

## EDITORIAL COMMENTS

### **Legislating free movement: An over-ambitious Commission package?**

The Commission has finally grasped the nettle of formally proposing the ending of all controls on persons crossing the border between one Member State of the European Union and another. Three draft texts were approved at a meeting of the Commission, held in Strasbourg on 12 July 1995, by what the Commissioner responsible for the Internal Market, Mr Mario Monti, described as “a very wide majority”.<sup>1</sup> These were forwarded to the Council, and the ad hoc Working Party on Free Movement of Persons began its examination of them after the summer break.

The texts, which the Commission regards as forming a package, and which accordingly have a common Introduction, comprise:

(1) *A proposal for a Council Directive on the elimination of controls on persons crossing internal frontiers.*<sup>2</sup>

The Directive would establish the general rule that all persons, whatever their nationality, must be able to cross Member States' frontiers within the Community at any point, without such crossing being subject to any frontier control or formality (Article 1(1)). However, it is made explicitly clear that the ban would not apply, even in areas near the frontier, to the exercise of Member States' general powers of law enforcement, including a possible obligation for individuals to possess or carry certain documents (Article (2)). A Member State,

1. See *Agence Europe*, 13 July 1995, p. 8.

2. COM (95) 347 final.

faced with a serious threat to public policy or public security, would be allowed to reinstate controls at its frontiers within the Community for renewable periods of 30 days; though, after the initial period, there would be an obligation to consult the Commission and the other Member States in advance (Article 2). The definition provision (Article 3) indicates that the notion of a Member State's "frontier within the Community" includes, besides common land frontiers, airports for intra-Community flights and seaports for intra-Community sea crossings, and that the general rule under Article 1(1) applies also to private parties, such as carriers checking travellers' documents in order to avoid possible liability under national immigration provisions. The proposed legal basis for the Directive is Article 100 EC.

*(2) A proposal for a European Parliament and Council Directive amending Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, as well as the corresponding Directive 73/148 with regard to establishment and the provision of services.*<sup>3</sup>

This is an ancillary proposal, designed to bring existing EC legislation on the rights of entry and residence of different categories of Union citizens into line with the abolition of internal frontier controls. The Directive would amend provisions allowing the crossing of internal frontiers to be made subject to the production of a valid identity card or passport. The proposed amendments would affect the Directives on the rights of residence of Union citizens who are not economically active,<sup>4</sup> even though these texts are not explicitly mentioned, because they cross-refer to the relevant provisions of Directive 68/360. The joint legal bases proposed for the Directive are Article 49, Article 54(2) and Article 63(2) EC.

3. COM (95) 348 final.

4. Respectively, Directive 90/364/EEC on the right of residence, O.J. 1990, L 180/26; Directive 90/365/EEC on the right of residence of employees and self-employed persons who have ceased their self-employed activity, O.J. 1990, L 180/28; and Directive 93/96/EEC on the right of residence for students, O.J. 1993, L 317/59.

(3) *A proposal for a Council Directive on the right of third country nationals to travel in the Community.*<sup>5</sup>

The Directive would provide for third country nationals who are lawfully in a Member State to be granted what is called “the right to travel” in the territories of the other Member States (Article 1(1)). The right would be quite narrowly circumscribed: beneficiaries would be entitled to cross internal frontiers for the purposes of a short stay in a Member State, or to pass through it, without being required to obtain a visa from that State (Article 2(1); however, Community and national legislation on stays other than for a short time or on access to employment or the taking up of self-employed activities would remain intact (Article 1 (3)). The detailed conditions for the exercise of the right (found in Articles 3 and 4) are designed to ensure consistency with the draft Convention on controls on persons crossing the external frontiers of the Member States and with the proposal for a Regulation determining the third countries whose nationals must be in possession of a visa. It would remain possible for a Member State to require third country nationals, who have entered its territory pursuant to the Directive, to report their presence (Article 5). The proposed legal basis for this Directive, as for the first one, is Article 100 EC.

Why, it may be asked, should proposals of such political sensitivity – and not only in the United Kingdom – be made at this particular time? While the maintenance of frontier controls, even in the form of a simple identity check, is certainly incompatible with the internal market as defined by Article 7A, should this be regarded as more of an affront to the ideal of unimpeded free movement than, say the existence of only partially harmonized regimes for the protection of intellectual property? The argument from political psychology, that the absence of immigration formalities will help the nationals of the Member States to feel more like Union citizens, seems a little feeble, given all the various factors – legal, social and cultural – that contribute to the consciousness of being “abroad”; at all events, its additional benefit is not quantifiable. It might be thought the

5. COM (95) 348 final.

Commission was simply seeking to placate the European Parliament, but that would be too cynical. It is certainly useful that the draft External Frontiers Convention and the proposal for a Visa Regulation should be complemented by texts spelling out the full legal implications, for the movement of persons, of the removal of physical frontiers between the Member States. Whatever may eventually be decided will depend on nicely balanced political calculations, but at least these can be made in an informed way, with a full set of relevant texts on the Council's table.

More intriguing, for lawyers, is the question whether the Commission was right to base its proposals on provisions of the EC Treaty. There is, of course, no problem as regards the second proposal which only affects Union citizens. But what of the first proposal, that would abolish all frontier controls, irrespective of a person's nationality; and the third proposal, that would create a general travel right for all third country nationals lawfully present in the Community?

The use of a Community instrument to secure the abolition of internal frontier controls seems unimpeachable, whatever view is taken of the scope of Article 7A. There is simply no practical way of effectively abolishing all formalities, at the point of entry, for some persons (those enjoying a right of free movement "in accordance with the provisions of this Treaty", including particular categories of third country nations benefiting, eg, from the provisions of certain association agreements), while keeping controls in place for third country nationals in general. Since Article 100A is prevented by its paragraph (2) from serving as a legal basis for measures relating to the free movement of persons, and since an act in the form of a directive would be apt to achieve the necessary harmonization of disparate national immigration laws, the choice naturally falls on Article 100.

The proposal on third country nationals' right to travel is likely to prove more controversial. The Commission adopts the position of principle that the lack of such a right, for persons lawfully present within the Community, is incompatible with a fully realized internal market: such persons ought to be entitled to travel to other Member States to obtain goods for their own use, or to be in receipt of services, notably in connection with tourism, or even to provide services.<sup>6</sup> The trouble with this argument is that it seems to prove too much. If the argument is based on the generality

6. See the Explanatory Memorandum, points 10 to 12.

of the language of Article 7A, second paragraph<sup>7</sup> (reflecting that in Article 3 (c)), how can the competence of the Community be limited to the matters mentioned by the Commission? The implication would be that all aspects of third country nationals' freedom of movement in the internal market, including rights of permanent residence and participation in economic life, could be regulated under the non-specific powers of Article 100 and Article 235. If that were so, the drafting of Article 3 (d) EC, which refers to "the entry and movement of persons in the internal market *as provided for in Article 100C*",<sup>8</sup> would be hard to understand; and so would the drafting of Article K.1 (3) of the Treaty on European Union, where points (a) and (b) would be virtually redundant.

The Commission does, though, put up a good case for the practical necessity of a measure such as the draft Directive, to avoid anomalies if and when the External Frontiers Convention and the Visa Regulation come into operation.<sup>9</sup> Pursuant to their provisions, a third country national in possession of a residence permit or a uniform visa issued by a Member State would be entitled to cross the external frontiers of the other Member States. It would be absurd if the right of entry of such persons, when coming directly from a third country, were not matched by a right of entry from other Member States of the Community. But this could be achieved by an amendment to the Convention, or by adopting a joint action under Article K.3(2).

The collection of draft texts on the realization of the free movement of persons graphically illustrates the problems and uncertainties of legislating on a matter that straddles the first and the third pillars. It does seem a pity that a subject so politically fraught should be further complicated by the difficulty of drawing clear lines between the Union's different areas of competence.

7. "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons ... is ensured ...."

8. Emphasis added.

9. Explanatory Memorandum, points 8 and 9.