning the responsibility for overseeing the fully implemented SIS II has not been taken as yet. One may only assume that it raises difficult issues about what is in EU competence, what is in national competence, and which Institution should therefore govern the SIS.

The initial call for proposals encouraging offers from potential developers of the second generation system worth 13.000.000 EUR was published in June last year and according to unofficial information the contract with the developer of SIS II was to be signed in the summer of 2004. The build-up part of the project is to be completed by mid-2007 and even though this target date is not an ultimately fixed deadline, as the Commission writes in its letter to ECAS of 29 July 2004,¹⁰ it is 'working hard in order to respect the tight target date.'

Nevertheless, as noted above, it is only after SIS II is built and fully implemented in new EU-10 that the respective evaluation procedures may commence. As the Commission clarifies in the above quoted letter the decision as to whether join *Schengen* as a group or rather to take a more individual approach lies entirely with the new Member States, which 'should trigger the launching of the evaluation procedure themselves once they consider to meet all preconditions for the implementation of the whole *Schengen acquis*.' However, earlier indications of the Schengen Evaluation Working Group suggested that evaluators will not be able to conduct inspections in more than two countries each year, which would mean that it would not be earlier than 2012 that the last of the 10 new Member States would be able to join the *Schengen zone*.

In their reply to the first edition of the 'Unfinished Enlargement' report the Commission writes that together with the Council Working Group it is currently working on the Schengen Evaluation Mechanism, which will allow 'the best solution which will make it possible to carry out the evaluation of the new Member States as soon, as fast and as effective as possible.' We should hope that it means that circumstances forcing evaluators to inspect only two countries a year will be overcome.

The late launch of the SIS II 'build up project' has created an important transitional period, which poses serious implications for freedom of movement between the new and old Member States. For an unspecified period of time, citizens of the new Member States, even though able to move freely in the territory of the enlarged EU, will still be subject to border controls at all internal EU borders. As granted to them by EU law, the right to cross the border of another EU Member State on simple presentation of a valid identity card or passport should constitute a tangible difference to the pre-enlargement situation. In the meantime, the cross border movement between old and new Member States is not entirely as 'unproblematic' as it should or was expected to be. On the one hand the

¹⁰ Available on ECAS website www.ecas.org > Hotline > Positive feedback

extension of the territory of the EU with tangible internal borders still present between old and new Member States and on the other, the two-step application of *Schengen acquis* create a situation whereby border officials unsure of the rules applicable, restrict or in worst cases deny the right of new Member State nationals to move freely within the territory of the EU. (cf. Case-Box 5, 6 & 7 below).

A citizen of a new Member State experiences problems each time that he has to cross the border between Estonia and Latvia. Systematically he has to open the boot of his car, to leave the car and to show what he keeps in his suitcases. He is also always questioned in detail about the purpose and duration of his journey. He contacted the ECAS hotline in order to find out whether this is a normal procedure in the EU.

ECAS hotline staff explained to the citizen that the procedure described by him was by no standards a norm. As a national of EU Member State, he has the right to enter any other EU country without having to comply with special formalities. Immigration officers are only entitled to check the validity of the identity document. He was encouraged to assert his rights by complaining firstly to the administration concerned and if necessary to the European Commission.

Case-Box 5: Extensive border controls

A Polish national travelled with his valid identity card. Dutch border control officers stopped the coach, on which the citizen was travelling to the UK, for a routine control. After it was discovered that he carried no passport but only his valid id card, he was asked to leave the coach. The officers informed him that he would not be allowed to enter the UK territory, since he had no passport with a stamped in visa (!) Only after long and laborious explanations was the citizen allowed to continue with journey.

The citizen was reassured by ECAS hotline staff about his right to travel with a valid id card only. At the time he contacted ECAS hotline the citizen had already launched an official complaint to the Dutch Embassy in Poland. He was also informed about the possibility of launching a complaint to the European Commission.

Case-Box 6: Recognition of valid id card

A Polish citizen contacted ECAS hotline reporting a case of an airline carrier threatening not to let her board the flight for which she had had a valid ticket, since, as the carrier claimed, she had no valid travel document. The citizen was in possession of an identity card and a passport valid for another 2 months. However she was informed by the operator that the identity card may not be respected and the period of validity of her passport was short. The citizen was trying to contact different administrative entities in Poland, but each respective institution was giving her contradictory answers as to the validity her documents. She contacted the ECAS hotline to receive clarification.

The citizen was informed about her right to travel with a valid id card only. Should this right be denied to her the citizen was advised to launch the complaint initially with the airline carrier and later possibly also with the European Commission.

Case-Box 7: Misinformation leading to failure to recognise a valid travel document.

Whilst for the majority of 75 million new EU citizens the existence of the lane for EU-passport holders, is not as tangible a difference as expected, problems such as those signalled above should be easily solved by a quickly undertaken, comprehensive and well targeted information campaign aimed as much at officials as at the travelling public. Majority of new Member State nationals do not see a clear difference between the

provisions of the *Schengen acquis* and those stemming from granted to them more general free movement rights.

2.2 The problem of the border region minority

Concerns have been voiced about the division that the two stage implementation of *Schengen* provisions imposes in certain border regions of the new Member States and their neighbouring countries, largely populated by ethnic minorities of the former. Representatives of the new Member States ethnic groups living e.g. in Ukraine, Belarus or Serbia and Montenegro need to go through additional administrative procedures, when visiting their families across the EU border. This not only involves the requirement of obtaining a visa, but in some cases (e.g. Romanians travelling to Hungary) also ensuring border authorities that one has a sufficient amount of money. Given the level of incomes in many countries bordering on the new EU Member States, requirement to present 500 EUR cash when crossing the border is a financial burden substantial enough to create space for the existence of special ‘businesses’ involved in the procedure of lending money that has to be returned with interest immediately after crossing the border.

A particularly striking example of what some describe as strongly as ‘another iron curtain,’ is Szelmenc – a village populated by ethnic Hungarians, located on the Slovak – Ukrainian border and now left cut in two parts: EU and non-EU territory. The border line running across the village, now EU external border, forces families living on the Ukrainian side not only to apply for a visa, but also to travel 300 km to the closest authorized border crossing point, each time they want to visit their relatives living across the road, but as from 1 May – ‘on the European side.’¹¹ As Mr Balázs Széchy, from the Government Office of the Hungarians Abroad, writes in his e-mails to the ECAS Hotline: ‘This might lead to an unpredictable psychological effect on the migration potential of those who feel that the doors of possibilities are being closed in their face.’

The problem of the division created by the two-stage implementation of the *Schengen acquis* is striking taking into consideration the number of ethnic Hungarians, Poles or Slovaks living today across the EU border and the frequency of their travel (e.g. Hungary has already issued more that 300.000 visas to their ethnic compatriots living in the neighbouring countries). While certain measures concerning visa policy (e.g. the regulation listing countries whose nationals must be in possession of visas when crossing the external borders, or rules relating to uniform visa stickers) do apply to the new Member States immediately, regulations referring to conditions for issuing so called ‘*Schengen visas*’ remain applicable only in the second phase of implementation of the *Schengen acquis*. Therefore, for example the same Ukrainian family that has already obtained a visa for their visit in Poland will not be able to travel with their Polish relatives for e.g. a relaxing weekend on the German side of the Baltic coast, unless they

¹¹ Quoted after article by Eszter Balázs ‘No man’s land in EU’ written for Budapest Sun and available at [\[http://www.budapestsun.com/full_story.asp?ArticleId={AE01AA8120544EBFA6B1AB3F29DF2AF6}&From=News\]](http://www.budapestsun.com/full_story.asp?ArticleId={AE01AA8120544EBFA6B1AB3F29DF2AF6}&From=News)

apply for a separate visa allowing them to enter the territory of the Federal Republic of Germany. Similarly Russians living in Vienna, even though residents of the *Schengen zone*, will not be able to visit Bratislava without first obtaining a Slovakian visa. (cf. *Case-Box 8*)

A Russian national resident in Poland contacted the ECAS hotline in order to establish whether information he obtained from his travel agency is correct. Resident in Poland already for over 15 years, his wife is Polish and their children have Polish passports. They intend to go on holiday to Italy and he was told that despite the fact of being married to a Polish national and having a Polish residence card, he still needs to obtain a visa in order to travel to another EU country.

The citizen was informed that unfortunately the travel agency was right. As Poland is not a member of the Schengen zone his Polish residence card does not have to be respected outside the Polish territory and he will need to apply for a Schengen visa (which should be given to him free of charge and without undue formalities) if he wants to go on holiday with the rest of his family.

Case-Box 8: Intra-EU movement of third country nationals

The failure to address the issue in time for enlargement does contrast with the Commission's proposal for a new 'neighbourhood instrument.' However, this does not mean that no steps have been taken to resolve the situation. The above problems have been at least partly addressed in the Commission's proposal for a 'Council Regulation on the establishment of a regime of local border traffic at the external borders of the Member States' (COM (2003) 502 final of 14.08.2003), which lays down common principles and e.g. provides for 'special L visas,' but leaves it to the authorities on each side of the border to negotiate solutions appropriate to their region. During the accession negotiations, the new Member States stressed the importance of such a regime and the possibility of signing such agreements would be much appreciated by them. However, although a partial agreement as to the proposed text was reached between the Commission and the European Parliament on 20 April 2004, the proposed text has run into difficulties in the Council, which has not reached agreement on the substance of the text. Moreover, as communicated in the Commission's letter to ECAS, the adoption of the proposal will have to be subject to some additional delay, since after the date of the 1 May parts of the initial text have been covered by the co-decision procedure and will therefore require new consultation with the European Parliament. This is an opportunity for the European parliament to exert some control and demanding explanation about the whole issue of extending *Schengen* to new Member States.

In the meantime, in addition to the proposal for the local border traffic, the Commission is also working on another proposal, the aim of which will be to eliminate some of the administrative difficulties faced by third country nationals currently resident or holders of short stay visas issued by one of the EU old or new Member States. It is to enable transit through the new Member States for holders of a short stay visa, a long term visa or a residence permit issued by a *Schengen State* or holders of similar documents issued by new Member States.

Until such time that the proposals are agreed and enforced, the only text relating to borders is that of the Council's Conclusion (11041/03) adopted in November last year

and calling for joint controls at the common land borders between old and new Member States. This does not solve the pressing issue of external borders.

* * *

The challenge, which the development of the second generation of SIS constitutes, as well as the complexities of the procedure leading to full implementation and application of the *Schengen acquis*, need to be appreciated. The lesson of previous extensions of *Schengen* to Italy, Greece and the Scandinavian countries shows this is a long and laborious process. However, given the already existing 'delay' as well as the divisions and problems this delay causes, continued and intensified efforts aimed at the abolition of the 'temporary external' as well EU internal borders should be undertaken by both sides, the new EU Member States as well as the European Institutions. Otherwise the enlarged EU is not only running the danger of creating a first and second class EU citizenship, but also of building a new barrier between the EU and its Eastern neighbours. It is absolutely imperative that some deadlines, especially with reference to the extension of the *Schengen zone*, are set and the only hope they will be met lies in a good deal more public and parliamentary scrutiny.

3. Derogations from the free movement principle allowed for by the Accession Treaty

The recent enlargement is the first to occur since Union citizenship was introduced. As a result many people consider there should have never been a transitional period, as it implies there are first and second class EU citizens. One person, who contacted ECAS Hotline asked whether it is possible to challenge transitional arrangements in court and the answer is that it is not. The Accession Treaty constitutes a primary source of EU law. One can only challenge the way transitional measures are applied.

1.1 Community provisions

Free movement rights were granted to workers of the EC/EU Member States by the Treaty of Rome. Since then their scope has been extended to other categories of the population by secondary legislation, which apart from guaranteeing the right of EU Member State nationals to travel, work and live freely in another Member State, ensures that they are not subject to any discrimination; can reside in the host Member State together with their family members; can remain in the host Member State after their employment ceases; can pursue an occupation if they obtained their qualifications in another Member State; or are subject to the same social security and tax rules as nationals of the host country. The Maastricht Treaty added Union citizenship, the right to vote and stand in European and municipal elections for EU citizens resident in other Member State and created the post of European Ombudsman.

However, the rights listed above are not granted to EU nationals unconditionally. The majority of them have their limits. For example the right to reside in another Member State for persons who are not economically active, is subject to fulfilment of a ‘self-sufficiency’ condition, which does not allow the citizen to become a burden on the host Member State. Similarly, the non-discrimination principle referring to EU citizens’ social security rights does not mean that they may go to another Member State in order to claim benefits there. The system of coordination of social security schemes (set out in Regulation 1408/71 and 574/74 as later amended) ‘protects’ those, who taking advantage of their free movement rights, throughout their professional career have lived, worked and consequently been subject to different social security systems. It does not offer EU citizens unconditional access to social security, let alone benefits, of any of the EU Member States. Many of the press reports and even statements national governments made, gave the wrong impression of free and unlimited access for nationals of other Member States to social security and social benefits.

This sophisticated system of ‘safeguards,’ however necessary, is not free of criticism.¹² Some parts of the EU *acquis*, for example the system of mutual recognition of qualifications, are overcomplicated. The fact that Member States retain a margin of discretion in considering applications in practice leads to a situation whereby automatic

¹² Look also at answers to the ECAS Enlargement questionnaire available on www.ecas.org > Hotline > News about hotline

recognition is not always as ‘automatic’ as it should be. There was already a problem with the recognition of qualifications in EU-15: refusals, long delays, administrative red-tape. In the light of the recent enlargement this problem is bound to become only more burdensome. (cf. *Case-Box 9*) Six of the new Member States join the EU with a ‘legacy’ of diplomas obtained in countries, which no longer exist (Soviet Union, Yugoslavia and Czechoslovakia). Moreover, qualifications in certain Member States result only from professional experience and correspond neither to training nor to a diploma. Yet there are also examples of professional from the new Member States who are offered jobs below their real level of qualifications.

This and other ‘limits’ and ‘safeguards’ under EU law have not been considered and debated sufficiently before the transitional arrangements were adopted.

An Estonian national qualified as a doctor in Poland currently wishes to practice in Germany. However, his application for recognition of qualifications has been refused by the German authorities on the ground that he obtained the diploma in 1997, when (only according to the German authority!) Polish training for doctors was not compatible with Directive 93/16 providing for automatic recognition of doctors’ qualifications. The fact that the citizen, alongside his Polish diploma, was also in possession of a certificate ascertaining the equivalence of his qualifications and issued by the Polish Medical Board was not deemed to be sufficient.

The citizen was informed that even though the Polish Ministry of Health is supposed to indicate a year after which all diplomas issued by Polish universities and Medical Academies are compatible with the directive, the exact date has not been set yet. Moreover, after such a date is finally confirmed, the qualifications of Polish doctors who obtained their diplomas in the period, when Polish training for doctors did not comply with the EU standards, will be deemed equivalent, if a particular person manages to obtain a special certificate issued by the Polish Medical Board (one that the citizen in question already had). The citizen was advised to refer the case to the SOLVIT centre and if necessary launch a complaint to the European Commission.

Case-Box 9: Refusal to recognise qualifications of a Polish doctor.

1.2 Derogations allowed by the Accession Treaty

The extension of free movement rights to the additional 75 million new citizens was a particularly sensitive, but ‘popular’ topic of many intensive discussions during the accession negotiations. On the one hand the ambitions and pressure exerted by some of the new Member States and on the other hand the anxiety about possible negative effects on the labour market and employment conditions, voiced by some of the old Member States, had to be balanced. The solution was found in the flexible 2+3+2 transitional arrangement referring to workers and proposed by the Commission. In the negotiations it was agreed in the same form with 8 Central and Eastern European new Member States (no transitional measures apply to workers coming from Cyprus or Malta, even though the latter may restrict access to its labour market in case of disturbances or a threat thereof) and included in the Accession Treaty signed on 16 April 2003.

Transitional measures as regards free movement of workers

The possibility of derogation from the free movement of workers principle is set out in Annexes V and VI, VII – X and XII – XIV¹³ attached to the Act on Accession.

Paragraph 1 of each of the annexes clearly states that the derogation applies and may be used only with reference to the free movement of workers and freedom to provide services (defined as per act mentioned in this Paragraph). Therefore the proposed transitional measures may not be used in order to restrict or limit the free movement rights of students, pensioners, self-employed persons, tourists and other self-sufficient persons. (*cf. with Case-Box 10 & 11 below*). Therefore, the ECAS hotline staff did not expect to come across cases like those presented below, which unfortunately were not the only two examples.

A Polish national wanted to register as self-employed in Germany. His application was not accepted and he was asked by the German authorities to supply them with an official letter, which would explain on what legal basis the citizen claims to have the right to be registered and pursue his activity in that country.

The citizen was reassured by the ECAS Hotline advisers about his right to freedom of establishment stemming from Art. 43 of the Treaty establishing the EC, and the fact that the Accession Treaty does not provide for any derogation from the application of this freedom. The citizen was advised about the legal provisions on which he may base his reply to the German authorities. Should the right to freedom of movement be still denied to him, the citizen was advised about the possibility of launching a complaint with the European Commission.

Case-Box 10: Restrictions imposed on freedom of establishment

A Polish entrepreneur wanted to buy a house in Germany where his wife and son would live. However, when he initially enquired with the competent German authority as to how to solve the necessary formalities he was informed that his family may not reside in Germany unless they work there, in which case they of course need to apply for a work permit.

The citizen was reassured about the right of his family to reside in Germany as long as they have health insurance and sufficient resources to support themselves in that country. The citizen was advised to send an explanatory letter to the German institution concerned and if required, launch a complaint to the European Commission.

Case-Box 11: Restrictions imposed on right of residence of inactive persons

The operation of the transitional measures, as set out largely in paragraphs 2 to 12 of the said annexes, is spread over three periods (the ‘2+3+2 formula’):

- Period 2004 – 2006 during which all current Member States apply national measures or measures resulting from bilateral agreements, thus regulating access to their labour markets. According to Paragraph 12 Member States may introduce

¹³ Each of the annexes refers to one of the eight Central and East European States, but all have been negotiated in the same way and therefore foresee application to the same transitional periods to all 8 new Member States.

under *national law* greater freedom of movement, (which may be equal to that guaranteed by the EC law provisions), but in any case national measures *may not be* more stringent than those that were in force on the day of signing the Accession Treaty (Paragraph 14). Furthermore, during any period, in which national measures or measures resulting from bilateral agreements apply, Member States are bound by the *principle of preference* set out in Paragraph 14. According to this clause, as regards labour market access, preference should be given to workers originating in the EU over workers who are third country nationals.

- Period 2006 – 2009 – Before the end of the first two year period, the Commission will produce a report, on the basis of which the Council will review the functioning of the transitional provisions. Nevertheless, the result of this review will not be binding on Member States. Those who wish to continue applying national measures will still be allowed to do so after having notified the Commission (Paragraph 3). Only in the absence of such notification, EU provisions governing free movement of workers will apply automatically to that particular Member State. During this three year period any Member State applying national restrictions may also at any time willingly ‘switch’ to full application of EU free movement provisions and should inform the Commission.
- Period 2009 – 2011 – as a general principle all national measures relating to labour market access should cease to apply by 2009. Nevertheless, a Member State is again given discretion to continue applying national measures (subject to the notification procedure as above) in case of serious disturbances of its labour market or a threat thereof. Moreover, during the whole seven year period Member States applying EU provisions on access to their labour market in full may resort to a *safeguard clause* included in Paragraph 7. This allows for partial or total suspension of application of the EU provisions referring to the free movement of workers, in case of disturbances to the labour market or threat thereof, even though the Commission’s permission will be required for this clause to be applied.

On the basis of Paragraph 13 of respective annexes, Austria and Germany are additionally allowed to apply national restrictions referring to the provision of certain services (as listed in this Paragraph). As clearly interpreted by the two countries in their joined Declaration no 19 (annexed to the Final Act of the Accession Treaty), where appropriate, the restriction may apply to their whole territory. Furthermore, provided that they retain restrictions as regards free movement of workers, they may also apply the restriction applicable to service providers for the entire period of seven years.

From the year 2011 onwards no transitional measures referring to freedom of movement of persons may be imposed. Until that time Member States, in declarations annexed to the Final Act of the Accession Treaty, have committed themselves to grant increased labour market access to new Member States nationals. (cf. Declarations no 6, 7, 10, 11, 13, 15, 16 and 18). However, at the moment, few are in reality doing so and majority is protected by a strict system of work permits.

Acquired rights and family members

There are also two exceptions to the possible restrictions described above. Firstly, as stated in Paragraph 2 new Member States nationals, who have lived and worked legally in one of the old Member States for an uninterrupted period of 12 months or longer prior to the accession 'will enjoy access to the labour market of that Member State.' Similarly, national measures of a particular Member State will cease to apply to those workers coming from the new Member States, who after 1 May 2004 will be admitted to the labour market of that particular current Member State for an uninterrupted period of 12 months or longer. (*cf. Case-Box 12 below*)

A Polish national, who has resided and legally worked in Belgium for two years now, has been recently informed that in the light of transitional measures, she will still need to apply for a work permit, should she wish to continue her residence and work in that country.

The citizen was informed that on the basis of Annex XII of the Accession Treaty she should be allowed to enjoy free access to the Belgian labour market, since before the 1 of May she had been admitted to the labour market of that Member State for and uninterrupted period of 12 months. She was advised to contact the national authority concerned again trying to clarify her situation and if necessary to launch a complaint in the European Commission.

Case-Box 12: Breach of '12 month' rule

The second exception relates to family members. A worker's spouse and children, who prior to the date of accession have been legally residing in a current Member State with a worker authorised to stay there for more than 12 months, should have immediate rights of access to that Member State's labour market. Those arriving after the date of accession, but during the period of application of the transitional provisions, should gain access to the labour market of the particular Member State once they have been resident in that country for at least eighteen months or after three years from the date of accession, whichever is earlier. Family members' general right to join a worker and reside with him/her in another Member States does not fall under the scope of transitional arrangements, hence applies fully as of 1 May 2004.

As indicated by the Member States at the time of signing the Accession Treaty, the flexible 2+3+2 arrangement would result in a more or less uniform system, under which free movement for labour would be guaranteed with only a few exceptions, largely covering countries which lie at the border with one of the new Member States or have historically been destinations frequently chosen by migrants from Central and Eastern Europe.

Nevertheless, the intentions expressed by EU 15 back in spring 2003 and even Declarations annexed to the Final Act (as discussed above) have not been binding on any of the Member States. Contagious as a virus, the scare of an 'influx of migrants from Central and Eastern Europe' led some of the Member States to 'rethink' their promises and as 1 May 2004 drew closer, in many cases to apply or announce more protectionist measures.

*National measures*¹⁴

The Accession Treaty does not clearly specify what form the transitional national measures may or must not take. The only guideline provided in Paragraphs 13 and 14 stipulates that national measures applied may not be more stringent than those applicable on 16 April 2003. Member States resorted to a variety of different restrictions ranging from limitations depending on sector or type of work, through quota arrangements, to work permits granted only when a national cannot be found to fill the vacancy. All these measures are also likely to apply on different timescales.

Old Member States

Ireland, the UK, and Sweden are the only three countries that decided to open up their labour markets as from the first day of accession, even though in case of the UK, citizens of the 8 new Member States will need to register with the Home Office within a month of the date on which they commenced employment in order to obtain a ‘worker’s registration certificate.’ All the other remaining old EU-Member States operate various work permit schemes.

Belgium retains its current work permit system with permits A (for all salaried workers) and B (for temporary employment) for a minimum period of two years. Workers wishing to take up employment in **the Netherlands** are also required to obtain a work permit, even though the government has abandoned its earlier intention of introducing quotas. In a number of sectors granting of such a permit is subject to simplified procedures, where the waiting time does not exceed two weeks. Nevertheless, work permits for all other jobs, falling outside the scope of specified sector ‘relaxations’ are granted only when a Dutch national (or national of another old Member State) willing to take the vacant post cannot be found. The situation is similar in **Finland**, where under national law, which is applicable to nearly all new EU nationals (with the exception of Malta and Cyprus) for a minimum period of two years, a work permit will only be granted provided that the vacancy cannot be filled by a Finnish worker. **Luxembourg** is known to operate a scheme under which work permits are granted only for specific position and applications are accepted only from the employers. Yet another work permit scheme is in force in **Denmark**. This country applies a system, under which citizens of the EU-8 are allowed to obtain a work permit only once they obtain an official residence permit and only for full time employment. The system applied by **France** *prima facie* may seem very similar to that operated by the Dutch, where current work permit policy applicable to salaried workers has been maintained. France foresees also possibilities of opening the labour market in specific professional sectors and currently the work permit requirement does not apply to students and researchers. Nevertheless, according to announcements made by this country’s representatives, the system will be in place for a period of 5 years.

Even stricter national measures are applied by another three countries. **Italy** operates a work permit scheme, which is automatically limited by an already fixed quota of 20,000

¹⁴ For a full account of detailed national measures please consult ECAS website on www.ecas.org > Hotline> Transitional measure by country or visit EURES website on europa.eu.int/eures/index.jsp

workers coming from the EU-8 in the year 2004. Only in cases of certain sector specific professions, work permits will be issued outside the scope of the quota fixed for 2004. **Spanish** system is based on the same principle – work permits are granted to nationals of the new Member States within a specific quota of applications accepted from all foreign nationals set for the year 2004. Similarly in **Portugal**, for the period of two years after enlargement the current system of work permits granted within quotas set every two years (covering all foreign nationals with the exception of EU-15, Cyprus and Malta) is currently maintained.

Austria and Germany, which have traditionally been the two countries receiving the majority of migrants from Central and Eastern Europe, voiced their concerns as regards the probable negative impact of migration on employment markets most loudly. Therefore, both will continue applying national restrictions (i.e. work permits schemes) and provisions deriving from bilateral agreements signed between themselves and individual new Member States. As discussed above, both countries are also allowed to apply certain restrictions as regards freedom to provide services.¹⁵ According to information available both complied with the ‘notification requirement’ and informed the Commission by letter dated 29.03.2004 in the case of Austria and letter dated 27.04.2004 in the case of Germany that they do intend to make full use of the derogation from Art. 49 allowed by the Treaty of Accession.

As regards the last remaining country of the old EU-15, namely **Greece**, it is known to be applying national measures restricting access of new Member States nationals to its labour market. However, since the country continuously fails to supply the necessary information to the Commission and no information about measures applied by Greece is directly available on the Greek Government websites, these will not be discussed here.

New Member States

On the basis of Paragraph 10 of the Annexes to the Accession Treaty discussed above, new Member States are allowed to restrict access to their labour market by nationals of the old Member States on the basis of reciprocity. That means that as long as restrictions flowing from national measures or bilateral agreements are applied by e.g. Italy with reference to Slovakian nationals, Slovakia may apply equivalent measures with reference to Italian nationals. Concerning free movement of workers between new Member States themselves, as long as any of the old Member States maintains restrictions with reference to one of the new Member States, the remaining 7 new Member States may resort to a safeguard clause (as discussed in earlier sections of this paper), applying restrictions with reference to nationals of that particular new Member State.

Countries exempt from the above rule are Cyprus and Malta. **Cyprus**, which will not face any restrictions on the part of the old EU-15, can also not be subject to such restrictions imposed by new Member States and cannot restrict access to its own labour market. **Malta**, similarly to Cyprus cannot be subject to restrictions applicable either on the part of old or new Member States, but according to provisions set out in Annex XI, Malta may

¹⁵ For list of sectors, please consult discussed here Annexes to the Accession Treaty – Paragraph 13

resort to a safeguard clause, restricting access to its labour market, at any time during the period of seven years after the accession, in case of disturbances to its labour market or threat thereof.

Even though shortly before the date of accession the 8 Central and Eastern European new Member States were expected to react on a ‘tit-for tat’ basis only three of them – **Hungary, Poland and Slovenia** are known to be applying reciprocal measures with reference to all nationals of the old Member States with the exception of Irish, Swedish and UK citizens. None of the new Member States have requested the Commission’s authorisation to restrict access to their labour markets by new EU Member States nationals. However, nationals of the new EU-8 taking up employment in Hungary need to report their presence in that country on the first day of their employment at the latest.

* * *

In the first report of 19 May we wrote how difficult it was to obtain information. Some Member States at the time failed to make the information about applied by them measures publicly available, in case of some others, different sources were contradicting one another. This was because measures were frequently late and introduced late. Now, all Member States with only one exception informed the Commission about applied by them transitional measures, however, some of them (for mysterious reasons) have taken the information about applied restrictions off their websites.

Implications of the application of transitional measures

Freedom of movement is a crucial part of the single market *acquis*. Meanwhile, due to imposed transitional arrangements nobody may be really sure what to expect. Contrary to earlier expectations and the promised benefits of the flexible 2+3+2 formula, under the cover of testing new solutions, the majority of Member States continue their pre-accession closed-door ‘management type’ migration policy, which contradicts basic priorities announced by the new Commission. In stead of reflecting the themes of the Lisbon Agenda, which promotes a far more flexible EU market, where mobility, increased language and other skills are valued and encouraged, the plethora of restrictive national measures sends a rather ‘uncomfortable’ political message that some of the EU citizens are ‘more of a liability than an asset.’¹⁶

Only a year ago it seemed that transitional arrangements restricting access to the labour market for citizens of the eight new Member States would not be applied by nearly half of the old EU-15. In the meantime national measures are not only applied by 12 of the 15 countries, but have proliferated as to the type of restrictions applied (quota arrangements, full work permit schemes, relaxed measures applicable in certain sectors) as well as

¹⁶ Helen Stalford (July 2003) – ‘Free Movement Post Accession – Transitional arrangements in Poland and Bulgaria’ *PHARE Symposium on Enlargement, Free Movement and Science Mobility*. University of Leeds: Centre for Study of Law and Policy in Europe, Department of Law; accessed at [<http://www.leeds.ac.uk/law/cslpe/phare/No.9.pdf>]

proposed the timeframe. Countries like e.g. France are already signaling their intention to extend the period of validity of transitional measures until 2009 and Germany (with Austria very likely to follow) is already known to be looking at stretching the period of restrictions to seven years. Given the non-binding nature of Council's reviews run after the initial two-year period, as well as the simple notification procedure in case of continuing application of national measures after 2006, such indications, however vague, should be observed very carefully if we want to avoid the 'domino effect' with which current measures have been introduced.

The 2+3+2 formula, flexible, but very complicated may have been an acceptable compromise at the time of signing the Accession Treaty. Therefore no systems of notification or co-ordination were established. Even though the Commission did attempt to provide for a comprehensive notification procedure the proposition was refused by the Council. The dangers connected with the parallel existence of European and national regimes, which differ on a country by country basis, were not foreseen in April 2003, when the Accession Treaty was signed.

Long after the date of 1 May 2004 the confusion as to how, when and where to go about the formalities connected with change of one's country of residence, still exists. More importantly it is not only the average citizen who is left unaware or confused about his EU rights. Insufficiently informed and trained officials, instead of serving the citizen with reliable advice, create additional problems and misunderstandings. (*cf. Case-Box 13 & 14*) Where does the dividing line between application of the national and European rules lie? As shown by examples compiled by the ECAS hotline having difficulties with correct identification of situations in which provisions of the EU law should prevail over more restrictive national measures, national officials will most often tend to opt for an option more familiar to them i.e. national law (*cf. Case-Box 15*).

A Hungarian student successfully applied for a place at one of the French universities. However, when he went to register with the French Prefecture where he lives, he was informed he is not allowed to reside in France as he does not have a French visa. He was advised to return to Hungary and apply to the French Embassy for the necessary (!) visa stamp.

A Similar report was received from a Slovene, who wanted to take up employment in Belgium. She found an employer and obtained necessary work permit. However, when she went the Commune close to the place where she lives, she was told she may not be registered. Here again the citizen was advised to go back to Slovenia and apply for a visa.

In both cases citizens were assured that a visa should not be required from them. National authorities wrongly interpreted the legislation. On both occasions the authorities involved were contacted by the ECAS hotline advisers and clarifications were made.

Case-Box 13: Unjustified requirement of visas

A Polish fisherman secured a contract with Belgian employer. When he applied for a work permit the application was refused on the grounds that the quota of work permits for the current year has already been filled. The citizen contacted the ECAS hotline to establish whether that may be true.

The citizen was advised that the reason given to him is not justified. Belgium, even though applying restrictive transitional arrangements and requiring from new Member State nationals work permits, does not limit the number of issued work permits by any quotas. At the time of writing the report the case is pending and circumstances are being clarified with the Belgian authority concerned.

Case-Box 14: National measures misapplied

Being caught on an illegal stay in the Federal Republic of Germany, a Polish citizen was banned from re-entering this country in 1991. Subsequently, having tried to re-enter Germany, he was issued with a fine, in place of which he served time in a German prison. After the date of enlargement when travelling via Germany to the Netherlands he was again accused of trying to re-enter the German territory and another fine was imposed on him. The citizen contacted the ECAS Hotline in order to establish whether as a European citizen he should be allowed to travel freely within the territory of the EU and the German re-entry ban should be void.

Unfortunately the citizen could not be provided with a definite answer. As a European citizen Polish national may be banned from entering another Member State only on grounds of public policy, public security or public health. Moreover, as Art 3 Directive 64/221/EEC clearly states even past criminal convictions in themselves are not sufficient reason for refusing right to enter and/or remain. However, EU law (equally in the legislative acts as well as ECJ case law) does not give us a clear answer as to how entry-bans, still valid under national law, however issued according to rules applicable in the pre-accession period, should be treated.

Case-Box 15: Validity of issued in the pre-accession period entry-bans

The Accession Treaty leaves also other grey areas. There is firstly, the question of social rights and their restriction, which some of the Member States are trying to enforce. Are Member States allowed to implement restrictions falling outside the scope of the definition of 'labour market access?' The answer seems a simple 'no!' As provisions of the Accession Treaty stand, Paragraph 2 of the relevant annexes limits the scope of derogation allowed for by the Accession Treaty to Articles 1-6 of Regulation 1612/68 regulating workers' access to employment. Additionally, Paragraph 9 mentions derogation from application of those articles of Directive 68/360EC (covering workers' residence rights), which 'may not be dissociated' from provisions of aforementioned Art 1-6 Regulation 1612/68. Consequently one would have to presume, that once a national of a new Member State is authorized to access the labour market of another Member State, Articles 7-9 of Regulation 1612/68 (concerning equal treatment) and Art. 10-12 (concerning the worker's family), let alone provisions of other EC law about non-discrimination, instruments on mutual recognition of qualifications or social security schemes do apply normally according to Community law. However, this does not always seem to be the reality. (*cf. Case-Box 16 below*)

According to a report received by the ECAS hotline from a community development organization located in Northern Ireland, the Northern Irish Housing Executive (NIHE) is claiming and insisting that nationals of the 8 new Member States are not entitled to avail of their accommodation, on the ground that NIHE is a publicly funded body.

It should be stressed that in the light of recently amended UK social security rules, citizens of the 8 new Member States are not entitled to any directly paid out social benefits and therefore are prevented from e.g. having their rental payment subsidized. This however, cannot mean that (as NIHE is claiming) they cannot benefit from general services which are being subsidized. Meanwhile, NIHE is refusing to entertain any housing enquiries that come from citizens of the EU-8.

Case-Box 16: Spill-over effect of restrictive measures

Second is the issue of possible limitation of rights granted by EU law to students. What will happen to students, who generally enjoying full free movement rights under Community law, wish to take up part-time employment in countries like Denmark. Will they be banned from doing so? And what about students in the UK, who, when taking up

employment will need to register with the Workers Registration Scheme? What rights and obligations will they be subject to? Those referring to their status of student and deriving from the EU law, or those referring to their status of worker, hence governed by the national system and not challengeable in the European courts?

Last, but not least remain the uncertainties relating to the worker's family members. As provided for by the Accession Treaty, family members moving to one of the old Member States after the date of 1 May will have to wait 18 months before gaining access to their new country's of residence labour market. Under the Europe Agreements they enjoyed right of access to employment immediately after settling down with a worker. This would imply that the provision of Paragraph 8 (as discussed above) is contradictory to the provision of Paragraph 14 of the Treaty Annex concerning freedom of movement for persons, according to which no measures should be more stringent than those existing on the date of signing the Treaty.

The unsure legal situation of certain categories of migrants and the divergence of measures stemming from the application of transitional arrangement not only leave citizens confused, but make them more prone to fall in the trap of fraudulent work agencies offering "guaranteed work with no administrative hassle". The work promised by the agencies work never materializes or in the 'best' case proves to be a low paid black market job. Meanwhile, the agency disappears together with the money paid in by the citizen as a deposit or an 'administrative' fee. As shown by ECAS hotline enquiries as well as the consultation with consulates it is particularly difficult to track down and prevent the activity of such 'gang masters' if citizens are not aware their rights are being infringed (e.g. when the agency demands the repayment of £200 cost for registering a worker in the UK) and even then do not know, who to contact to report the case.

The problems and questions raised here will remain problematic as long as transitional measures allowing for the co-existence of two regimes applicable to the freedom of movement of people: national and European, are kept in force. The long awaited and historic date of 1 May, which was expected to change Europe forever, is already gone. Nevertheless, the atmosphere of confusion as to who is welcomed in the enlarged Union and on what terms only seems to be thickening. (*cf. Case-Box 17 below*) It is equally in interest of the EU Institutions as well as national governments to adhere to their declared commitment to create a truly enlarged Europe within the full meaning of this word, in which there is more clarity and legal certainty.

An Estonian national wanted to set up his own company in the Netherlands. He was told by the national administration that there is a difference between the old and the new EU citizens; he would be free to register himself only after a period of seven years.

The citizen was informed that on the basis of Article 43 of the Treaty establishing the EC he has the right to set up a business and establish himself permanently in another country for the purpose of any industrial or commercial activity. The Dutch authorities have wrongly interpreted his rights; he was advised to lodge a complaint at the national and if necessary also the European level.

Case-Box 17: Restrictions imposed on other categories of migrants

4. Conclusions and recommendations

The aim of the ECAS' hotline and this report is to defend the right to equal treatment for the citizens from the new Member States. There is no reason why the spirit of the 1 May celebrations could not be recaptured, provided citizens are well prepared and informed, and the Institutions show the necessary political will to complete the process of enlargement in the area of free movement of people rapidly.

A first set of recommendations is addressed to citizens themselves to prepare themselves before leaving their home country and find out as much as they can about the scope and limits of their free movement rights. The key point here is that the transitional measures can be applied only with reference to labour market access. Therefore when it comes to social security, workers from the new Member States are entitled to equal treatment with that accorded to workers in the host country.

It should also be made clear to people that the transitional measures apply only to workers and not to the self-employed or other categories of the population. The hotline has found cases where the transitional regime becomes the norm rather than the exception. Such reports lead to our recommendation below that the Commission should be particularly vigilant and enforce European law. All those cases will result in ECAS supporting follow-up complaints to the Commission.

It is clearly not right to put the responsibility to be well informed entirely on the citizen. Although the information is available many callers to the hotline did not know where to find it. An information and communication campaign to inform citizens of their rights is necessary and as the cases quoted in the report show, staff at the borders or officials working in town halls require much better information. It is a worrying sign that there are problems with recognition of the right to travel on the basis of a valid ID card, for example.

Our second set of recommendations to the EU Institutions takes as a starting point a request to the European Parliament to organise a public hearing. What has been the impact of enlargement? The Parliament should recommend updating the studies done during the accession negotiations and which showed that the impact would be slight. Indeed, the evidence from the hotline points in the same direction. All - individuals, consulates and travel companies confirm that the expected influx was a trickle. One reason for this is that although higher wages in Western Europe may attract potential migrants, the first obstacle for them to overcome is that of the higher cost of living. It forces many of the jobseekers to return home empty handed. Are the transitional arrangements, which contrary to what was expected at the conclusion of the enlargement negotiations have spread to all but three of the 15, justified? The European Parliament should interrogate national authorities and recommend their phasing out within 2 years, (with the only exception of certain border regions).

The transitional measures create legal uncertainty and with their different timescales quantitative and qualitative restrictions, they are bad both for the citizen and for the internal market. They are also in contradiction to the emphasis placed by the new Commission on the Lisbon strategy for open flexible labour markets.

Lastly, it is logical to seek a firm commitment from the new Member States and the Council to extend *Schengen* and to do so in a way which does not discriminate against minorities in border regions. Therefore, ECAS proposes following deadlines: to achieve the full freedom of movement for workers by the end of 2006 and an EU-wide internal market without borders by the end of 2007.

* * *

To Citizens

There are certain rights, which citizens should be aware of:

- Despite the existence of EU internal and temporary external borders, all new Member States' nationals are free to move within the territory of the EU on simple presentation of a valid passport or identity card. Hence they may travel and reside in another Member State for a period of up to three months without complying with any special formalities and their entry may be refused only on grounds of public policy, public security or public health.
- Transitional measures relate only to workers. They do not affect the freedom to move to another Member State as a student, pensioner, self-employed or worker's family member. In reality any citizen may move to another Member State provided he is able to prove his medical cover and sufficient resources to be self sufficient.
- For the first two years after the accession each Member State is regulating access to its labour market on the basis of national legislation. Nevertheless, none of the measures may be more restrictive than those imposed prior to enlargement. In fact three of the old Member States operate a rather relaxed system, which allows new EU citizens to take up jobs in the UK, Ireland and Sweden. They are also free to access the labour market of any of the new Member States.
- Member States may only impose restrictions as regards access to employment. Hence, one should insist that provisions of mutual recognition of qualifications, as well as social security rights should be applied equally to workers from new and old Member States.
- Each citizen has a right to be informed about measures directly influencing his/her rights. Some useful links and possible sources of advice and information are listed

below. Nevertheless, citizens should also insist on better information by the national administrations of individual Member States.

To European Institutions

1. A public hearing should be organized by the European Parliament in order to examine whether the restrictions on free movement of people in the enlarged Union are justified. Too many decisions about deadlines for extending *Schengen* or phasing out transitional arrangements are left to national authorities. A public hearing would allow MEPs to interrogate representatives of the national governments, social partners, NGOs and experts, and propose to the European Institutions a plan on how to complete enlargement.
2. A new research programme should be coordinated by the Commission to find out whether pre-enlargement predictions of a low impact on migration have turned out to be correct. Updating the research is essential for the report the Commission is to prepare by May 2006. There must be a better informed and unprejudiced debate about free movement of people in the EU if we are to avoid the continued plethora of restrictive measures announced in a sudden ‘domino-like’ way in two years time.
3. An information and communications campaign should be launched by the Commission and national governments to inform new EU citizens of their rights. This should include pre-departure advice and proper training of officials. Even though useful information is available on European sites, there is a clear need for this rich source of information to be communicated more effectively.
4. Commercial employment agencies should be controlled. There is a danger of agencies exploiting citizen’s ignorance of their European rights and the complex legal situation. There is a need for rules against unfair and fraudulent commercial practice in the employment market and for placing an obligation on agencies to inform job seekers of their European rights. The possibility of creating such EU rules should be examined.
5. Enforcement of EU citizenship rights should be a priority for the Commission. It should ensure that transitional measures are limited to access to the labour market. The illegal extension of their application to service providers, the self employed and other categories of the population should be prevented.
6. Transitional measures for workers should be phased out except for limited border regions within 2 years. There has been no influx to justify them and the unexpected proliferation of complex national quotas and qualitative restrictions undermines the Lisbon strategy for flexible markets and a skilled, mobile labour force. The safeguard clause included in the Accession Treaty, the EU legal

requirements on the recognition of qualifications and the requirement of ‘sufficient financial resources’ offer sufficient protection.

7. A firm deadline for the extension of the Schengen zone by 2007 should be set. The delayed extension of *Schengen* creates inconvenience for citizens of the new Member State. It also brings problems to Communities living across the new EU borders, who recently divided by the EU external border need to go through additional administrative formalities like that of obtaining a visa or providing a guarantee, when visiting their friends and family in the EU. The adoption of Commission’s proposals on local frontier traffic and a firm EU commitment to extend *Schengen* by 2007 would help to overcome these problems.

Information sources

1. To obtain more information about free movement rights within the enlarged EU please consult the Europa website (www.europa.eu.int), and especially its ‘Dialogue with citizens’ part (www.europa.eu.int/citizensrights). ‘Dialogue with citizens’ contains comprehensive information about all 25 EU countries. The site’s fact sheets with information about national legislation and contact points are currently being updated and completed.
2. Questions may also be referred to Europe Direct by an e-mail or free phone number. Please visit the website (www.europedirect-cc.cec.eu.int/websubmit/?lang=en) or telephone 0800 67 89 10 11.
3. You can also refer your questions concerning the scope or ‘meaning’ of EU legislation and their influence on your rights to the Signpost Service (www.europa.eu.int/citizensrights/signpost/index.htm) or in cases of infringement of EU rules – to a SOLVIT (please find the address of the SOLVIT centre located in your country on a website (www.europa.eu.int/citizensrights/signpost/index.htm)).
4. For information about individual national measures referring to workers, please consult the EURES portal on (<http://europa.eu.int/eures/index.jsp>) or individual websites of respective national authorities:
 - Austria – (<http://www.bmwa.gv.at/BMWA/default.htm>)
 - Belgium (http://www.meta.fgov.be/pa/ena_index.htm)
 - Denmark (<http://www.udlst.dk/english/default.htm>)
 - Finland (<http://www.mol.fi/tiedotteet/2004043001.html>) or (<http://www.ecas.org/product/91/default.aspx?id=258>)
 - France (http://www.diplomatie.gouv.fr/mae/index_gb.html)
 - Germany (<http://www.arbeitsagentur.de/>)
 - Ireland (<http://www.google.co.uk/search?hl=en&ie=UTF-8&q=Department+of+Enterprise+Trade+and+Employment+-+Ireland&meta=>)

- Italy
(<http://www.welfare.gov.it/NR/rdonlyres/eksea53ajmavixsir26pzfuq5pljfhvd5bubzabhn2qr5gqqprh4eirc24wqbvtyrkfea4t7fxxc5j4cownczbkkece/UElcome.pdf>)
 - The Netherlands (<http://internationalezaken.szw.nl/>)
 - Poland (<http://www.mpips.gov.pl/english/index.php?dokument=86>)
 - Sweden (<http://www.migrationsverket.se/english.jsp>)
 - UK
(http://www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/work_permits.html)
5. You can also try contacting citizens Citizen Advice Centre in your own country. Such networks are not existent in all European Member States, but you may try obtaining information about them from the secretariat of Citizens Advice International, a new organization, which shares premises with ECAS.