QUEEN MARY, UNIVERSITY OF LONDON

Department of Law

Free Movement of Persons and Access to the Labour Market: Lessons from the European Economic Community for the Association of Southeast Asian Nations Economic Community

Atipa Junwerasatien

Submitted in fulfilment of the requirements of
the Degree of Doctor of Philosophy – **PhD (Law)**

Supervisors: Prof. Valsamis Mitsilegas and Prof. Elspeth Guild

I, Atipa Junwerasatien, confirm that the research included within this thesis is my own work or that where it has been carried out in collaboration with, or supported by others, that this is duly acknowledged below, and my contribution indicated. Previously published material is also acknowledged below.

I attest that I have exercised reasonable care to ensure that the work is original and does not to the best of my knowledge break any UK law, infringe any third party's copyright or other Intellectual Property Right, or contain any confidential material.

I accept that the College has the right to use plagiarism detection software to check the electronic version of the thesis.

I confirm that this thesis has not been previously submitted for the award of a degree by this or any other university.

Signature: Atipa Junwerasatien

Abstract

While a regional framework on the free movement of persons does not exist within the current AEC, it envisions advancing the region to have a freer flow of skilled labour. It has initiated the regional movement of selected high-skilled labour through the MRAs on the movement of selected professionals and the MNP on the movement of businesspersons. However, the AEC does not have any integration at the regional level on the movement of low-skilled labour. Thailand, which is the most preferred destination for low-skilled AEC labour, has entered into bilateral agreements with other four AEC member states, namely, Myanmar, Laos, Cambodia and Vietnam, in order to supplement the regional rule regarding low-skilled labour.

This thesis postulates that the EEC free movement of persons framework, which involved the movement of persons to pursue economic activities, could provide useful lessons for the emerging AEC labour migration framework. The main supporting reason for this hypothesis is that the original EEC framework has eventually developed into the most mature regional system on the free movement of persons within the EU.

This thesis perceives the development of a regional framework on labour migration as a historical development, which challenges labour migration theory. The central question of this research is "How can participating states develop and accept a legal framework on labour migration within regional economic associations?" This thesis aims to examine the feasibility of regional integration on labour migration within the AEC, taking into account the experiences of the EEC free movement of persons framework. It aims to explore approaches and main features of the labour migration framework of the EEC and the AEC. The examination mainly relies on obstacles to labour migration including access to the labour market, permission to perform economic activities, permission to reside, family reunification, working conditions, and protection from expulsion.

This thesis also aims to prove the hypothesis of the new regionalism theory, which proposed that regionalism emerges from below and within the region. Through the lens of the new regionalism theory, it explores the challenge that reliance only on existing international law may be inadequate for regional cooperation to achieve deep regionalism in respect of labour migration. Nevertheless, an effective regional framework could be initiated by new rules agreed by the participating states or developed from reciprocal bilateral agreements.

Acknowledgements

Free movement of persons is not a topic that is widely discussed in the region where I come from. There is no free movement of persons regime within the AEC. Some regional cooperation on the movement of high-skilled labour has been initiated. However, for low-skilled labour, the cooperation is limited to the form of bilateral agreements.

Then, in 2017, I left my home country to pursue my Master of Laws in London. During my studies, I came across the issue of the free movement of persons framework. My curiosity was driven by my desire to gain more knowledge on the topic. I acknowledge the advancement of the current EU framework, so I traced back to look at the legislation during the period of time when it began. Subsequently, I found that the transitional period of the original EEC was the critical moment when the free movement of persons framework was initially achieved. Thus, I believe that the original free movement of persons framework of the EEC could provide beneficial lessons for the current AEC labour migration framework.

This thesis would not have been possible without the help, good advice, insightful suggestions and encouragement of my supervisors, Professor Valsamis Mitsilegas and Professor Elspeth Guild. I will not forget those illuminating discussions with both of them, at each stage of my writing, which have led me to the final completion of this thesis.

I would like to express many thanks to the Anandamahidol Foundation, particularly for the award of a scholarship that provided the necessary financial support for this research. I also would like to extend my sincere thanks to all my interviewees, who generously shared their thoughts on my research.

Finally, I am deeply grateful to my dearest family for their continuous support. I owe hugely to my parents, Thawesak and Jonghatai, as well as my younger brother, Kornranut. They have always been there for me. Their love and confidence in me have encouraged me to go ahead in my studies throughout the years.

Abbreviations

AA	Association of Southeast Asian Nations Architects
ACCSTP	Association of Southeast Asian Nations Common Competency Standards for Tourism Professional
ACPA	Association of Southeast Asian Nations Chartered Professional Accountant
ACPE	Association of Southeast Asian Nations Chartered Professional Engineer
AEC	Association of Southeast Asian Nations Economic Community
ASC	Association of Southeast Asian Nations Security Community
ASCC	Association of Southeast Asian Nations Socio-Cultural Community
ASEAN	Association of Southeast Asian Nations
CA	Competence Authority
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CENTO	Central Treaty Organisation
CI	Certificate of Identity
COVID-19	Coronavirus Disease of 2019
CRC	Convention on the Rights of the Child
CRD	Citizens' Rights Directive
DSM	Dispute Settlement Mechanism
EAEC	European Atomic Energy Community
EC	European Community

ECSC	European Coal and Steel Community
EEC	European Economic Community
EU	European Union
FDP	Foreign Dental Practitioner
FMP	Foreign Medical Practitioner
FN	Foreign Nurses
FWAO	Foreign Workers Administrative Office
GATS	General Agreement on Trade in Services
GBP	British Pound Sterling
ILO	International Labour Organisation
MNP	Movement of Natural Persons Agreement
MOU	Memorandum of Understanding
MRA	Mutual Recognition Arrangement
NV	Nationality Verification
OSSC	One Stop Service Centre
PRA	Professional Regulatory Authority
RFA	Registered Foreign Architect
RFPA	Registered Foreign Professional Accountant
RFPE	Registered Foreign Professional Engineer
SEATO	Southeast Asia Treaty Organisation

TIP	Trafficking in Persons
TP	Temporary Passport
TPCB	Tourism Professional Certification Board
UDHR	Universal Declaration of Human Rights
WTO	World Trade Organisation

Contents

INTRODUCTION

1. Background and Aim of the Study

The central question to be addressed in this research is "How can participating states develop and accept a legal framework on labour migration within regional economic associations?" The main purpose of this research is to examine the feasibility of regional integration on labour migration within the AEC, taking into account the experiences of the EEC free movement of persons framework.

The "ASEAN" was established by the ASEAN Declaration in 1967.[1] The five founding member states were Indonesia, Malaysia, the Philippines, Singapore, and Thailand.[2] Subsequently, Brunei joined in 1984, Vietnam in 1985, Myanmar and Laos in 1997 and Cambodia in 1999, comprising the present 10 member states.[3] Then, in 2007, the heads of the ASEAN member states signed the ASEAN Charter which established the AEC.[4] While a regional framework on the free movement of persons does not exist within the current AEC, it envisions advancing the region to have a freer flow of skilled labour.[5] Specifically, it has initiated the regional movement of selected high-skilled labour through the MRAs on the movement of selected professionals and the MNP on the movement of businesspersons.[6] However, the current AEC does not have any integration at the regional level on the movement of low-skilled labour. Thailand, which is the most preferred destination of low-skilled AEC labour,[7] has entered into bilateral agreements with other four AEC member states, namely, Myanmar, Laos, Cambodia and Vietnam, in order to supplement the regional rules regarding low-skilled labour.

---

[1] Association of Southeast Asian Nations Declaration (ASEAN Declaration) (8 August 1967).
[2] ibid.
[3] ASEAN, 'Establishment' (2018) <https://asean.org/asean/about-asean/overview> [accessed 28 February 2021].
[4] Charter of Association of Southeast Asian Nations (ASEAN Charter) (20 November 2007) Preamble.
[5] ASEAN Economic Community Blueprint 2025 (AEC Blueprint 2025, November 2015) [19-A5].
[6] ibid.
[7] International Labour Organisation, 'Countries of Origin and Destination for Migrants in ASEAN' (2015) <http://apmigration.ilo.org/resources/ilms-database-for-asean-countries-of-origin-and-destination-for-migrants-in-asean> [accessed 21 February 2021]; International Labour Organisation, 'Triangle in ASEAN Quarterly Briefing Note' (2020) <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/genericdocument/wcms_735103.pdf> [accessed 21 February 2021].

For the EEC, the six founding member states which were Belgium, Germany, France, Italy, Luxembourg, and the Netherlands signed the Treaty of Rome in 1957.[8] It contains the most extensive provisions which cover the four freedoms of goods, persons, services and capital. Following the declaration in the Treaty of Rome, the EEC adopted several regulations and directives in order to actualise the objective of the free movement of persons. This right to free movement of persons under the Treaty of Rome was primarily limited to only nationals of the EEC member states engaging in economic activity as workers, self-employed and service providers.[9]

This research postulates that the regional framework on free movement of persons in the EEC, which involved the movement of persons with the purpose to pursue economic activities, could provide useful lessons for the AEC labour migration framework. The main supporting reason for this hypothesis is that the original EEC framework has eventually developed into the most mature regional system on the free movement of persons within the EU.[10] This research acknowledges that the free movement of persons framework has been greatly developed since the EEC period. However, the transitional period of the EEC could be considered as a critical moment in which the free movement of persons was initially achieved. Therefore, this research mainly focuses on the development of regional legislation during the EEC transitional period from the 1950s to the 1970s. This research also believes that the examination of this period could provide valuable lessons for the current AEC labour migration framework.

2. Research Methodology and Sources

In order to answer the main research question, this research adopted a doctrinal method that mainly focuses on critical reasoning derived from authoritative texts.[11] In general, the task for doctrinal analysis aims to extract the patterns of normative understanding

[8] Treaty establishing the European Economic Community (Treaty of Rome) (25 March 1957).
[9] ibid.
[10] International Organisation of Migration, 'International Dialogue on Migration Intersessional Workshop on Free Movement of Persons in Regional Integration Process' (2007) <https://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/microsites/IDM/workshops/free_movement_of_persons_18190607/idm2007_handouts.pdf> [accessed 21 February 2021]; Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases and Meterials* (6th edn, Oxford University Press 2015) 4-8, 744-745; Catherine Barnard, *The Substantive Law of the EU: The Four Freedom* (5th edn, Oxford University Press 2016) 203.
[11] Christopher McCrudden, 'Legal research and the social sciences' (2006) 122 Law Quarterly Review 633-635.

or to seek the best solution to a specific issue.[12] Additionally, this method allows this research to examine both internal and external legal history. The former is the history of written laws and legal principles. Its main sources are statutes, court's cases, and academic literature.[13] The latter is the history of law in practice. Its main sources are the functions of legal institutions.[14]

With this doctrinal method, this research is able to analyse related regional instruments, case law and academic literature. Consequently, this method provides profound knowledge of the initiation and historical development of the regional labour migration framework as well as the institutional framework of the EEC and the AEC.

To explore the historical development of the EEC legal framework, this research relies heavily on the primary legislation, which was the 1957 Treaty of Rome.[15] It also relies on the related secondary legislation, including directives and regulations, during the EEC transitional periods from the 1950s to the 1970s. This research also analyses some related case law of the Court of Justice to illustrate the implementation of these Community laws.[16]

To examine the current approaches of the AEC, this research relies on the regional instruments including the ASEAN Charter, the MRAs, the MNP and the Consensus. It also refers to the AEC Blueprints, which are the political instruments. As mentioned in the introduction, there is no regional instrument on low-skilled labour within the AEC. This research examines the bilateral labour agreements between the AEC member states. It focuses on agreements between Thailand and the four AEC states which are Myanmar, Laos, Cambodia and Vietnam.

This thesis also engages with the rich academic literature on related topics. Moreover, it also conducted in-depth interviews in order to gain insight into the historical development of the EEC free movement of persons framework and the current practice of the AEC labour migration regime. Specifically, this research interviewed experts in related fields, including

---

[12] ibid, Alfred W B Simpson, 'The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature' (1982) 3 (4) University of Chicago Law Review 632.

[13] McCrudden (n 11) (2006); David Ibbetson, 'Historical Research in Law' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (2005) 863-864; "Its sources are predominantly those that are thrown up by the legal process: principally statutes and decided cases, supplemented where possible with lawyers' literature expounding the rules and occasionally reflecting on them."

[14] Ibid, "…the history of the law in practice, of legal institutions at work in society rather than legal rules existing in a social, economic, and political vacuum."

[15] Treaty of Rome (1957). This research mainly focuses on the original Treaty of Rome. Therefore, the numbering of Articles referred to in this thesis is as of the original Treaty (before the amendments).

[16] This research focuses on the historical development of the early EEC laws, not the current EU laws. From the perspective of this research, regional legal instruments of the EEC are seen as 'Community laws,' not the 'Union laws.'

academics, judges of the constitutional court, government officials, and representatives from the professional association.

The framework of this research is based on the new regionalism theory which proposed that regionalism emerges from below and within the region.[17] In other words, regional rules might not develop from international law but could be initiated by the participating states.[18] This research aims to prove this hypothesis of the new regionalism theory by examining the relationship between the regional framework on labour migration and international law. To be specific, this research analyses whether the EEC and AEC frameworks on labour migration developed from international law. Additionally, it also scrutinises whether international law could be considered as a proper means for advancing regional cooperation on labour migration within the regional context.

Additionally, this research adopted the doctrinal method to examine the approaches and main features of the labour migration framework of the original EEC and the current AEC. The examination based on the ways in which each economic community dealt with the main obstacles to labour migration including access to the labour market, permission to perform economic activities, permission to reside, family reunification, working conditions, and protection from expulsion. These obstacles are explained further in section 4 of chapter 1.

With the above-mentioned research methodology, this research is able to draw valuable lessons from the original EEC free movement of persons framework and to provide recommendations for the current approaches of the AEC labour migration regime.

3. Chapter Outline

This thesis is comprised of seven chapters, an introduction and a conclusion.

Chapter 1 aims to provide a theoretical framework of the thesis. It examines related literature on labour migration, free movement of persons and regionalism. This chapter analyses labour migration theories and obstacles to labour migration. It also theorises free movement of persons from the perspective of labour migration. Then, this chapter examines the theory of new regionalism and how it fits with labour migration in the regional context.

---

[17] Björn Hettne and Fredrick Söderbaum, 'The New Regionalism Approach' (1998) 17 (3) Politeia 6-21.
[18] Ján Klučka and Ľudmila Elbert, *Regionalism and its Contribution to General International Law* (Pavol Jozef Šafárik University; Institute of European Law and Department of International Law 2015) 30-31.

The next two chapters examine the development of EEC legislation on the free movement of persons framework. Chapter 2 focuses on workers and chapter 3 focuses on self-employed persons and service providers. The two chapters analyse the approaches that EEC legal instruments employed to deal with the obstacles to labour migration set out in chapter 1. These chapters also aim to prove the hypothesis of the new regionalism theory that only following international law may not be suitable for the regional grouping to achieve regionalism.

Chapter 4 explores the AEC labour migration framework. This chapter analyses the current AEC legal instruments which are limited only to high-skilled labour. It has a similar structure as the two preceding chapters. Specifically, the obstacles to labour migration and the new regionalism theory are used as a framework of analysis.

Chapter 5 relies on the new regionalism theory, which proposed that a regional regime can be developed from bilateral arrangements or initiated by new rules agreed by the participating states. It analyses the extent to which the national efforts between the AEC member states on low-skilled labour could form a regional regime. The examination is based on the experiences of bilateral labour agreements between certain founding member states of the EEC.

Chapter 6 is devoted to the institutional framework. This chapter examines the roles and functions of the core regional institutions of the EEC and AEC. Additionally, it analyses the influence of these institutions on the development of regional legislation on labour migration within the two economic communities.

Chapter 7 presents the main findings of the research. It summarises the regional framework on labour migration of the EEC and that of the AEC dealing with the main obstacles to labour migration. This chapter illustrates the main features of those frameworks. Finally, it provides recommendations for the current AEC framework on labour migration, considering the experiences of the EEC free movement of persons framework.

CHAPTER 1. Setting the Scene: Labour Migration Theory, Free Movement of Persons and Regionalism

1. Introduction

The main purpose of this research is to examine the feasibility of regional integration on labour migration within the AEC, taking into account the experiences of the EEC. In order to explore the two economic communities on the issue of labour migration, it is necessary to set out the general theoretical framework for further analysis.

This chapter focuses on theories and literature relevant to labour migration, free movement of persons, and regionalism. It begins with a general discussion on the concept of migration, state sovereignty and the study of migration. It continues to analyse labour migration theories and obstacles to labour migration. Following that, it moves on to theorise on the free movement of persons framework from the perspective of labour migration. It specifically analyses the free movement of persons framework of the EEC. Subsequently, this chapter examines the theory of new regionalism and how it fits with labour migration in the regional context.

2. General Discussion

To begin with, migration can be separated into movement within a country and movement across the international border. This research focuses only on international migration. In general, states have the power to designate their nationals by setting conditions of nationality and authorising identity documents to prove the legal status of their nationals.[19] In international law, it gives "nationals" of a state the right to enter state territory. However, those who are not classified as nationals of a state are foreigners and, depending on that state's national legal definition, migrants. Modern states also claim the power to control entry into and exit from their own territory.[20] States are more likely to make sovereignty claims at

[19] John Christopher Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge University Press 2014) 17-20.
[20] Steffen Mau, Heike Brabandt, Lena Laube and Christof Roos, 'Globalization and the Challenge of Mobility' in Steffen Mau and others (eds), *Liberal States and the Freedom of Movement: Selective Borders, Unequal Mobility* (Palgrave Macmillan 2015) 25-26.

the legitimate border crossings.[21] Individuals who depart their own states of nationality and enter other states are classified as foreigners or migrants.[22] Whether they will be allowed to enter a state or to remain there is normally considered in migration theory as the state's sovereign right of the authorities of the state of destination.

The study of the movement across international borders has been divided into two bodies of investigation. The first body is the study of migration processes and patterns, which is founded in the sociology of migration – what happens to the destination territory of people the state designates as migrants.[23] The second body is the study of the incorporation of migrants into the receiving state.[24] Both presuppose that the destination state controls the right of entry, residence, and work. Haas, Castles and Miller argued that migration studies should embrace both bodies of the investigation while still accepting the fundamental position that states are entitled to control the entry, residence and work of anyone they have not classified as a national.[25] The second body of study might be defined more extensively to cover the ways in which migration brings about a change in both the country of destination and the country of origin.[26] Whether this change, normatively framed, is good or bad is often part of the academic debate.

From the perspective of this research, migration is not only about third-country nationals but also about the migration of labour across the member states of a regional economic association. This research examines the feasibility of regional integration on labour migration within the AEC by adopting lessons from the free movement of persons framework of the EEC from the perspective of labour migration. Thereby, the movement of third-country nationals is not the focus of this research. The issue, which this research will explore further, is the challenge to the state-sovereigntist approach to labour migration posed by regional systems. Questions about the meaning of state sovereignty in border and labour migration could be raised, as the EEC free movement of persons framework reverses the relationship of state sovereign power to exclude migrants by substituting the right of the migrant to enter and

---

[21] ibid, Torpey (n 19) (2014) 17-24.
[22] Bridget Anderson and Scott Blinder, 'Who Counts as a Migrants? Definitions and their Consequences' (2015) <http://migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/Briefing-Who_Counts_as_a_Migrant.pdf> The Migration Observatory [accessed 21 February 2021].
[23] Douglas Steven Massey and others, 'Theories of International Migration: A Review and Appraisal' (1993) 19 (3) Population and Development Review 431.
[24] ibid.
[25] Hein de Haas, Stephen Castles and Mark J Miller, *The Age of Migration: International Population Movements in the Modern World* (6th edn, Palgrave MacMillan 2020) 30-32, 42-73.
[26] ibid.

work in the destination state with a limited right for the state to exclude them.[27] By means of a regional labour migration agreement, sovereign states have to renounce control over a group of non-nationals who obtain rights of entry, residence, family reunification or other entitlements.[28] From the labour migration perspective, the free movement of persons framework is also based on the state sovereignty approach. In other words, the sovereign states, which are member states, have decided to accept the free movement of persons framework to regulate labour migration. Therefore, it can be concluded that the free movement of persons framework is a form of labour migration.

3. Interrogating Labour Migration Theory

This research plans to further study the area of labour migration within the regional context of the two major economic associations, namely the EEC and the AEC. Thus, it would be practical to examine the related literature on the theory of labour migration. To be specific, this part of the chapter discusses the four primary theories on migration for employment purposes.

3.1 Neoclassical Theory

The earliest theory was the "neoclassical theory", which was introduced in the nineteenth century. This theory presumed that migrants have the potential to acknowledge wage rates in the state of destination,[29] so decisions to migrate are merely based on economic factors.[30] According to academic authors' basic assumptions, migration for employment is linked with gaps in wage rates among states.[31] It is simply based on the general push and pull factor theory that migrants aim to obtain a higher wage[32] and maximise their quality of life.[33]

---

[27] Diego Acosta, 'The Expansion of Regional Free Movement Regimes. Towards a Borderless World?' in Paul Minderhoud, Sandra Mantu and Karin Zwaan (eds), *Caught In Between Borders: Citizens, Migrants and Humans* (2019 Wolf Legal Publishers) 9-15.
[28] ibid 10.
[29] Clark Kerr, 'Labor Markets: Their Character and Consequences' (1950) 40 (2) The American Economic Review 280.
[30] Robert Leiter, 'The Contributions of Wage Theory' (1953) 4 (6) Labour Law Journal 394.
[31] William Lewis, 'Economic Development with Unlimited Supplies of Labour' (1954) 22 (2) The Manchester School 139.
[32] Alfred Kuhn, 'Market Structures and Wage-Push Inflation' (1960) 13 (4) Industrial and Labour Relations Review 161-162; Barry Raymond Chiswick, 'Are Immigrants Favourably Self-Selected? An Economic

It is apparent that this theory relies extensively on the supply aspect that the initiation of migration came from the individual decisions of migrants. Therefore, based on this theory, migration could not occur with the absence of wage differentials because the chief incentive for migration would not exist. Additionally, the result of movement based on this theory would solve the unemployment issue and bring equilibrium to an international wage differential. Massey and others inserted that this movement would decrease labour supply in the sending states, leading to wage increases in the capital-poor country and increase labour supply in the receiving states, leading to wage falls in the capital-rich country.[34] Olsen also predicted that this movement should equalise labour costs across the participating area.[35]

However, the predictions of neoclassical labour migration theorists carry doubts. For instance, the unemployment issue has not been solved. According to a statistic in 1957, approximately 7 per cent of Italian nationals were unemployed.[36] Nowadays, it has been 60 years since the initiation of the free movement of persons framework. However, Italy, which is one of the original EEC and the current EU member states, still has a high unemployment rate of 9.8 per cent.[37]

The neoclassical theory also faced criticism from academics, even in the 1950s and later. Its fundamental assumptions were critiqued by Parnes and Lannes that workers might not migrate, even with a higher wage in the state of destination.[38] Additionally, Sassen also critiqued this theory as being unable to explain or predict the future movement of migrants in reality.[39] In other words, the presumption of this theory regarding the knowledge of migrants might not be correct. In fact, there are migrants who have limited information on wages and other issues related to employment opportunities, especially low-skilled labour. This critique

---

Analysis' in Caroline B Brettell and James F Hollifield (eds), *Migration Theory: Talking Across Disciplines* (Routledge 2000) 61-76.

[33] George Jesus Borjas, *Heaven's Door: Immigration Policy and the American Economy* (Princeton University Press 1999) 189-190.

[34] Massey and others (n 23) (1993) 433.

[35] Erling Olsen, 'Regional income differences within a common market' (1965) 14 (1) Papers of the Regional Science Association 35-36.

[36] Paola Casavola, 'Unemployment Rate in Italy: Historical Series' (1955-1998) Bank of Italy Statistic.

[37] Eurostat, 'Unemployment rates, seasonally adjusted: Italy' (October 2020) <https://ec.europa.eu/eurostat/documents/portlet_file_entry/2995521/3-02122020-AP-EN.pdf/3b4ec2e2-f14c-2652-80bd-2f5e7c0605c2#:~:text=The%20EU%20unemployment%20rate%20was,office%20of%20the%20European%20Union> [accessed 21 February 2021].

[38] Herbert Parnes, 'Research on Labour Mobility: An Appraisal of Research Findings in the United States' (1954) 65 New York: Social Science Research Council 147-150; Xavier Lannes, 'International Mobility of Manpower in Western Europe: I' (1956) 73 (1) International Labour Review 2-3.

[39] Saskia Sassen, *The Mobility of Labour and Capital: A Study in International Investment and Labour Flow* (Cambridge University Press 1998) 4-6.

is even more significant when considering the EEC free movement of persons framework, which has been incorporated into the current EU framework for a long time. It is still difficult to understand why, currently only 3.3 per cent of nationals of EU member states live in the member states, other than that of their nationality[40] when there are high differences in wages and social benefits among the member states apart from unemployment levels.

3.2 Dual Labour Market Theory

The second theory was the "dual labour market theory" which proposed that movement across countries results from the demand in the country of destination. This theory argues that the previous theory presumption that movement is initiated by the personal decisions of migrants is implausible. It leads to a hierarchy in the labour market in the destination country. The primary labourer is the high-skilled labourer who generally has regular legal status in the country.[41] The secondary labourer is the low-skilled labourer who tends to face unfavourable circumstances due to his or her irregular status and lack of education.[42]

This theory essentially examines the demand aspect that migration is initiated by the employers or the government of countries that have a better economy. Nevertheless, the explanation of the dual labour market theory was also questioned by academics. Haas, Castles and Miller critiqued that demand by employers could be contrary to certain state interests. Specifically, the demand for undocumented low-skilled labourers who could be easily controlled by the employer could undermine the government's immigration and employment policies and equal treatment legislation.[43]

This theory leads to government policies aimed at increasing deterrence for illegal employment or exploitation of labour in the country of destination.[44] Moreover, this theory insufficiently integrates with the free movement of persons regime and requires more explanation. It rests on' the state sovereigntist assumption that the destination states make the

---

[40] Eurostat, 'EU Citizens Living in Another Member State – Statistical Overview' (2019) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=EU_citizens_living_in_another_Member_State_-_statistical_overview> [accessed 21 February 2021].
[41] Gilles Saint-Paul, *Dual Labor Markets: A Macroeconomic Perspective* (Massachusetts Institute of Technology Press 1997) 45-54.
[42] ibid.
[43] Haas, Castles and Miller (n 25) (2020) 35, 124, 194–195.
[44] ibid.

rules, and that the state of origin and migrants have little say in the matter. It is also premised on the idea that sufficient employers are "free-riders" seeking to subvert labour law protections in order to influence the amount of labour migration. A free movement of persons regime that provides labour migrants with the entitlement to move and work creates little opportunity for "illegal migration" from which poor employers can profit.

3.3 New Economic Labour Migration

The third theory is the "new economic labour migration" which suggested that migration decisions are influenced by the people surrounding migrants, including families, communities and households.[45] Specifically, sending family members to work abroad could provide self-insurance against family income risk or unemployment arising from possible economic fluctuations in the country of destination.[46] The factors or reasons for migration are quite different from the aspects described in the first and second theories.

The third theory challenges the neoclassical theory, stating that the decision to migrate could not come individually from the migrants or the quality of life of the individual migrant. Additionally, the purpose of migration for acquiring a high income is not the sole reason for migration under this third theory. Instead, the purpose of migration in this case is to provide benefits to people related to the migrant in terms of financial sustainability. The approach of this third theory considers, and is related to, a wider group of people compared to the first theory. However, similar to the neoclassical theory, this theory essentially concerns the supply side for migration. Additionally, an increased wage in the destination country might also be an incentive for facilitating the flow of migrants. Therefore, this theory also encounters similar challenges and critiques with respect to the realities of the free movement of persons regime, as the previous two theories.

3.4 Migration System Theory

The final theory is the "migration system theory" which suggested that migration is a result of previous links between the country of destination and the country of origin, based on

[45] Massey and others (n 23) (1993) 432, 437.
[46] Ode Stark and David Bloom, 'The New Economics of Labour Migration' (1985) 75 (2) The American Economic Review 173-178; J Edward Taylor, 'Undocumented Mexico-U.S. Migration and the Returns to Households in Rural Mexico' (1987) 69 American Journal of Agriculture Economics 626.

several causes, including political influence, trade, cultural ties, investment or colonisation. The theory posits that migration could be considered a result of the interaction between the three related structures.

The first structure is the macro-structure that refers to large social institutional factors. This structure includes the states and state-related practices that aim to control migration, such as interstate relationships, laws, structures and other state policies.[47] Similar to the dual labour market theory, the macro-structure is also based on the state sovereignty approach in which states have the executive power to make rules regulating migrants.

The second structure is the micro-structure that includes the migrants. This structure could be considered an informal social network, naturally formed by the actions of the migrants themselves while they deal with migration, working, and living conditions in the country of destination. Specifically, this structure considers both cultural and social aspects.[48] Similar to the neoclassical theory and the new economic labour migration approach, the macro-structure assumes that the migrants consider living and working conditions including wage rates and cultural and social aspects when deciding to migrate.

The final structure is the meso-structure, which refers to the intermediate mechanisms that connect the macro- and micro-structures. In other words, this structure is related to the steps of migration from the country of origin to the country of destination. This structure covers an extensive range of migration industries.[49] On the one hand, the migrant industry could assist migrants. For instance, legal recruitment intermediaries or agencies may have been authorised by officials to facilitate the process of sending migrants to employers in the country of destination. On the other hand, the migration industry could also exploit migrants. For instance, human traffickers are not authorised and seek illegal pathways to bring migrants to the destination country.

From the above examination of migration system theory, it is evident that this theory is different from the former theories, as it considers migration as a whole system or process. It focuses on the demand aspect, that migration is initiated by employers or the government, and on the supply aspect, which states that migration is initiated by migrants and related

---

[47] James F Hollifield, 'The Politics of International Migration: How Can We Bring the State Back In?' in Caroline B Brettell and James F Hollifield (eds), *Migration Theory: Talking Across Disciplines* (Routledge 2000) 137-185.
[48] Massey and others (n 23) (1993) 454-455; Haas, Castles and Miller (n 25) (2020) 43-44, 53-54, 124, 360; A Wickramasinghe and Wijitapure Wimalaratana, 'International Migration and Migration Theories' (2016) 1 (5) Social Affairs: A Journal for the Social Sciences 24-27.
[49] ibid.

persons as well. Nevertheless, this theory is still difficult to accommodate with respect to the free movement of persons framework in the regional context. The main reason is similar to the previous theories that it has essentially developed from the state sovereignty approach and the assumption regarding wages as the main incentive for the migrant to move remains. Therefore, this theory could also face similar questions about the realities of the free movement of persons framework as the previous three theories of labour migration.

It can be concluded from these four primary theories regarding labour migration that none on its own can capture fully the regional movement of labour in reality. In other words, the arguments of each theory remain unfulfilled. Although the EEC free movement of persons framework has long been embedded in the current EU framework, labour migration within the region does not solve unemployment, create wage balance, or increase intra-regional migration. Nevertheless, the recent survey by Eurobarometer illustrates that a large majority of EU nationals still support the free movement of persons framework.[50] It shows that 84 per cent of respondents think that this framework brings overall benefits to the economy of their country.[51] It can be seen that the results from the survey highlighted that the free movement of persons framework is one of the EU's main achievements from the perspective of EU nationals.

4. Obstacles to Labour Migration

As seen from the previous section, labour migration theories only intersect with the actual development of labour migration within the regional context. It is interesting that academics writing on the development of labour migration within the region during the establishment of the free movement of persons framework within the EEC (from the 1950s to the 1970s) and more recent academics (since the 1990s) have proposed similar obstacles to labour migration.

The first obstacle is access to the labour market. This obstacle results from national prioritisation, which protects national interests from the encroachment of migrants.[52] There

[50] Standard Eurobarometer, 'Public Opinion in the European Union: European Union Citizenship and Democracy' (July 2020) <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/WhatsNew/index> [accessed 22 February 2021].
[51] ibid.
[52] Lannes (n 38) (1956) 4.

could be complicated frontier formalities in the state of destination. The migrants may have to pay the fees and wait for the long process to be completed.[53] Moreover, the national authorities in the state of destination often set rules allowing national labour to access available jobs before migrants.[54]

The second obstacle is the permission to perform economic activities. This obstacle could also be a consequence of national prioritisation. Restrictive domestic regimes regarding the conditions for obtaining work permits can lessen the interest of migrants to apply for jobs in the state of destination.[55] Additionally, this obstacle can relate to professional qualifications and recognition of diplomas. Specifically, different levels of education, training, and other experiences required for each profession among the member states can also create difficulties for persons pursuing economic activities in other states.[56]

The third obstacle is the permission to reside. This obstacle results from the issues of housing and overpopulation. Residence permits for migrants can be restrictive in terms of the length of the permit and limitations on the area of residence.[57] A short length of residence puts on migrants the burden of going through domestic administrative procedures several times. A limited residential area could result in overcrowded residents where conditions of hygiene and comfort do not reach minimum standards.[58]

The fourth obstacle is family reunification. Family members tend to be considered an extra burden for the state of destination. This attitude of the host state could result in national rules that limit the number, or the category of family members allowed to accompany the migrants. Thus, moving to other countries with their family members can be difficult.

---

[53] International Labour Organisation, 'Migration and Economic Development - The Preliminary Migration Conference, Geneva' (1950) 62 (2) International Labour Review 94; Heinrich Dreyer, 'Immigration of Foreign Workers into the Federal Republic of Germany' (1961) 84 (1) International Labour Review 1-25; Daniel Turack, 'Freedom of Movement and Travel Documents in Community Law' (1968) 17 (2) Buffalo Law Review 435-453; World Bank, 'The Policy Challenges of Migration: The Origin Countries' Perspective' (2006) Global Economic Prospects 57-60.

[54] Simone Goedings, *Labour Migration in an Integrating Europe: National Migration Policies and the Free Movement of Workers 1950-1968* (SDU Uitgevers 2005) 153-157.

[55] ibid, World Bank (n 53) (2006) 57-60.

[56] Jaroslav George Polach, 'Harmonization of Laws in Western Europe' (1959) 8 (2) American Journal of Comparative Law 157; Geoffrey Sawer and Gunther Doeker, 'The European Economic Community as a Constitutional System' (1962) 4 (2) Inter-American Law Review 226.

[57] Policy Department C: Citizens' Rights and Constitutional Affairs, 'Obstacles to the right of free movement and residence for EU citizens and their families: Comparative analysis' (2016) European Parliament 12.

[58] International Labour Organisation (n 53) (1950) 95.

Specifically, accommodation for the whole family,[59] education for children, and employment opportunities for other family members[60] can also hinder the movement of migrants.

The fifth obstacle is working conditions. It is possible that the state of destination proposes national protectionist attitudes towards foreigners, which leads to restrictive domestic regimes on working conditions.[61] It might lack minimum standards to guarantee that the working conditions for migrants are the same as for nationals.[62] Therefore, migrants could be discouraged by this unfavourable treatment, especially in the area of remuneration, dismissal and other related social benefits.[63]

The final obstacle is protection from expulsion. The authorities in host states might revoke or refuse to renew the permission to work for migrant workers without clear justification.[64] Moreover, safeguards from unfair expulsion may not be available for migrants in the state of destination.[65] Such expulsion could also lead to re-entry bans, afterwards.[66] It may be seen as a flaw in a migrant's profile, which might adversely affect his or her ability to migrate for employment in the future.

As the main purpose of this research is to study the feasibility of the regional integration of labour migration within the AEC by taking into account the experiences of the EEC, the six obstacles to labour migration set out above could be considered as an interesting framework for this research. Specifically, it is interesting to understand how the regional legislation of each economic association dealt with these six obstacles.[67] Therefore, this

---

[59] Julius Isaac, 'International migration and European Population Trends' (1952) 66 (3) International Labour Review 194.
[60] Nicholas Green, T C Hartley and John A Usher, *The Legal Foundations of the Single European Market* (Oxford University Press 1991) 153.
[61] International Labour Organisation (n 53) (1950) 95.
[62] Isaac (n 59) (1952) 195.
[63] Policy Department C (n 57) (2016) 12.
[64] David D Christian, 'Resistance to International Workers Mobility: A Barrier to European Unity' (1955) 8 (3) Industrial and Labour Relations Review 385-386.
[65] Policy Department C (n 57) (2016) 100-102.
[66] ibid.
[67] The research acknowledges that there are other obstacles to free movement of workers such as coordination of social security. This research understands that harmonisation of social security is important for European integration regarding free movement of persons because it could promote and improve working and living conditions for labour. However, social security systems are the result of long-standing traditions deeply rooted in national culture and preferences. Moreover, the issue of social security was so sensitive that Articles 51 and 121 of the Treaty of Rome (1957) required unanimity. The EEC's progress in this area was slow and often resulted in gridlock. Therefore, the area of social security is not the main focus of this thesis. [The early EEC measures on social security were Regulations 3/58 (1958), 4/58 (1958) and 1408/71 (1971). However, these measures did not provide harmonisation of national security systems. They rather adopted a coordination system that allowed the member states to retain their national sovereignty regarding social security.]; Lionello Levi-Sandri, 'Speech on social policy by President of the social affairs group of the Commission of the European Economic Community' Dortmund (21 July 1962) 1-6,15; C Ramacciotti, 'European Workers: Human and

research will further examine the development of EEC legislation on the free movement of persons that tackled these obstacles. Additionally, it will also explore the current practice of the AEC labour migration framework in dealing with these similar obstacles. Such an examination allows this research to analyse the approaches of the EEC and the AEC. Subsequently, it will be able to draw useful lessons from the original EEC and to provide recommendations for the current AEC.

5. Theorising Free Movement of Persons from the Perspective of Labour Migration

This research examines intra-regional labour migration in the EEC because it has developed into the current EU that is a highly integrated region and its framework on the free movement of persons is more mature than other regional cooperation.[68] As this research examines the EEC in terms of its development into a mature regional framework regarding labour migration, it is necessary to explore the core concept of the framework and related literature.

To begin with, free movement of persons was a key feature of the European Common Market, which was the first stage of the EU's economic integration.[69] This Common Market, which was designed in the 1950s, allowed the free movement of goods, persons, services and capital.[70] The political arguments in favour were: the four freedoms share the main purpose of achieving greater prosperity through the better allocation of products and production factors.[71] In terms of the free movement of persons framework, it would make it possible for supply and demand to meet across frontiers. The argument was that it is unacceptable that economic growth in one country is impeded by labour shortages, while unemployment is a

---

Social Problems Placed by the Free Circulation of Workers' (1965) 2 (1) The International Migration Digest 21; Rhianon Visinsky, 'European Integration and the Welfare State - European Social Policy: From Rome to Maastrich' (2000) <https://www.pitt.edu/~heinisch/eu_integ2.html> Pittsburgh University [accessed 2 May 2021]; Marc Morsa, 'The European Regulations on Social Security Coordination from the Perspective of the Belgian Authority' (2019) <https://socialsecurity.belgium.be/sites/default/files/content/docs/fr/publications/rbss/2019/rbss-2019-1-european-regulations-on-social-security-coordination-belgian-authority-fr.pdf>Revue Belge de Securite Social [accessed 2 May 2021].

[68] International Organisation of Migration (n 4) (2007).

[69] Barnard (n 10) (2016) 203-205.

[70] Wilhelm Molle, *The Economics of European Integration: Theory, Practice, Policy* (Dartmouth Publishing Company Limited 1991) 12-14.

[71] ibid.

problem in another region.[72] For the emigration states, the free movement of persons can lower domestic unemployment rates.[73] For the immigration states, it can ease the labour shortage situation.[74] For the migrants, it can provide them with a better chance to capitalise on their specific qualities.[75] Therefore, this free movement of persons regime is ideally advantageous for all related parties.

As mature regional cooperation, labour migration activities have moved from collective action to legal action. Specifically, the legislation on the free movement of persons framework has become a primary mechanism for facilitating mobility, developing services, and delivering assistance for intra-European labour.[76] The concept of the free movement of persons has become more technical than political because it relates to different judicial levels and legal spaces including regional and national laws.[77] Issues regarding the movement of labour within the region tend to be eventually decided by the European Court of Justice.[78] For instance, the Court of Justice decided that the EEC relies on the concept of the supremacy of regional law over national law in order to ensure the enforcement of and compliance with regional law.[79] This decision illustrates that the free movement of persons in the EEC has been displaced from the socio-political arena to the judicial arena. It can be seen from the literature that the political theory of the free movement of persons is found mainly implicit in legal analysis.

Instead of viewing the regional framework regarding the free movement of persons as a universal set of rules, this research views it as a historical development. Specifically, the concept of the free movement of persons has been through several stages of development. Before the introduction of the EEC, the usual management of labour migration in the western European countries was in the form of bilateral agreements.[80] In other words, the method for

---

[72] Wilhelm Molle, 'Regional Policy' in Peter Coffey (eds), *Main Economic Policy Areas of the EEC Towards 1992* (2nd edn, Kluwer Academic Publishers 1988) 68-69.
[73] Molle (n 70) (1991) 21-23; Heiko Korner and Ursula Mehrlander, 'New Migration Policies in Europe: The Return of Labour Migrants, Remigration Promotion and Reintegration Policies' (1986) 20 (3) The International Migration Review 672-675; John Salt, 'The Future of International Labour Migration' (1992) 26 (4) The International Migration Review 1077-1111; Massey and others (n 23) (1993) 431-466.
[74] ibid.
[75] ibid.
[76] Adrien Thomas, 'Degrees of Inclusion: Free Movement of Labour and the Unionization of Migrant Workers in the European Union' (2016) 54 (2) Journal of Common Market Studies 408.
[77] Adrien Thomas, 'The Borders of Solidarity? Trade Unions, Social Entitlements and Regional Integration' (2013) 18 (1) Geopolitics 157.
[78] ibid.
[79] Case 6/64 *Flaminio Costa v E.N.E.L* [1964] ECR 588-600.
[80] Xavier Lannes, 'Recent Developments in the Clearance of Manpower Between Western European Countries' (1959) 79 (2) International Labour Review 183.

transferring labour from one country to another was commonly conducted by means of an agreement between the two countries concerned[81] such as an agreement between Belgium and France in 1952[82] and an agreement between Germany and Italy in 1955.[83] In 1957, the six founding states, namely Belgium, Germany, France, Italy, Luxembourg, and the Netherlands, signed the Treaty of Rome, which contained extensive provisions that covered the four freedoms of goods, persons, services and capital.[84] After that, the EEC transitional period allowed the member states to gradually achieve the objectives stated in the Treaty of Rome. In terms of the free movement of persons, the Treaty of Rome proposed abolishing obstacles to labour migration among member states.[85] This right to free movement of persons under the Treaty of Rome was primarily limited to only nationals of the EEC member states engaging in economic activity as workers, self-employed persons and service providers.[86] In other words, there was a clear link between economic activity and the EEC free movement of persons framework. [87]

In 1990, three directives on the right of movement and residence of the economically inactive,[88] pensioners[89] and students[90] were adopted. Consequently, the Treaty on European Union (Maastricht Treaty) was signed in 1991 and entered into force in 1993. As a result, the EEC was renamed the EC and was then embedded in the EU. Since then, the literature has tended to explain the free movement of persons framework from the perspective of EU integration. Specifically, most of the literature is more likely to explain the way in which the completion of the free movement of persons has been subsumed into the integration theory. Barnard commented that the three directives adopted in 1990 show the erosion of the link

---

[81] ibid.
[82] United Nations Treaty Series Vol. 160, Agreement No. 2110, Agreement between Belgium and France for the Issue Free of Charge of a Temporary Residence Visa to Wage-Earners, (October and November 1952) Page 261-265 <https://treaties.un.org/doc/Publication/UNTS/Volume%20160/v160.pdf> [accessed 21 February 2021].
[83] Vereinbarung zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Italienischen Republik über die Anwerbung und Vermittlung von italienischen Arbeitskräften nach der Bundesrepublik Deutschland [Agreement Between the Government of the Federal Republic of Germany and the Government of the Italian Republic on the Recruitment and Placement of Italian Workers in the Federal Republic of Germany] (December 1955).
[84] Treaty of Rome (1957) Preamble.
[85] Treaty of Rome (1957) Article 3 (c).
[86] ibid.
[87] Elspeth Guild, Steve Peers and Jonathan Tomkin, *The EU Citizenship Directive: A Commentary* (Oxford University Press 2014).
[88] Directive 90/364 on the right of residence (28 June 1990).
[89] Directive 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activity (28 June 1990).
[90] Directive 90/366 on the right of residence for students (28 June 1990).

between economic activity and the free movement of persons regime.[91] These three directives also reflect a change in perception from considering intra-regional migrants as only factors of production to viewing them as individuals with rights.[92]

Additionally, research on the development of the case law of the Court of Justice during 1955–2001 also suggested a rise in the importance of union citizenship in court decisions.[93] For instance, *María Martínez Sala v Freistaat Bayern* went beyond the former cases to decide that Sala was entitled to protection from discrimination on the ground of nationality because of her status as an EU citizen lawfully residing in another member state. This case law reflects the increasing significance of the concept of union citizenship which was used by the court as an additional argument to interpret other provisions.[94] Moreover, in 2004, the EU adopted the Citizens' Rights Directive (CRD), which was created based on the previous measures and replaced the previous directives and regulations in the relevant field. The CRD allows EU citizens to enter and reside in other member states without engaging in economic activity during the first three months[95] and after five years of residence.[96] However, during the period of three months and five years, EU citizens should become economically active or have sufficient resources and medical insurance.[97] Barnard also commented that the CRD is noteworthy evidence of the change in perspective regarding the free movement of persons.[98] Specifically, the literature based on the integration theory points out that the concept of free movement of persons has gradually turned into the concept of union citizenship. In other words, EU workers are seen as EU citizens.

Nevertheless, there has been a challenge to the integration theory explaining the development of free movement of persons. An argument was raised by Verschueren that EU labour migrants are different from other types of EU mobile citizens. Specifically, economically inactive EU nationals in other member states face legal limitations on fundamental rights regarding free movement of persons and equal treatment. For instance, the right to reside in the receiving states for economically inactive EU nationals depends on not

---

[91] Barnard (n 10) (2016) 324-378.
[92] ibid.
[93] A Castro Oliveira, 'Workers and Other Persons: Step-By-Step from Movement to Citizenship – Case Law 1995-2001' (2002) 39 Common Market Law Review 77.
[94] Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.
[95] Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states (29 April 2004) Article 6 (1).
[96] ibid Article 16.
[97] ibid Article 7.
[98] Barnard (n 10) (2016) 324-378.

being an unreasonable burden for the social assistance system of the destination country.[99] Therefore, these non-economic EU migrants are at risk of being expelled from the receiving states in which they reside due to the burden that they cause to the social assistance system. Additionally, economically inactive EU citizens might not be able to obtain social benefits and might be unable to make a claim regarding equal treatment in certain situations. In *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, the court decided that economically inactive EU citizens can only claim equal treatment for social benefits with nationals of the receiving states if their residence complies with the conditions in the CRD.[100] Therefore, it is possible for member states to refuse to grant social benefits to economically inactive EU citizens who reside in the country for more than three months but not over five years and are without sufficient resources and medical insurance for themselves and their family members.

From the above discussion, it is evident that the evolution of the concept of free movement of persons has not been consistent. In the early stages (during the EEC period - before 1990), it was clear that there was the need for EEC nationals to engage in economic activity in order to enjoy the right of free movement to enter and reside in other member states. However, since 1990, when the EU adopted the three directives, and 2004 when the EU adopted the CRD, the literature has tended to be based on the EU integration theory that seems more likely to point out that the concept of free movement of persons has gradually turned into the concept of union citizenship. It is true that the Court of Justice has used this concept as an additional argument to interpret other provisions.[101] However, this concept might not be entirely plausible. The main argument can be found in Verschueren's literature.[102] It is apparent that EU nationals engaging in economic activity as workers in other member states have a better status than those who do not.[103] Therefore, it might not be entirely correct to consider that the free movement of persons framework has evolved into or been subsumed into the concept of EU citizenship.

To conclude, the free movement of persons framework has not usually been recognised as labour migration and does not normally appear in the labour migration literature. Specifically, most of the literature tends to view intra-European labour from the perspective of the integration theory and tries to explain that these persons were EU citizens.

---

[99] Herwig Verschueren, 'Free Movement of EU Citizens: Including for the Poor?' (2015) 22 Maastricht Journal of European and Comparative Law 10.
[100] Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* [2014] ECR I-2358.
[101] Oliveira (n 93) (2002) 77.
[102] Verschueren (n 99) (2015) 10.
[103] ibid.

Additionally, the European Commission refers to this movement of labour as "intra-regional labour mobility" as if it is something different.[104] Nonetheless, this research disagrees with most of the literature. This research theorises the free movement of persons framework from the perspective of labour migration. Specifically, this research perceives such a framework as the historical development of labour migration, which challenges labour migration theory. It challenges the assumptions that migrants are aware of higher wages in the destination country and therefore predominantly wish to move to other high-capital states to improve their quality of life. It also challenges the proposed result of the neoclassical theory that the movement of labour would create an equilibrium, diminishing the international wage differential. The reasons for such challenges could be that the concept of the free movement of persons initiated in the EEC has, over the subsequent period, revealed a profound divergence between theory and reality. Free movement of persons was prevalent in the EEC, and later in the EU, for almost 60 years. However, only a small percentage of EU nationals move to other member states, and differences in wages still exist among member states. This research acknowledges that the free movement of persons framework has been greatly developed since the EEC period. However, the transitional period of the EEC could be considered as a critical moment in which the free movement of persons was achieved. Therefore, this research mainly focuses on the development of regional legislation during the EEC transitional period.

6. New Regionalism Theory and Labour Migration

As this research focuses on labour migration in the regional context, it is useful to examine the theory of regionalism. This section explains how this new regionalism theory relates to labour migration in the region. As mentioned in the previous section, the free movement of persons in the regional context is not only related to the political regime but also to the legal regime. Therefore, this section also examines how the new regionalism theory leads to legislation at the regional level regarding intra-regional migration.

The theory of regionalism can be separated into old regionalism theory, which began in the 1950s, and new regionalism theory, which emerged in the mid-1980s.[105] Old regionalism can also be referred to as hegemonic regionalism theory, which is where

[104] European Commission, 'Annual Report on Intra-EU Labour Mobility' (2019) <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8242&furtherPubs=yes> [accessed 21 February 2021].
[105] Hettne and Söderbaum (n 17) (1998) 6.

powerful initiators facilitate the creation of regional cooperation.[106] Possible reasons for such powerful initiators to act as hegemons include access to new markets, access to cheap resources such as labour, strengthening military alliances or promoting stability in neighbouring countries.[107] This theory considers regionalism a top-down approach. Examples of powerful initiators are the United States and the Soviet Union, which created regional organisations such as CENTO, SEATO, and the Warsaw Treaty Organisation to ensure regional security against external attacks.[108] It is, thus, apparent that the old regionalism essentially began with a specific objective and narrow content mostly related to a free trade arrangement and security alliances. This theory was criticised because the structure of the old regionalism was dominated by the Cold War power structure.[109] Therefore, regional cooperation under the old regionalism was generally controlled by powerful states. After the end of the Cold War, the regional organisation of the old regionalism gradually faded away.[110]

On the other hand, the new regionalism involves a spontaneous process that essentially emerges from below and within the region. This theory defines a comprehensive, multifaceted, and multidimensional process, implying the transformation of a region from relative heterogeneity to increased homogeneity with regard to several dimensions.[111] It considers regionalism as a bottom-up approach. Specifically, it considers the alliances that domestic, non-state actors build with supranational actors. As powerful leaders with specific needs no longer exist, the dimensions of the new regionalism theory have gradually expanded to include traditional security, social policy, environmental areas, and migration.[112] Additionally, the convergence of these dimensions could occur naturally, could be a result of political movement or both. This theory was derived from the growth of economic, social and political interdependence, which triggered new patterns of interaction among government and/or non-state actors.[113]

---

[106] Joseph M Griecon, 'Systemic source of Variation in Regional Institution in Western Europe, East Asia, and the Americas' in E D Mansfield and H V Milner (eds), *The Political Economy of Regionalism* (Columbia University Press) 164-187.
[107] Agata Antkiewicz and John Whalley, 'China's New Regional Trade Agreements' (2005) 28 The World Economy 1539.
[108] Klučka and Elbert (n 18) (2015) 30-31.
[109] Hettne and Söderbaum (n 17) (1998) 6-21.
[110] Klučka and Elbert (n 18) (2015) 30-31.
[111] Hettne and Söderbaum (n 17) (1998) 6-21.
[112] Klučka and Elbert (n 18) (2015) 26.
[113] Hettne and Söderbaum (n 17) (1998) 6-21.

It is evident that the new regionalism theory challenges the state-centrism of the old regionalism theory by proposing that "the state is no longer regionalism's only gatekeeper."[114] Although the beginning of the new regionalism can be traced to the beginning of the EEC, new regionalism has a worldwide character as it encompasses both developing and developed regional groupings around the world, including the AEC.[115] In order to form a regional grouping, the new regionalism proposes that the participating states are required to respect the rule of law and comply with fundamental international law. Klučka and Elbert noted that "regional organisations were not established inside an international-legal vacuum, but in the background of general international law with which they entered certain relations."[116] They also stated that the rules or regulations at the regional level might not certify or develop from international law. However, these rules or regulations can be given. In other words, the regional groupings could turn out to be the initiators of new rules or regulations that are different from existing international law. From the argument of Klučka and Elbert, it is evident that international law is sometimes unable to effectively fulfil the specific purpose of regional cooperation. In other words, mere international law might not be suitable for regional groupings to achieve regionalism. Therefore, in certain situations, the regional grouping must devise its own rules to deal with specific issues. For the issue of a regional regime on labour mobility, idiosyncrasies and peculiarities of each specific region should be taken into consideration.[117]

This research aims to examine the approach of the EEC to the regional framework of free movement of persons as a lesson for the AEC through the lens of the new regionalism theory. Although both the EEC and the AEC are regional organisations that strive to enable the stability and economic prosperity of participating states,[118] this research acknowledges the differences between these two regional economic associations. Therefore, this research will further examine the development of regional legislation on labour migration of each economic association. This examination allows this research to analyse the relationship between international law and regional legislation. Consequently, this research will be able to

---

[114] ibid, Louise Fawcett, 'Regionalism from An Historical Perspective' in Mary Farrell, Björn Hettne and Luk Van Langenhove (eds), *Global Politics of Regionalism: Theory and Practice* (Pluto Press 2005) 21-38.
[115] ibid.
[116] Klučka and Elbert (n 18) (2015) 190.
[117] Leiza Brumat and Diego Acosta, 'Three generations of free movement of regional migrants in Mercosur: any influence from the EU?' in Andrew Geddes, Marcia Vera Espinoza, Leila Hadj Abdou, and Leiza Brumat (eds), *The Dynamics of Regional Migration Governance* (Edward Elgar Publishing 2019) 67-68.
[118] W John Hopkins, 'Falling on stony ground: ASEAN's acceptance of EU constitutional norms' (2015) 13 (3) Asia Europe Journal 275.

prove the hypothesis of the new regionalism theory that only following the standards in international law might not be a suitable technique for a regional economic association to achieve regionalism, especially on the issue of intra-regional labour migration. Additionally, this research will examine other possible foundations of regional cooperation on labour migration, apart from international law. As mentioned previously, the AEC labour migration regime does not cover the movement of low-skilled labour. Instead, there are bilateral agreements between the AEC member states on low-skilled labour. Therefore, this research will also examine the extent to which bilateral labour migration arrangements could form the foundation for regional regimes.

7. Conclusion

All in all, this research perceives the development of a framework on regional labour migration as the historical development, which challenges labour migration theory. This research examines how participating states can develop and accept a legal framework on labour migration within regional economic associations. It aims to examine the feasibility of regional integration on labour migration within the AEC, taking into account the experiences of the EEC.

Through the lens of the new regionalism theory, this research explores the challenge that reliance only on existing international law may be inadequate for regional cooperation to achieve deep regionalism in respect of labour migration. However, a regional framework could be initiated by new rules agreed by the participating states or developed from bilateral agreements.

This research explores how a regional economic association could initiate a regional legal and institutional framework on labour migration. In terms of the legal framework, chapters 2 and 3 analyse the development of EEC legislation on the free movement of persons framework. The above-mentioned obstacles to labour migration will be the framework of analysis. Then, chapter 4 examines the current AEC legislation on labour migration, based on similar obstacles to labour migration. In terms of the institutional framework, chapter 6 explores the impact of the roles of regional institutions on the development of regional cooperation on labour migration within the EEC and the AEC.

Moreover, this research examines bilateral labour agreements between the member states of an economic association. Chapter 5 examines the extent to which bilateral labour

migration arrangements could form the foundation for a regional regime. In other words, it analyses the extent to which the national efforts between the AEC member states on low-skilled labour can promote regionalism on a bottom-up basis via bilateralism. This research bases this examination on the experiences of the bilateral labour agreements between certain founding member states of the EEC.

After examination of the above issues, this research will be in a position to answer the main research question of "How can participating states develop and accept a legal framework on labour migration within regional economic associations?" Consequently, this research will draw useful lessons from the experiences of the EEC, critique the current AEC approach, and provide recommendations for the AEC in order to facilitate the actual flow of labour within the regional context.

CHAPTER 2. Achieving Free Movement of Workers in the European Economic Community

1. Introduction

The six founding EEC member states which were Belgium, Germany, France, Italy, Luxembourg, and the Netherlands signed the three main treaties in the 1950s. The Treaty establishing the European Coal and Steel Community (Treaty of Paris) was signed in 1951.[119] Consequently, the Treaty establishing the European Atomic Energy Community (Euratom Treaty)[120] and the Treaty establishing the European Economic Community (Treaty of Rome)[121] were signed in 1957. The Treaty of Rome contains the most extensive provisions which cover the four freedoms of goods, persons, services, and capital. Moreover, the free movement of persons as an objective and with a timetable also emerged in the Treaty of Rome.

According to Article 2 of the Treaty of Rome, the establishment of the Common Market was one of its main objectives.[122] Article 3 proposed to abolish the obstacles to the free movement of persons among member states.[123] "Persons" in Article 3 were categorised into 3 groups; workers, self-employed persons and service providers. The main focus of this chapter is workers. The other two groups of persons are discussed in the next chapter. The objectives in the Treaty of Rome led to EEC legislation that gradually abolished the obstacles to the free movement of workers within the member states. The term "workers" was not defined by the Treaty, but it was gradually developed by the Court of Justice. The case law developed after the end of the transitional period. Surprisingly, it was not until 1986 that the definition of a worker was finally settled. According to *Lawrie-Blum*, a worker refers to a person who performs services for and under the direction of another person in return for remuneration, for a certain period of time.[124] Only 10 years later did the Court of Justice have

[119] Treaty establishing the European Coal and Steel Community (18 April 1951).
[120] Treaty establishing the European Atomic Energy Community (25 March 1957).
[121] Treaty establishing the European Economic Community (Treaty of Rome) (25 March 1957).
[122] Treaty of Rome (1957) Article 2.
[123] Treaty of Rome (1957) Article 3 (c).
[124] Case 66/85 *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2139-2148 [12].

to provide further clarification in the case of *Asscher* where it explained that such an employment relationship is required to have a subordination characteristic.[125]

As discussed in the previous chapter, the academics writing on the development of labour migration within the regional context during the establishment of the free movement of persons framework within the EEC (from the 1950s to the 1970s) and more recent academics (since the 1990s) proposed six similar obstacles to labour migration. The six obstacles are: access to the labour market, permission to perform economic activities, permission to reside, family reunification, working conditions and protection from expulsion. As the main objective of this research is to examine the feasibility of the regional integration of labour migration within the AEC by taking into account the experiences of the EEC, it is essential to understand the key steps in the negotiations regarding the free movement of workers framework of the EEC by abolishing these obstacles to labour migration. This chapter plans to explore the development of the free movement of workers framework specified in EEC legislation during the transitional period from 1957 to 1968. As mentioned in the previous chapter, the research acknowledges that this framework has been greatly developed since the end of the transitional period. Nevertheless, this EEC transitional period was a critical moment in which the free movement of persons was initially achieved. Therefore, the examination of these periods for achieving the free movement of workers framework within the EEC could provide valuable lessons for the current AEC[126] which envisions becoming a region which facilitates the movement of labour in the future.[127]

This chapter begins with the objective to abolish obstacles to the EEC free movement of workers framework. It analyses the approach that led the EEC from the declaration in the Treaty of Rome in 1957 to the achievement of the free movement of workers regime in 1968. If the AEC is to facilitate the movement of labour, it will be worthwhile to take account of the formula used by the EEC. The chapter then examines the development of the provisions from 1957 to 1968 regarding the six main obstacles which are set out in chapter 1. Additionally, the chapter also examines the gap in the free movement of workers framework related to controversial economic activities. It focuses on the type of work that is permitted in

---

[125] Case C-107/94 *Asscher v Staatssecretaris van Financiën* [1996] ECR I-3113-3132 [26].

[126] The formal establishment of the ASEAN Economic Community (AEC), as part of the Association of Southeast Asian Nations, was on 31 December 2015: ASEAN Secretariat, 'ASEAN Economic Community' (2017) <https://asean.org/wp-content/uploads/2012/05/7c.-May-2017-Factsheet-on-AEC.pdf> [accessed 23 February 2021].

[127] The current ACE framework is to facilitate the movement of goods, services, investment, capital, and skilled labour (not including low-skilled labour) within ASEAN. Therefore, free movement of workers does not currently exist in the ASEAN: AEC Blueprint 2025 (November 2015).

one state but may be considered as an illegal act in another state. It analyses the difficulties which workers performing this kind of work encounter. Consequently, the conclusion of this chapter summarises the approach of the EEC regarding the free movement of workers within the regional context constituted from the perspective of value to the current situation in the AEC.

2. General Objectives on Free Movement of Workers in the EEC

The objective relating to the free movement of workers was elaborated in Articles 48 to 51 of the Treaty of Rome. The main concepts and procedures regarding free movement of workers were laid down in Articles 48 and 49. As this chapter explores the development of regional legislation related to the free movement of workers during the EEC transitional period, it is necessary to examine the general objective specified in these two main articles as they relate to: the main principle of the free movement of workers framework; the time frame for the transitional periods; and the legislative forms setting out the measures on free movement of workers.

In terms of the main principle, the Treaty of Rome stated that the free movement of workers framework was built upon the principle of non-discrimination based on grounds of nationality. According to Article 48 of the Treaty of Rome,

> "Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the member states as regards employment, remuneration and other conditions of work and employment."[128]

This provision illustrates that discrimination based on nationality is a fundamental impediment to the free movement of workers. From the perspective of this research, it can be seen that four of the six obstacles to labour migration can be overcome by this principle of non-discrimination on the basis of nationality. However, the fourth and the sixth are different. On the issue of family reunification, the EEC created rules to specify the category of family members allowed to accompany EEC workers. The host member states might have stricter or more lenient rules regarding the right to family reunification of their own nationals.

[128] Treaty of Rome (1957) Article 48 (2).

Therefore, the scope of family members of EEC workers could be wider or narrower than that of national workers in the host member states. On the issue of expulsion, it is clear that host states cannot expel their own nationals. Thus, an exception from the free movement of workers to permit expulsion cannot be subject to a prohibition on discrimination on the basis of nationality.

It is necessary to develop the framework relying on the principle of non-discrimination based on nationality for the free movement of workers within the EEC, as four of the six obstacles to labour migration can be abolished by this principle. However, this principle did not apply in all cases. Article 48 of the Treaty of Rome excluded the free movement of workers regime from public service.[129] This exception has never been codified in any secondary legislation and its parameters have been determined exclusively by the Court of Justice. Additionally, Article 48 of the Treaty of Rome allowed member states to restrict the free movement of workers when justified on grounds of public policy, public security and public health.[130] Lewin mentioned that these three grounds did not provide much discretion for the member states to impose restrictions.[131] Specifically, the national use of these grounds was limited because they cannot be invoked to service economic ends[132] and must be based exclusively on the personal conduct of the individual.[133]

In terms of the time frame, the free movement of workers framework of the EEC was to be created over a transitional period. The specific timetable and deadline for the negotiations on the free movement of workers were also stated in the Treaty of Rome. According to Article 48 of the Treaty of Rome, the overall goal of free movement of workers shall be secured within the EEC "no later than at the date of expiry of the transitional period at the latest."[134] The time limit for transposition is found in Article 8, which stated that "a transitional period should not be any longer than 12 years and it is divided into three stages of four years each."[135] As the Treaty of Rome came into force on 1 January 1958, the deadline was 31 December 1969. Dahlberg commented that this specific deadline in the Treaty of Rome illustrates an explicit ambition in the goals to be achieved in the field of free movement

[129] Treaty of Rome (1957) Article 48 (4).
[130] Treaty of Rome (1957) Article 48 (3).
[131] K Lewin, 'The Free Movement of Workers' (1965) 2 (3) Common Market Law Review 310-312.
[132] Directive 64/221 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (25 February 1964) Article 2 (2), 10.
[133] Directive 64/221 Article 3 (1).
[134] Treaty of Rome (1957) Article 48 (1).
[135] Treaty of Rome (1957) Article 8 (1).

of workers in the EEC.[136] Goedings also mentioned that the explicit time frame provided safeguards from the delay.[137]

There were three phases of negotiation, which resulted in three main regulations on the free movement of workers, accompanied by three directives on the abolition of restrictions on movement and residence for workers of member states and their families. After the first round of negotiations, they were Regulation 15/61[138] and the Directive of August 1961.[139] Then, the second round of negotiations resulted in Regulation 38/64[140] and Directive 64/240.[141] In 1964, there was also Directive 64/221 on the coordination of special measures concerning the movement and residence of foreign nationals which included the issue of expulsion of workers.[142] The negotiation process for the free movement of workers in the EEC period was ended by the adoption of Regulation 1612/68[143] and Directive 68/360 in August 1968,[144] respectively. This means that the negotiations on the EEC free movement of workers framework did not encounter any delays.

In terms of legislative form for the free movement of workers framework in the EEC, Article 49 of the Treaty of Rome specified that there were two options: directives or regulations.[145] On the one hand, a regulation is directly applicable in all member states without any requirement of transposition into domestic laws.[146] On the other hand, a directive binds member states with the aims of the legislation. National legislators can decide on the method of implementation.[147] It can be seen that the regulation is more powerful and constraining on national authorities than the directive. Any contrary domestic norms would be superseded by the regulation. The directive sets out objectives, but it is up to member states to devise domestic laws to reach the objectives.

---

[136] Kenneth A Dahlberg, 'The EEC Commission and the Politics of the Free Movement of Labour' (1967) 6 (4) Journal of Common Market Studies 311.
[137] Goedings (n 54) (2005) 303-308.
[138] Regulations 15/61 on free movement for workers within the Community (26 August 1961).
[139] Directive of 16 August 1961 (this directive does not have a number) on the abolition of restrictions on movement and residence within the community for workers of member states and their families (16 August 1961).
[140] Regulation 38/64 on free movement for workers within the Community (25 March 1964).
[141] Directive 64/240 on the abolition of restrictions on movement and residence within the community for workers of member states and their families (25 March 1964).
[142] Directive 64/221 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (25 February 1964).
[143] Regulation 1612/68 on free movement for workers within the Community (15 October 1968): remained in force until finally replaced by Directive 2004/38 (29 April 2004).
[144] Directive 68/360 on the abolition of restrictions on movement and residence within the community for workers of member states and their families (15 October 1968).
[145] Treaty of Rome (1957) Article 49.
[146] Treaty of Rome (1957) Article 189 (2).
[147] Treaty of Rome (1957) Article 189 (3).

The following table presents the regulations and the directives regarding free movement of workers within the EEC during the transitional period. It also presents the lists of the main Articles in the EEC legislation dealing with the six main obstacles to labour migration.

Table 1: EEC legislation and the Obstacles to Labour Migration							
Obstacles	**Regulation**			**Directive**			
	1961	**1964**	**1968**	**1961**	**1964**		**1968**
	15/61	38/64	1612/68	16 Aug	64/240	64/221	68/360
1. Access to Labour Market							
1.1 Frontier Formality	-	-	-	Art. 2,3	Art. 2,3	-	Art. 2,3
1.2 National Priority	Art. 1,2,4	Art. 1,2	Art. 1	-	-	-	-
2. Permission to Perform Economic Activities							
2.1 Validity of Permission	-	Art. 22	Art. 7	Art. 4	-	-	-
2.2 Conditions of Renewal	Art.6	Art. 6	Art. 7	-	-	-	-
3. Permission to Reside							
3.1 Required Documents for Application Process	-	-	-	Art. 5	Art. 7	-	Art. 9
3.2 Administrative Fees	-	-	-	Art. 6	Art. 7	-	Art. 9
3.3 Validity of Permission	-	-	-	Art. 5	Art. 5	-	Art. 6

4. Family Reunification							
4.1 Category of Family Members	Art. 11	Art. 17	Art. 10	-	-	-	-
4.2 Access to employment	Art. 12-14	Art. 18-19	Art. 11	-	-	-	-
4.3 Access to education and trainings	Art. 15	Art. 21	Art. 12	-	-	-	-
4.4 Frontier Formality	-	-	-	Art. 2,3	Art.2,3	-	Art. 2,3
4.5 Permission to Reside	-	-	-	Art. 4	Art. 5	-	Art. 4
5. Working Conditions							
5.1 Wage	Art. 8	Art. 9	Art. 7	-	-	-	-
5.2 Dismissal	Art. 8	Art. 9	Art. 7	-	-	-	-
5.3 Social Benefits	-	-	Art. 7	-	-	-	-
6. Expulsion							
6.1 Conditions of Expulsion	-	-	-	-	-	Art.2-4	-
6.2 Remedies	-	-	-	-	-	Art. 8	-

From the table, it can be seen that both forms of EEC legislation, regulation and directive, were adopted at each stage of the negotiations in 1961, 1964 and 1968. Each form of legislation deals with different issues relating to the free movement of workers. However, this legislation works together with the shared purpose of abolishing the obstacles to the free movement of workers within the EEC.

The directives tend to cover the detailed procedural issues which are frontier formalities, permission to reside, and expulsion. These issues related to the administrative procedures such as the authorisation of visas, passports, residence permits and expulsion orders. Generally, each member state had its own domestic procedures regarding these issues

which varied among the member states. In order to meet the standards of the directives, the national authorities had to adjust their existing procedures. Therefore, the detailed procedures were contained in the directive which only allows member states to decide on the means by which to achieve the results of the directives.

On the other hand, the regulations tend to contain the core issues for the free movement of workers including the national priority for access to the labour market, extension of the permission to work, categories of family members, access to employment and education for family members, and working conditions. These issues provide core rights for EEC workers. When the national prioritisation of the domestic workers was abolished, EEC workers became entitled to equal treatment as regards accepting employment offers. When the condition to renew the permission to work was abolished, EEC workers' right to work was enhanced. When family members were allowed to work and reside in host states, EEC workers' right to family reunification was engaged. Additionally, when EEC workers became entitled to the same working conditions as domestic workers, their right to equal treatment was guaranteed. Unlike the issues stated in the directives, the core rights in the regulation tend not to relate to administrative procedures. Thus, these issues were put in the regulations which needed to be directly applicable.

It is interesting to note that the issue regarding the validity of permission to reside was initially put in the 1961 Directive but moved to the regulation in 1964. During the first transitional period, EEC workers were required to obtain work permits[148] which were related to administrative procedures. Thus, it was necessary to allow the host state to adjust domestic regimes regarding the validity of work permits for EEC workers in the first stage. In the second period, the Commission considered the validity of permission to work as a crucial issue which needed to be directly applicable to all member states. Thus, the issue was moved to the regulation in 1964. Additionally, the 1968 Regulation abolished work permits and confirmed the right to equal treatment.[149] EEC workers were, thus, no longer required to obtain or renew work permits, so the administrative procedure was no longer necessary.

To conclude, the Treaty of Rome provided the objective for the creation of the free movement of workers framework. Specifically, the explicit time frame for the transitional periods was set out. The framework was built upon the principle of non-discrimination based

[148] Directive of 16 August 1961 Article 4 (1).
[149] Regulation 1612/68 Article 7.

on nationality and the member states could impose restrictions only on certain grounds. The Treaty also specified the legislative forms of free movement of workers measures.

3. Development of EEC Legislation on Free Movement of Workers Framework

This part of the chapter aims to examine the key steps that the EEC developed to move from the ambitious objectives to reality. It focuses on how the EEC developed its legislation to deal with the six main obstacles set out in the introduction chapter. It also analyses the relationship between the abolition of these obstacles and the enhancement of the rights of EEC workers. It mainly analyses the provisions in the regulations and the accompanying directives on the free movement of workers. As these regional legal measures were implemented at the national level, there were conflicts between the member states and workers. The Court of Justice [150] was charged with resolving such conflict by giving preliminary rulings concerning the interpretation of the legislation.[151] Therefore, this chapter also explores selected case law interpreting and clarifying provisions on the obstacles to the free movement of workers.

3.1 Access to Labour Market

When the EEC states wanted to integrate their economies to include the free movement of workers, the initial issue that they needed to consider was access to the labour market for EEC workers. States tended to have restrictive national laws which protected national labour markets from foreign workers. To facilitate the free movement of workers, the host member states were required to loosen their border and domestic market controls.[152] Such controls were obstacles to the free movement of workers for two reasons. The first reason is frontier formalities. The host state tends to set national rules to require the migrant

[150] This research acknowledges the crucial roles of the Court of Justice as well as other regional institutions in the achievement of the EEC free movement of workers framework. The detailed issues related to the roles of regional institutions and the institutional framework of the EEC will be examined further in chapter 6.
[151] Treaty of Rome (1957) Article 177.
[152] Christian (n 64) (1955) 3.

workers to be involved in the process regarding travel documents.[153] States normally requested the applicants to submit other evidence and pay administrative fees.[154] The second reason is national prioritisation of domestic workers. Specifically, countries of destination were concerned that migrant workers should only fill gaps in their labour market without causing competition with national workers for the available jobs.[155] Thus, local authorities set national laws providing preferential access to the labour market for local workers. [156] Such laws allowed national workers to have priority access to available jobs before migrant workers.[157] To achieve the free movement of workers within the EEC, these administrative formalities needed to be diminished and states had to change their attitude to non-discrimination based on nationality. In the case of the EEC, the issue relating to frontier formalities was addressed in three directives and the issues relating to national prioritisation were addressed in three regulations in 1961, 1964 and 1968.

In the first transitional period, the Directive of 16 August 1961 covered the issue relating to frontier formalities. It required member states to issue and renew identity cards or passports for their nationals who wanted to work in other member states.[158] Passports must be valid at least for all member states and transit countries.[159] No entry visa may be demanded.[160] Although the 1961 Directive did not explicitly abolish exit visas, Article 2 stated that a valid identity card or passport was acceptable for nationals to enter or depart from the countries of origin to work in other member states.[161] It could be implied that exit visas were not required to depart from their home states. The obstacles regarding administrative procedures for border controls were significantly decreased by this directive because EEC workers could simply use their national identity documents to go through border controls. In terms of national prioritisation, Regulation 15/61 stated that EEC workers were entitled to accept employment offers if no local worker was available within three

---

[153] International Labour Organisation (n 53) (1950) 94; Mark B Salter, 'The Global Visa Regime and the Political Technologies for the International Self: Borders, Bodies, Biopolitics' (2006) 31 (2) Alternatives: Global, Local, Political 170.
[154] Dreyer (n 53) (1961) 1-25; Turack (n 53) (1968) 435-453; International Labour Organisation (n 53) (1950) 94; World Bank (n 53) (2006) 27-30.
[155] Lannes (n 38) (1956) 4; Goedings (n 54) (2005)153-157.
[156] Lannes (n 38) (1956) 4; Martin Ruhs, 'Immigration and Labour Market Protectionism: Protecting Local Workers' Preferential Access to the National Labour Market' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford University Press 2014) 68-77.
[157] ibid.
[158] Directive of 16 August 1961 Article 2 (1).
[159] Directive of 16 August 1961 Article 2 (2).
[160] Directive of 16 August 1961 Article 3.
[161] Directive of 16 August 1961 Article 2 (1).

weeks from the time of notification of the vacancy.[162] It provided nationals a three-week priority period in which to accept employment offers. There were exceptions in two main situations: where the employment offer was addressed to a specific person[163] and where there were labour shortages in specific regions.[164] In these cases, EEC workers could immediately take up employment offers. Therefore, the obstacles regarding national prioritisation remained during the first transitional period since the host member states could still preserve preferential access for their local workers.

In the second transitional period, the issue relating to frontier formalities was addressed in Directive 64/240. The member states were still required to issue and renew identity cards or passports for EEC workers.[165] Additionally, the passport must be valid at least for all member states and the transit countries.[166] Similar to the Directive in 1961, a valid identity card or passport was acceptable for departure from and entry into the member states.[167] Directive 64/240 clearly stated that no entry visa[168] or exit visa[169] was required. Thus, this directive confirmed the simplified administrative procedures in the 1961 Directive that EEC workers were allowed to exit and enter member states with their identity documents and without visa requirements. In terms of national prioritisation, the revised proposal of the Commission in 1963 stated that priority for national workers "may be invoked only in more limited circumstance(s) than during the first stage."[170] This proposal led to Regulation 38/64. It provided EEC workers with the right to immediately accept employment offers.[171] However, the two-week priority for national workers to accept employment offers was permitted when there was a high unemployment rate.[172] It can be seen that Regulation 38/64 enhanced EEC workers' right to access the labour market, but the member states could preserve priority for their nationals in exceptional cases. Therefore, the obstacles regarding preferential access for domestic workers were not completely removed.

---

[162] Regulation 15/61 Article 1.
[163] Regulation 15/61 Article 2
[164] Regulation 15/61 Article 4 (b).
[165] Directive 64/240 Article 2 (1).
[166] Directive 64/240 Article 2 (3).
[167] Directive 64/240 Article 2 (1), 3 (1).
[168] Directive 64/240 Article 3 (1).
[169] Directive 64/240 Article 2 (4).
[170] Executive Secretariat of the Commission of the European Economic Community, 'Revised proposal for a regulation and a directive relating to free movement of workers within the Community – Submitted by the Commission to the Council on 17 May 1963' (1967) Supplement to Bulletin of the European Economic Community No. 7 <http://aei.pitt.edu/6870/> [accessed 21 February 2021].
[171] Regulation 38/64 Article 1.
[172] Regulation 38/64 Article 2.

In the third transitional period, the issue relating to the frontier formalities was addressed in Directive 68/360 which confirmed all the simplified administrative procedures in the previous directives. The member states had to issue and renew identity cards or passports[173] which must be valid at least for all member states and the transit countries.[174] EEC workers could go through border controls on presentation of valid identity documents and without any visas.[175] In terms of national prioritisation, Regulation 1612/68 allowed EEC workers to accept employment offers without any three-week priority being given to nationals in all cases.[176] Unlike the two previous regulations, EEC workers were also allowed to seek employment in other member states.[177] Therefore, the obstacle regarding access to the labour market was abolished in 1968.[178] Although frontier formalities for entering host member states were simplified in Directive 1612/68, EEC workers might encounter penalties in host member states if they failed to provide the required documents. Almost ten years after the end of the transitional period in 1968, the case of *Concetta Sagulo* in 1977 held that Community law did not prevent the host member states from imposing penalties for EEC workers who fail to obtain or provide a valid identity card or passport.[179] However, such penalties must be reasonable and proportionate to the nature of the offence committed.[180] The penalties should not be so severe as to cause an impediment to the freedom of entry of EEC workers to the host member states based on the free movement of workers and on the general application of the principle of equal treatment with nationals.[181]

It can be seen that the two different forms of EEC legislation were formulated together with the shared goal to abolish the obstacles to the free movement of workers. On the one hand, issues relating to frontier formalities which were related to administrative procedures were addressed in the directives. Thus, the member states were allowed to transpose the standards regarding the frontier formalities from the directives into their national laws. On the other hand, the issue relating to national prioritisation which confirmed the equal right to access the labour market for EEC workers was stated in the regulations. This objective in the regulations was directly applicable to the member states and EEC

[173] Directive 68/360 Article 2 (1).
[174] Directive 68/360 Article 2 (3).
[175] Directive 68/360 Article 3 (1), 3 (2), 2 (4).
[176] Regulation 1612/68 Article 1.
[177] ibid.
[178] Article 48 (4) of the 1957 Treaty of Rome excluded free movement of workers regime from public service. Therefore, the preferential access to public services has never been abolished.
[179] Case 8/77 *Concetta Sagulo, Gennaro Brenca and Addelmadjid Bakhouche* [1977] ECR 1496-1508 [6-7].
[180] ibid [13].
[181] ibid [13].

workers could directly rely on this right in the regulations. Additionally, the development of EEC legislation easing frontier formalities and abolishing the preferential access of local workers enhanced the rights of EEC workers, as stated in the third paragraph of Article 48 (a) of the Treaty of Rome. This achieved the free movement of workers, which entailed the right of EEC workers "to accept offers of employment actually made."[182] EEC legislation went further by expanding the right to seek employment in other member states. The abolition of the priority for nationals to access domestic labour markets also ensured that migrant workers were entitled to equal treatment with nationals to access labour markets. This implemented the main objective in Article 48 of the Treaty of Rome regarding non-discrimination based on nationality.[183]

3.2 Permission to Perform Economic Activities

After migrant workers enter the territory of receiving states, another issue that the states need to consider is permission to perform economic activities. Access to work permits can become an obstacle to the free movement of workers for two main reasons. The first reason is the administrative procedure. Receiving states often secure their power to control migrant workers through national work permit schemes. Thereby, host states often collected fees for the issue or renewal of work permits.[184] The second reason is related to the validity of the permission to work. National protectionist attitudes of states can result in limited validity of work permits in terms of working location, choice of occupation, re-employment and change of occupation.[185] The interest of migrant workers could be impaired when they understand the costs related to applications for national work permits and the limited validity of those work permits.[186] To achieve the free movement of workers, states have to be more open towards migrant workers and provide them with equal treatment regarding permission to work.[187] In the case of the EEC, the issue regarding permission to work was addressed in the three periods of negotiation.

---

[182] Treaty of Rome (1957) Article 48 (3a).
[183] Treaty of Rome (1957) Article 48 (2).
[184] Christian (n 64) (1955) 385-386; Philip Martin, 'Lower Migration Costs to Raise Migration's Benefits' (2014) 16 (2) New Diversity 9-19.
[185] Christian (n 64) (1955) 385-386, World Bank (n 53) (2006).
[186] Michael Burawoy, 'The Functions and Reproduction of Migrant Labor' (1976) 81 (5) American Journal of Sociology 1050-1087.
[187] The obstacle related to permission to perform economic activities can be associated with professional qualification requirements. However, the text of the Treaty of Rome explicitly addressed the issue of recognition

In the first period of negotiation, the validity of work permits was addressed in the directive, while the extension of permission to work was addressed in the regulation. In terms of the validity of work permits, the Directive of 16 August 1961 stated that member states shall issue work permits for EEC workers[188] which must be valid for the whole territory of the member state which issued it.[189] However, member states could restrict the validity of work permits for EEC workers in certain areas due to a serious circumstance.[190] This directive also allowed member states to tie EEC workers to a specific employer during the first year of employment.[191] Therefore, it was possible that EEC workers could not change their employers in the first year of work. In terms of extending work permits, Regulation 15/61 clarified that the conditions depended on the duration of employment that the workers had undertaken. After the first year of employment, EEC workers were entitled to renewal-of-work permits only in the same type of occupation.[192] After three years of employment, EEC workers were allowed to accept another type of occupation if they were qualified.[193] After four years of employment, EEC workers were allowed to accept any occupation under the same conditions as national workers.[194] It can be seen that the obstacles to the free movement of EEC workers were reduced but still remained. All EEC workers were required to obtain work permits which could be restrictive. In the first period, EEC workers had to

---

of qualifications in the context of freedom of establishment only. Specifically, Article 57 of the Treaty of Rome stated that the Council "shall issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions... concerning the taking-up and pursuit of activities as self-employed persons." Therefore, during the EEC transitional period (1957 to 1969), there was no provision in the EEC legislation regarding the professional qualifications of the workers. The first EEC legislation on mutual recognition of qualifications for the workers was Directive 75/362. This directive was adopted in 1975, six years after the end of the EEC transitional period. In fact, this directive was adopted under the two 1961 General Programmes for the movement of self-employed persons and service providers. Nevertheless, the preamble of the directive extended the scope of application to the employed doctors. Additionally, the early cases in the Court of Justice were mainly linked to the movement of the self-employed persons. A case related to the workers was first held by the Court of Justice in the case of *Heylens* in 1987, 18 years after the end of the transitional period (Case 222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others* [1987] ECR 4099). As this chapter aims to examine the development of the EEC legislation abolishing the obstacles to free movement of workers during the EEC transitional period, issues relating to professional qualifications will not be discussed in this chapter. For further discussion on qualification requirements, please see section 3.2 of the next chapter (Chapter 3: Achieving Free Movement of Self-employed Persons and Service Providers in the European Economic Community - Section 3.2: Permission to Perform Economic Activities).

[188] Directive of 16 August 1961 Article 4 (1).

[189] Directive of 16 August 1961 Article 4 (2a).

[190] ibid.

[191] Directive of 16 August 1961 Article 4 (2b).

[192] Regulation 15/61 Article 6 (1).

[193] Regulation 15/61 Article 6 (2).

[194] Regulation 15/61 Article 6 (3).

work for four years until they were entitled to unrestricted work permits under the same conditions as national workers.

Then, in the second period of negotiations, the issue relating to the validity of work permits addressed the extension of permission to work in Regulation 38/64. EEC workers were still required to obtain work permits.[195] Similar to the Directive in 1961, work permits were valid nationwide with certain exceptions[196] and workers were not allowed to change jobs during the first year of employment.[197] However, there were some changes regarding the renewing of work permits. After the first year of employment, EEC workers were entitled to renewal-of-work permits only in the same type of occupation.[198] After two years of employment, they were allowed to accept any occupation under the same conditions as national workers.[199] Nevertheless, the requirement for EEC workers to obtain work permits during this second period was not absolute. In other words, workers might not have to obtain work permits in order to perform their jobs in other member states. Specifically, Article 23 exempted EEC workers from requiring work permits when the duration of employment did not exceed three months[200] or one month[201] depending on the category of worker.

In the second transitional period, Regulation 38/64 reduced the obstacles in relation to permission to work. It decreased the number of years that workers were required to work in the state of destination from four years to two years in order to obtain unrestricted permits and to be entitled to the same conditions as national workers from four years to two years. Therefore, EEC workers who had arrived in the host member state after the first transitional period (1961-1963) received the benefit of this provision. The reason is that these workers would by then have been employed for two years in 1964 and they would immediately obtain unrestricted permission to work in the host state and would be treated in the same way as national workers. Additionally, in the first round of negotiations, the details on work permits were contained in the Directive of 16 August 1961 which member states had to transpose into their national laws. However, in this second round of negotiations, the issues regarding

[195] Regulation 38/64 Article 22 (1).
[196] Regulation 38/64 Article 22 (2a), 2 (1).
[197] Regulation 38/64 Article 22 (2b).
[198] Regulation 38/64 Article 6 (1).
[199] Regulation 38/64 Article 6 (2).
[200] Regulation 38/64 Article 23 (1b): The workers whose occupation is one of those expressly covered by the Council directives issued in pursuance of the General Programme for the removal of restrictions on the freedom to supply services and the duration of employment does not exceed three months.
[201] Regulation 38/64 Article 23 (1a): The workers who have special skills or occupy a confidential post and the duration of employment does not exceed one month, Article 23 (1c): The workers who do not belong to one of the categories referred to in (a) and (b) and the duration of employment does not exceed one month.

permission to work were moved to the regulation which was directly applicable in the member states. Therefore, EEC workers could directly rely on the provisions regarding work permits in the regulation. Proposing the matter in the form of a regulation required a high degree of cooperation among member states to abolish all of the national impediments to the free movement of workers. This illustrates the agenda of the Commission to reach the maximum possible outcome as rapidly as possible during the negotiations on the free movement of workers.[202]

In the third period of negotiations, all the issues relating to permission to work were moved to Regulation 1612/68. According to Article 7 of the Regulation,

> "a worker who is a national of a member state may not, in the territory of another member state, be treated differently from national workers on the ground of nationality in respect of any conditions of employment…and also re-employment."[203]

It can be seen that EEC workers were no longer required to obtain national work permits. Additionally, restrictive conditions regarding the change of employers and waiting periods for EEC workers to obtain unrestricted permission to work were abolished. This illustrates the strong achievement toward the abolition of the obstacles to the free movement of workers within the EEC. When work permits were no longer required, member states no longer needed to adjust their administrative procedures to issue national work permits. EEC workers were entitled to directly rely on their right to non-discrimination in respect of employment and re-employment in the regulation. Thus, it makes sense that the form of the legislation regarding the permission to work was changed from the directive to the regulation.

This EEC legislation, which abolished obstacles regarding work permits and re-employment, extended the rights of workers. EEC workers were entitled to accept employment offers, to change employers and to change occupations without restrictions regarding choice of occupation or working location. The development of EEC legislation on this issue entailed "the right of the EEC workers to accept offers of employment actually made" and "to move freely within the territory of member states for this purpose" as stated in Article 48 of the Treaty of Rome.[204] Additionally, the unrestricted permission to work which

---

[202] Goedings (n 54) (2005) 331.
[203] Regulation 1612/1968 Article 7.
[204] Treaty of Rome (1957) Article 48 (3a).

allowed EEC workers to work under the same conditions as nationals also follows the main principle of non-discrimination based on nationality in Article 48 of the Treaty of Rome.[205]

3.3 Permission to Reside

When states participate in a free movement of workers regime, another crucial concern is residence for migrant workers. This could result from two main concerns. The first reason relates to housing shortages. Receiving states might have inadequate accommodation or land to handle a large number of migrant workers.[206] The second possible reason is related to national protectionist policies that states would like to use to control the number of foreigners residing in their territories.[207] This could lead to specific residential restrictions limiting the movement of foreign workers. Moreover, the receiving states might authorise only a short length of residence, putting on migrant workers the burden of going through domestic administrative procedures several times which require fees to be paid and documents to be supplied.[208] Thus, permission to reside becomes another migration cost and obstacle for migrant workers. As permission to reside is clearly related to administrative procedures, it was addressed in the form of the directive in every stage of EEC negotiation.

In the first transitional period, the Directive of 16 August 1961 stated that member states had to issue residence permits for EEC workers who had been authorised to work in their territory.[209] In order to issue residence permits, the directives clarified that member states should take the necessary measures to achieve maximum simplification of administrative procedures.[210] Therefore, EEC workers were not subject to excessive documentation requirements for permission to reside in the states of destination. There were only two documents that they were required to obtain. Firstly, the document with which the worker entered the territory of the state of destination:[211] a valid identity card or passport;[212] secondly, the document issued by the competent service of employment which confirmed that

[205] Treaty of Rome (1957) Article 48 (2).
[206] Isaac (n 59) (1952)194, International Labour Organisation (n 53) (1950) 95, Policy Department C (n 57) (2016) 12.
[207] ibid.
[208] Christian (n 64) (1955) 385-386, Martin (n 184) (2014) 9-19.
[209] Directive of 16 August 1961 Article 5 (1).
[210] Directive of 16 August 1961 Article 6.
[211] Directive of 16 August 1961 Article 5 (2a).
[212] Directive of 16 August 1961 Article 3 (1).

the worker had an occupation in the territory.[213] In terms of the residential area, the directives stated that the permit was valid for the whole territory of the member state in which the worker was employed.[214] The directive did not allow member states to require EEC workers to stay in a specific region of the country, so workers were able to change their residential areas and freely move within states of destination. In terms of administrative fees, the directives stated that residence permits must be issued and renewed free of charge or on payment of an amount not exceeding the fees charged for the issue of identity documents for nationals.[215] It can be seen that EEC workers might have had to pay administrative fees for a residence permit, but the payment could not exceed the amount that nationals normally paid for their identity documents. In terms of validity of the residence permit, this directive stated that if the residence permit were for a shorter period than the work permit, it would be automatically renewed for the duration of the work permit.[216] This implies that the member state could issue a residence permit with a shorter length of validity than the work permit. This could be regarded as an obstacle regarding permission to reside which was reduced but host member states might issue resident permits with a shorter period of time than work permits.

In the second transitional period, Directive 64/240 confirmed the simplified application procedure[217] for residence permits, as stated in the Directive of 16 August 1961, EEC workers were still entitled to live and work in an unrestricted residential area[218] and an equal rate of administrative fees.[219] Unlike the former directive, there was an exemption to the requirement for residence permits for EEC workers whose duration of employment did not exceed three months. In this case, the documents that the workers used to enter the territory of the member state (a valid national identity or passport) could be used instead of a residence permit.[220] However, those migrant workers who were exempted from the need for a residence permit might be required by the receiving states to report their presence on the territory to the competent authorities.[221] Additionally, this Directive 64/240 clarified that the

[213] Directive of 16 August 1961 Article 5 (2b).
[214] Directive of 16 August 1961 Article 5 (3).
[215] Directive of 16 August 1961 Article 6 (1).
[216] Directive of 16 August 1961 Article 5 (1).
[217] Directive 64/240 Article 7, 4 (2a), 3 (1), 4 (2b).
[218] Directive 64/240 Article 5 (1a).
[219] Directive 64/240 Article 7 (1).
[220] Directive 64/240 Article 6 (1).
[221] Directive 64/240 Article 6 (2).

residence permit must have a duration at least equal to that of the work permit.[222] Where EEC workers obtained a permanent work permit, the residence permit was valid for at least five years and automatically renewable.[223] In this second period, obstacles in the form of permission to reside had been significantly decreased.

In the third transitional period, Directive 68/360 confirmed the simplified application procedure[224] for residence permits, unrestricted residential area[225] and an equal rate of administrative fees,[226] as stated in the Directive of 16 August 1961 and Directive 64/240. Similar to Directive 64/240, Directive 68/360 provided the same exemption regarding resident permits and the EEC workers' duty to report, where the duration of employment did not exceed three months.[227] In terms of the length of residence permits, the third Directive 68/360 clearly specified that the residence permit must be valid for at least five years from the date of issue and be automatically renewable.[228] However, where the duration of employment exceeded three months but not more than one year, EEC workers were entitled to a temporary residence permit whose validity would be limited to the expected duration of employment.[229] These developments in terms of the exemptions to the need for residence permits and the length of permission illustrate the efforts to decrease this impediment to free movement of workers in terms of residence permits.

After the end of the transitional period of the EEC, the Court of Justice further clarified the obligations of the member states regarding the permission to reside. The case of *Royer* in 1976 stated that the provision on documentation requirements in the directive entailed an obligation for member states to issue a residence permit to any worker who was able to provide only the required documents.[230] However, at the time that workers applied for a residence permit, they might no longer be in possession of the same documents with which they had entered the territory of the host member state. The case of *Giagounidis* in 1991 explained that it would be contrary to the principle of freedom of movement for workers if the right to reside was granted merely under the strict condition of production of that same

[222] Directive 64/240 Article 5 (1b).
[223] Directive 64/240 Article 3 (2).
[224] Directive 68/360 Article 9, 6 (2a), 3 (1), 6 (2b).
[225] Directive 68/360 Article 6 (1a).
[226] Directive 68/360 Article 9 (1).
[227] Directive 68/360 Article 8.
[228] Regulation 1612/68 Article 6 (1).
[229] Regulation 1612/68 Article 6 (3).
[230] Case 48-75 *Jean Noël Royer* [1976] ECR 498-520 [2].

document.[231] The Court of Justice concluded that host member states were obliged to issue residence permits to EEC workers who were able to produce either a valid identity card or a valid passport, regardless of the document with which they had entered the territory.[232] The Court of Justice also clarified the function of residence permits and the right of EEC workers to reside. According to the case of *Commission v Belgium* in 1989*,* the residence permit has only a declaratory function vis à vis the right of residence under Community law.[233] Specifically, the right of EEC workers to reside in the host member state came from the Treaty of Rome, not from the residence permit. In other words, Article 48 of the Treaty was the source of the right to reside. Additionally, the decision in *Commission v Germany* in 1998 also stated that host member states were allowed to impose penalties on EEC workers who could not produce their residence permits, but the penalties had to be comparable to those imposed on nationals who failed to carry their identity cards.[234] This illustrates that if member states required EEC workers to hold residence permits and workers failed to show the permits for inspection, they faced only a minor fine which must be comparable to those imposed on the nationals of the host member states. It can also be seen that these judgments regarding the obligation of states and the right to reside were delivered by the Court of Justice a very long time after the end of the transitional period of the EEC.

It can be seen that the directive was the only form of EEC legislation that dealt with the issue of permission to reside because this issue was mainly related to administrative formalities. Therefore, the directive was a proper instrument which allowed states to transpose the way they complied with objectives regarding permission to reside to fit their domestic laws. The development of EEC legislation which diminished the obstacles surrounding administrative procedures and the validity of residence permits enhanced EEC workers' right to reside. Specifically, EEC workers no longer encountered excessive documentation requirements and complicated domestic procedures. These workers were guaranteed the validity of their residence permits in terms of geographical residential area and length of the permit. The development of EEC legislation gave effect to the right "to move freely within the territory of member states for this purpose" and "to stay in a member state for the purpose of employment" as stated in Article 48 of the Treaty of Rome.[235]

---

[231] Case C-376/89 *Panagiotis Giagounidis v Stadt Reutlingen* [1991] ECR I-1086-1094 [22].
[232] ibid [23].
[233] Case 321/87 *Commission v Belgium* [1989] ECR 1007-1012 [12].
[234] Case C-24/97 *Commission v Germany* [1998] ECR I-2140-2146 [15].
[235] Treaty of Rome (1957) Article 48 (b), (c).

Additionally, permission to reside did not limit the applicable residential region and did not allow member states to collect administrative fees for the permit at a rate exceeding the amount normally paid by nationals for their own identity documents. The case law also allowed host states to oblige EEC workers to respect the duty to possess residence permits only where there were comparable obligations for nationals. These followed the main principle of non-discrimination in Article 48 of the Treaty of Rome.

3.4 Family Reunification

When the states decided to achieve free movement of workers, they had to legislate for the position of the family members of migrant workers. Host states might want to exclude family members of foreign workers due to housing or overpopulation issues.[236] Family members tend to be considered as an extra burden for states. This could result in national rules that limit the number, or the category of family members allowed to accompany the migrant worker. Additionally, host states frequently set certain requirements regarding the entry, residence, access to education and employment of family members.[237] These restrictive domestic practices lead to problems regarding the entry and stay of family members because they adversely affect school attainment, vocational training and employment opportunities.[238] To facilitate free movement of workers, these obstacles regarding family members of the migrant worker need to be diminished. In the case of the EEC, the category of family members, the issues relating to access to employment and access to education were addressed in three regulations and the issues relating to frontier formalities and permission to reside were addressed in three directives in 1961, 1964 and 1968.

In the first transitional period, under Regulation 15/61, only spouses and children under the age of 21 years old who were nationals of the member states were allowed to accompany EEC workers to host member states.[239] This regulation permitted only a small circle of relatives and limited the nationality of those family members. EEC workers must have available for the permitted family members the kind of housing considered normal for

---

[236] International Labour Organisation (n 53) (1950) 95; Chiara Berneri, *The movement and residence rights of third country national family members of EU citizens: a historical and jurisprudential approach* (City University of London 2014) 35.
[237] ibid.
[238] Isaac (n 59) (1952) 194; Green (n 60) (1991) 153; William Clark and Regan Maas, 'Interpreting Migration Through the Prism of Reasons for Moves' (2015) 21 (1) Population, Space and Place 54-67.
[239] Regulation 15/61 Article 11 (1).

national workers in the region where the workers were employed.[240] The reason for this requirement, mentioned in the case of *Diatta* (but which was only decided in 1985), was to protect public security by preventing the immigration of persons who would have to live in precarious conditions.[241] Specifically, it could prevent problems regarding overcrowded residential areas in host states. In terms of employment, Regulation 15/61 allowed these authorised family members to work in host states under the same conditions as the EEC workers on whom they were dependent.[242] Children who regularly resided in the territory of the host member state were entitled to apprenticeships and vocational training courses under the same conditions as nationals in the host member state.[243] This entitlement was available to all children of EEC workers regardless of conditions of age or dependency.[244] Thus, children were entitled to apprenticeships and vocational training courses even if they were over 21 years old and no longer dependent on their parents. In terms of entry and residence, family members were required to have only a valid identity card or passport for entry into the host member state.[245] They were entitled to the same conditions regarding permission to reside as the worker on whom they were dependent.[246] Frontier formalities and permission for family members to reside in this 1961 Directive were not complicated because Regulation 15/61 did not cover procedures regarding the third-country nationals.

In the second transitional period, Regulation 38/64 kept the condition regarding normal housing for family members.[247] However, Article 17 authorised not only spouses and children under the age of 21[248] but also all the ascendants and descendants of the worker and their spouse who were dependent on the worker.[249] Additionally, these family members were admitted to host member states regardless of their nationality.[250] Therefore, the scope of family members regarding category and nationality was extended. Similar to the first transitional period, the authorised family members were provided with access to employment[251] under the same conditions as the EEC workers on whom they were

[240] Regulation 15/61 Article 11 (3).
[241] Case 267/83 *Aissatou Diatta v Land Berlin* [1985] ECR 574-591 [10].
[242] Regulation 15/61 Article 12-14.
[243] Regulation 15/61 Article 15.
[244] Case C-7/94 *Landesamt für Ausbildungsförderung Nordrhein-Westfalen v Lubor Gaal* [1995] ECR I-01040-1050 [31].
[245] Directive of 16 August 1961 Article 3 (1).
[246] Directive of 16 August 1961 Article 4.
[247] Regulation 38/64 Article 17 (3).
[248] Regulation 38/64 Article 17 (1a).
[249] Regulation 38/64 Article 17 (1b).
[250] Regulation 38/64 Article 17 (1).
[251] Regulation 38/64 Article 18-19.

dependent. However, Regulation 38/64 extended the right of these children to cover the same general education as nationals in states of destination.[252] Thus, the children of EEC workers, regardless of their dependency and nationality, were entitled not only to access vocational training courses but also general education under the same conditions as nationals in host states. As Regulation 38/64 provided the right to family reunification to family members regardless of nationality, requirements for entry depended on their nationality. According to Directive 64/240, if the family members were nationals of a member state, the required document was a valid identity card or passport.[253] If the authorised family members were third-country nationals, a valid identity card or passport was still required.[254] This directive stated that "no entry visa or equivalent may be demanded save from members of the family who are not nationals of a member state."[255] Therefore, family members who were third-country nationals might be required to have entry visas, but member states had the responsibility to provide every facility for obtaining the necessary visas.[256] Moreover, this visa would be free of charge.[257] In this second period, all authorised family members were entitled to the same conditions regarding permission to reside in host states as the worker on whom they were dependent, regardless of their nationality.[258]

In the third transitional period, Regulation 1612/68 retained the extended scope of family members,[259] the condition regarding normal accommodation,[260] access to employment,[261] vocational training courses and general education,[262] as existed in the previous Regulation 38/64. Likewise, Directive 68/360 confirmed the procedures regarding frontier formalities[263] and permission to reside[264] from the previous Directive 64/240.

After the end of the transitional period in 1968, access to general education and vocational training in the regulation was further clarified by the Court of Justice. In the case of *Donato Casagrande* in 1974, this right to general education was held not only to refer to the domestic rules regarding the admission process but also to other general measures aimed

[252] Regulation 38/64 Article 21.
[253] Directive 64/240 Article 3 (1).
[254] Directive 64/240 Article 3 (1)
[255] Directive 64/240 Article 3 (2).
[256] ibid.
[257] Directive 64/240 Article 7 (2).
[258] Directive 64/240 Article 5.
[259] Regulation 1612/68 Article 10 (1).
[260] Regulation 1612/68 Article 10 (3).
[261] Regulation 1612/68 Article 11.
[262] Regulation 1612/68 Article 12.
[263] Directive 68/360 Article 3, 9 (2).
[264] Directive 68/360 Article 4.

at facilitating educational attendance of children.[265] The Court of Justice mentioned that although educational grants were within the competence of host states, they could support access to education. So, the children of EEC workers also had the right to take advantage of any educational grants provided by domestic law in the host member state under the same conditions as a national in a similar position.[266] Additionally, the two regulations in 1964 and 1968 also stated that host member states had the responsibility to "encourage all efforts to enable the children to attend general educational, apprenticeship and vocational training courses under the best possible conditions."[267] This provision was also applicable to access to the vocational rehabilitation of disabled children of EEC workers in the state of destination. According to the case of *Michel S* in 1973, rehabilitation would allow handicapped children to realise and enhance their physical and mental ability for employment purposes.[268] Therefore, disabled children of EEC workers were entitled to the advantages provided by the law of the host country regarding rehabilitation programmes for the handicapped under the same conditions as nationals in similar conditions.[269]

It can be seen that two different forms of EEC legislation have been used to deal with family reunification. On the one hand, issues relating to the category of the family members, access to employment and access to education of the family members were set out in the regulations. These objectives in the regulations would be directly applicable to the member states and EEC workers could directly rely on their right to be accompanied by their family members, a right to access employment and a right to education under the regulations. On the other hand, issues relating to frontier formalities and permission to reside which related to administrative procedures were contained in the directives. Thus, the member states were allowed to transpose the requirements and standards regarding frontier formalities from the directives into their national laws. The developments regarding family members in EEC legislation could enhance the rights of family members in relation to employment, education, vocational training, frontier formalities and residence in the host member state. These would encourage the movement of EEC workers. Although the Treaty of Rome did not specifically mention family rights of migrants, obstacles to family rights would, logically, hinder the effectiveness of the free movement of workers. According to the preamble of Regulation

[265] Case 9/74 *Donato Casagrande v Landeshauptstadt München* [1974] ECR 774-780 [9].
[266] ibid.
[267] Regulation 38/64 Article 21 (2) and Regulation 1612/68 Article 12 (2)
[268] Case 76-72 *Michel S v Fonds national de reclassement social des handicapés* [1973] ECR 458-466 [16].
[269] ibid [14].

1612/68, workers could not exercise free movement of workers' rights without the worker's right to be joined by his family and the conditions for the integration of that family into the host country.[270] Therefore, providing rights for family members follows the aims of abolishing obstacles to the free movement of workers stated in Article 3 (c) of the Treaty of Rome.[271]

3.5 Working Conditions

Working conditions for migrant workers is another concern for the host states. It is possible that host states have national protectionist attitudes towards foreigners which leads to restrictive domestic regimes on working conditions. Specifically, states of destination might provide less attractive working conditions for foreign workers than national workers.[272] This could discourage the movement of migrant workers because they must accept different working conditions which could be less favourable in the host states. Especially, states of destination might have national laws or policies that allow employers to treat migrant workers differently from local workers in terms of remuneration or dismissal.[273] Domestic rules in states of destination could also treat migrant workers unequally by prohibiting or limiting the rights of migrant workers to obtain certain social benefits as well as tax advantages.[274] To facilitate the free movement of workers, the EEC considered it necessary to abolish these obstacles relating to working conditions in states of destination. In the case of the EEC, these issues were addressed in three successive regulations on free movement of workers in 1961, 1964 and 1968.

In the first transitional period, Regulation 15/61 stated that EEC workers may not be treated unequally, based on nationality, in comparison with national workers in relation to any conditions of employment and work, especially regarding remuneration and dismissal.[275] On the issue of remuneration, well after the end of all the transitional periods, the court held in the case of *Sotgiu* that a separation allowance, which was paid in addition to wages for the inconvenience suffered by workers who were separated from home, could also be considered

[270] Regulation 1612/68 Preamble.
[271] Treaty of Rome (1957) Article 3 (c).
[272] International Labour Organisation (n 53) (1950) 95.
[273] Christian (n 64) (1955) 386; Policy Department C (n 57) (2016) 12.
[274] Christian (n 64) (1955) 386; Barnard (n 10) (2016) 204.
[275] Regulation 15/61 Article 8 (1).

remuneration within the meaning of the regulation.[276] It also stated that any clause or agreement or any other collective regulation relating to eligibility for employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other member states.[277] Therefore, EEC workers were entitled to the same protection and treatment as national workers in the host states regarding remuneration and dismissal from the first transitional period. However, Regulation 15/61 did not cover equal treatment in social or tax benefits. Thus, it was possible that EEC workers would encounter different conditions from nationals of host states in relation to social benefits during the first period.

In the second transitional period, Regulation 38/64 did not change the objective regarding working conditions for EEC workers. Regulation 38/64 confirmed the same objectives as Regulation 15/61 that EEC workers were entitled to equal treatment in remuneration and dismissal.[278] Similarly, it was still possible that EEC workers would be treated differently from the national workers in the host states in terms of tax benefits or social advantage.

In the third transitional period, Regulation 1612/68 of 1968 confirmed equal treatment in remuneration and dismissal for EEC workers in host member states.[279] However, the second paragraph of Article 7 contained a new provision that EEC workers were entitled to the same social benefits and tax advantages as national workers.[280] The case of *Vera Hoeckx* in 1985 defined social benefit or social advantage under Article 7 as all advantages which are generally provided to national workers mainly due to their position as workers or their residence in the national territory, or whose extension to workers who are nationals of other member states therefore seems likely to facilitate the migration of such workers within the EEC.[281] According to the case determined by the Court of Justice, social benefit within the meaning of Article 7 of Regulation 1612/68 included loans granted on childbirth by a credit institution incorporated under domestic law to low income workers with a view to stimulating the birth rate,[282] grants of income guaranteed to old people by the legislation of a member

[276] Case 152-73 *Giovanni Maria Sotgiu v Deutsche Bundespost* [1974] ECR 154-167 [8].
[277] Regulation 15/61 Article 8 (3).
[278] Regulation 38/64 Article 9 (1), 9 (3).
[279] Regulation 1612/68 Article 7 (1), 7 (4).
[280] Regulation 1612/68 Article 7 (2).
[281] Case 249/83 *Vera Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout* [1985] ECR 982-990 [20].
[282] Case 65/81 *Francesco Reina and Letizia Reina v Landeskreditbank Baden-Württemberg* [1982] ECR 34-46 [18].

state to a worker's dependent relatives in the ascending line,[283] benefits provided by domestic law guaranteeing a minimum means of subsistence in a general manner for workers,[284] and child-raising allowances automatically granted by a member state to workers fulfilling certain objective criteria.[285] This is a very wide interpretation of social benefit. The benefits must be granted to EEC workers under the same conditions as those which apply to national workers in the host member state. The obstacles to free movement of workers regarding unequal treatment in relation to social benefit and tax advantage continued to apply until the final round of negotiations. From the extent of the Court of Justice's case-law on the provision, it is clear that some member states remained resistant to this equal treatment for many years after the end of the transition.

It can be seen that the regulation was the only form of EEC legislation that dealt with the issue of working conditions. As mentioned previously, these regulations are directly applicable in all member states. The possible reason was that the issue of working conditions was related to core rights for EEC workers. When EEC workers became entitled to the same working conditions as domestic workers in the host member states, their right to equal treatment was guaranteed. This development of EEC legislation on this issue follows the main principle of non-discrimination based on nationality in Article 48 of the Treaty of Rome.[286]

3.6 Protection from Expulsion

The final obstacle to the free movement of workers that states use is expulsion of migrant workers. Similar to previous obstacles, national protectionist attitudes of states result in restrictive domestic expulsion regimes for foreigners. The countries of destination are concerned that migrant workers are needed only to fill gaps in their labour market.[287] When there is no gap in the labour market then migrant workers are not in high demand, so states of destination refuse to extend the permission to work and reside to migrant workers without

[283] Case 261/83 *Carmela Castelli v Office National des Pensions pour Travailleurs Salariés* (ONPTS) [1984] ECR 3200-3215 [13].
[284] Case 249/83 *Vera Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout* [1985] ECR 982-990 [25].
[285] Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I-02691 [26].
[286] Treaty of Rome (1957) Article 48 (2).
[287] International Labour Organisation (n 53) (1950) 95; Goedings (n 54) (2005) 153-157.

clear or fair grounds.[288] States may not provide adequate protection, assistance or remedies for migrant workers who are subject to an expulsion order from national authorities.[289] This may be seen as a flaw in a migrant worker's profile which might adversely affect his or her ability to migrate for employment purposes in the future. In order to facilitate the free movement of workers, protection from expulsion needed to be addressed. States of destination had to give up certain control over foreigners on their territory and agree to liberalise protection from their expulsion regimes. Unlike other obstacles to the free movement of workers during the transitional period of the EEC, the issue regarding protection from expulsion was dealt with only in Directive 64/221. This issue did not go through the development in the three stages of negotiation. Indeed, it was not changed until 2004.

Article 2 of Directive 64/221 allowed member states to expel EEC workers when justified only on the three grounds of public policy, public security and public health.[290] According to Articles 2 and 3 of this directive, the use of these grounds was restrictive because they cannot be invoked to service economic ends[291] and must be based exclusively on the personal conduct of the individual concerned.[292] As an expulsion order must consider personal conduct, the Court of Justice in the case of *Bonsignore* confirmed that an expulsion order could not be justified on extraneous matters.[293]

In terms of public policy, the case of *Van Duyn* explained that particular circumstances justifying recourse to public policy "may vary from one country to another and from one period to another."[294] The concept of public policy was then narrowed by the case of *Bouchereau* which stated that public policy presupposes the existence of "a genuine and sufficiently serious threat affecting one of the fundamental interests of society."[295] The annex to Directive 64/221 suggested possible threats to public policy, such as drug addiction and profound mental disturbance.

In terms of public security, the case of *Rutili* held that the protection of public security "usually reserves to the national authorities discretionary powers."[296] The case of *Bouchereau*

---

[288] Christian (n 64) (1955) 386.
[289] Policy Department C (n 57) (2016) 100-102.
[290] Directive 64/221 Article 2 (1).
[291] Directive 64/221 Article 2 (2).
[292] Directive 64/221 Article 3 (1).
[293] Case 67-74 *Carmelo Angelo Bonsignore v Oberstadtdirektor der Stadt Köln* [1975] ECR 297-308 [6].
[294] Case 41-74 *Yvonne van Duyn v Home Office* [1974] ECR 1338-1352 [18].
[295] Case 30-77 *Régina v Pierre Bouchereau* [1977] ECR 200-215 [35].
[296] Case 36-75 *Roland Rutili v Ministre de l'intérieur* [1975] ECR 1220-1237 [20].

explained further that previous criminal convictions do not in themselves constitute grounds for restrictions on the free movement of workers on the ground of public security.[297] However, previous criminal convictions are relevant only when they manifest a present personal conduct contrary to public security.[298] The possible threats to public policy listed in the Annex to Directive 64/221 were also applicable to the case of public security.[299]

In terms of public health, Article 4 stated that "diseases or disabilities occurring after a first residence permit has been issued shall not justify a refusal to renew the residence permit or expulsion from the territory."[300] This illustrates that the host member states could invoke the ground of public health to expel EEC workers only during their first entry. The annex to Directive 64/221 also listed diseases which might endanger public health, such as tuberculosis of the respiratory system, syphilis, and other infectious diseases.

Other provisions in Directive 64/221 also limited the discretion of member states to expel EEC workers in their territory. Article 3 stated that "expiry of the identity card or passport used by the person concerned to enter the host country and to obtain a residence permit shall not justify expulsion from the territory."[301] Moreover, member states were not permitted to enact new domestic laws in respect of expulsion of EEC workers in a more restrictive manner than those in force at the date of notification of the directive.[302]

In order to issue a decision of expulsion, host member states were obliged to officially notify the EEC worker and the notification must state the period of time allowed for leaving the territory.[303] Article 7 also specified the minimum for such time period, in general, not less than one month. This minimum period could be reduced to fifteen days only in the case of urgency with the condition that the EEC worker had not received a residence permit.[304] If EEC workers had received residence permits from host states, the minimum period was one month. EEC workers must have time to prepare for leaving and host member states were not permitted to immediately expel them from their territory.

In terms of remedies for EEC workers who received expulsion decisions from the host member state, Article 8 stated that EEC workers shall have the same legal remedies as are

[297] Case 30-77 *Régina v Pierre Bouchereau* [1977] ECR 200-215 [28].
[298] ibid.
[299] Annex of Directive 64/221.
[300] Directive 64/221 Article 4 (2).
[301] Directive 64/221 Article 3 (3).
[302] Directive 64/221 Article 4 (3).
[303] Directive 64/221 Article 7.
[304] ibid.

available to nationals of the state concerned in respect of acts of the administration.[305] This article mandated equal treatment for EEC workers regarding remedies against an expulsion decision. Where there was no right to appeal to a court in the host member state regarding expulsion or the appeal could not have suspensory effect, Article 9 stated the right to refer the case to a competent authority in the host state who should not be the same as that empowered to take the decision ordering expulsion.[306] If EEC workers had held residence permits in the host state, the case should be automatically referred to the competent authority. If the EEC workers concerned encountered an expulsion order before receiving residence permits, the case should be referred to the competent authority upon the request of such workers. Directive 64/221 provided remedies for EEC workers who received expulsion orders that such orders should not be executed by administrative authorities until an opinion had been obtained from a competent authority on appeal or review.

The protection from expulsion for EEC workers appeared in only one directive during the transitional period of the EEC. The reason that the form of legislation is a directive is that the issue was mainly related to administrative procedures. Therefore, member states were allowed to transpose the objective in the directive to fit their domestic law and practice regarding the expulsion of foreign workers. Directive 64/221 of 1964 aimed to abolish the obstacles to the free movement of workers regarding protection from expulsion. Specifically, it limited the scope of justification by the member states for ordering expulsion of EEC workers within their territory. It also provided remedies for the EEC workers concerned after receiving an expulsion order with a minimum period of time for preparing to leave the country, a right to legal remedies and to submit the case for review by a competent authority. This diminished the obstacles to the free movement of workers as stated in Article 3 (c) of the Treaty of Rome.[307]

4. Controversial Economic Activities and Free Movement of Workers

It can be seen from this chapter that the free movement of workers framework of the EEC was primarily built upon the principle of non-discrimination based on grounds of

[305] Directive 64/221 Article 8.
[306] Directive 64/221 Article 9.
[307] Treaty of Rome (1957) Article 3 (c).

nationality. This principle was clearly stated in Article 48 of the Treaty of Rome. It prohibited host member states from treating workers who were the nationals of other member states differently from their nationals (the exceptions were in respect of family reunification and expulsion). In other words, EEC workers were entitled to the same right to work and reside as national workers performing the same professions in the state of destination. This free movement of workers regime of the EEC would work straightforwardly if the economic activities of EEC workers were similarly recognised and certified by domestic law, both in the sending and receiving member states. In this respect, problems could arise in the case of controversial economic activities. It is possible that a certain type of work is considered as legal in one member state but is regarded as a crime in another member state. Prostitution is a perfect example of this issue. In certain jurisdictions, prostitution is permitted by domestic law, while in others, it may be condemned as a comparable form of trafficking in persons.[308]

As regards the principle of non-discrimination based on grounds of nationality in the Treaty of Rome, the free movement of workers framework did not oblige all member states to recognise and certify the same economic activities for workers. This principle only prohibited the different treatment of EEC workers and nationals of the member states. In other words, the domestic laws of the member states were still allowed to ban certain economic activities, as long as the laws were also applicable to their nationals. When the free movement of workers framework was implemented during the transitional period, workers who performed controversial activities might encounter certain difficulties in their migration for employment purposes. Specifically, prostitutes who were legal workers in their home states could be treated as criminals or victims of human trafficking when they migrated to work in another state.

In the case of the EEC, this issue first arose in the case of *Adoui and Cornuaille* in 1982. This case related to two French nationals who worked in Belgium; one as a waitress "displayed herself in the window and was able to be alone with their clients" and the other as a waitress who "in scant dress displayed herself to clients."[309] Their residence permits were rejected and they were issued with expulsion orders on the grounds of public policy that their work was "suspect from the point of view of morals" and "contrary to the 1957 Police

[308] L Fairfield, 'Notes on Prostitution' (1959) 9 (3) British Journal of Delinquency 164-173; Shlomo Shoham and Giora Rahav, 'Social Stigman and Prostitution' (1968) 8 (4) British Journal of Criminology 402-411; David Richards, 'Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution' (1979) 127 (5) University of Pennsylvania Law Review 1195-1287.
[309] Case 115, 116/81 *Rezguia Adoui v Belgian State and City of Liège; Dominique Cornuaille v Belgian State* [1982] ECR 1668-1669.

Regulation."[310] Moreover, the Belgian authority revealed that "they are systematically expelling all French waitresses because they may be the logistic support for the French underworld."[311] Thus, the residence permits were rejected due to "the campaign against the crime."[312] In this case, the domestic law in the host member state prohibited certain types of work, on the ground that they were harmful from a social point of view. This illustrates that the workers who performed controversial economic activities as in the case of *Adoui and Cornuaille* could encounter difficulties relating to their permission to work and reside in the host member state. The Court of Justice, referred to the reservation relating to public policy in Article 48 of the Treaty of Rome. It decided that a member state may not expel a national of another member state by reason of the conduct which, when attributable to the former state's nationals, does not give rise to measures aimed to combat that conduct. The Court of Justice also referred to Article 3 of Directive 64/221 that the measure taken on the basis of public policy must be based on the personal conduct of the individuals concerned. Thus, the claim by the Belgian authorities that the women's expulsion was part of a national campaign against crime could be considered as extraneous to the individual case. Specifically, the Court of Justice stressed that the national court had to consider whether the act of the individuals concerned was a sufficiently serious threat affecting the fundamental interests of society.[313]

Although five of the six founding EEC member states, had signed the 1950 Convention for the Suppression of the Traffic in Women and Children,[314] neither the Court of Justice nor the Advocate General[315] raised concerns about human trafficking in the *Adoui and Cornuaille* case. From this case, it can be seen that the Court of Justice mainly interpreted Article 48 of the Treaty of Rome and Article 3 of Directive 64/221 which are EEC legislation. However, in the *Jany case* in 2001 the Advocate General discussed the relationship between trafficking in persons and free movement of a self-employed prostitute.[316] As the case concerns self-employed persons, it is outside the scope of this chapter and will be discussed in the next chapter.

---

[310] ibid 1707 [2]-[3].
[311] ibid 1680.
[312] ibid.
[313] ibid 1707 [7].
[314] The United Nations Convention for the Suppression of the Traffic in Women and Children (1950): Belgium (1947), Netherlands (1949), Luxembourg (1955), Italy (1949) and Germany (1973).
[315] Opinion of Advocate General: *Rezguia Adoui v Belgian State and City of Liège; Dominique Cornuaille v Belgian State* (16 February 1982).
[316] Opinion of Advocate General: *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* (8 May 2001).

5. Conclusion

The EEC free movement of workers framework had gradually abolished most of the obstacles to labour migration. As this chapter has illustrated, such achievement of the EEC framework could be a result of explicit objectives with a clear time frame and a programmatic approach in the Treaty of Rome.

In terms of an explicit objective, it can be seen that the objective of the Treaty of Rome prohibiting discrimination based on nationality was a crucial principle in abolishing the obstacles to the free movement of workers. From this chapter, it is clear that discrimination based on nationality is a fundamental impediment to labour migration. Specifically, the national protectionist attitudes of national authorities tend to end up creating restrictive domestic rules to control and exclude migrant workers from host member states. To achieve the free movement of workers, member states of an economic association need to rethink and adjust their attitudes of cooperation from national prioritisation or exclusion of foreign workers to non-discrimination based on the nationality of EEC workers.

In terms of a clear time frame, the Treaty of Rome separated the negotiation into three transitional periods and set the ultimate deadline to achieve it by 31 December 1969. The EEC was attentive to this time frame. This resulted in Regulation 15/61, Regulation 38/64 and Regulation 1612/68. There were also three successive directives on the abolition of restrictions on movement and residence within the EEC for workers and their families: the Directive of 16 August 1961, Directive 64/240 and Directive 68/360. The EEC negotiations on the free movement of workers were completed in 1968 by the adoption of Regulation 1612/68 and Directive 68/360, so the negotiations did not encounter delays.

In terms of a programmatic approach, this approach was adopted in order to achieve a free movement of workers framework within the EEC from 1957 to 1968. Specifically, the Treaty of Rome set out the timetable and the objectives for the member states to follow. The three-round negotiation was a chance for member states to gradually make decisions on how to abolish the obstacles to the free movement of workers within the EEC. In other words, the member states did not have to suddenly give up control on all facets of the free movement of workers during the first round of negotiations. Instead, they could revise their position and increase the degree of cooperation in the next negotiation round.

This chapter also illustrates that EEC legislation on the free movement of workers did not develop mainly from existing international law. The possible reason is that there were not

many international laws related to the movement of workers during the EEC transitional period. There was the 1949 ILO Convention on Migration for Employment (No. 97).[317] It calls for non-discriminatory treatment based on nationality for migrant workers on the issues of remuneration and family allowances. [318] However, this international law did not tackle all of the obstacles to the free movement of workers. The EEC, with the objective of abolishing major obstacles to labour migration, needed to go beyond international law and demanded a stronger programmatic approach by the member states to achieve the free movement of workers. This proves a hypothesis of the new regionalism theory that following only international law may not be suitable for the regional grouping to achieve regionalism. Therefore, the regional grouping has to devise its own rules to deal with specific issues such as the free movement of workers.

In addition, even though five out of the six founding EEC member states signed the 1950 Convention for the Suppression of the Traffic in Women and Children, neither the Court of Justice nor the Advocate General in *Adoui and Cornuaille* referred to this international law. The Court merely interpreted EEC legislation. This also illustrates the insignificant role of international law in the EEC free movement of persons framework.

This research aims to further examine the feasibility of regional integration on labour migration within the AEC by considering the experiences of the EEC. Therefore, the EEC's attitude of cooperation among the member states, its approach to labour liberalisation, and its relationship with the international law examined in this chapter could provide valuable lessons for the AEC.

---

[317] Four of the six founding EEC states, Netherlands, Italy, Belgium and France signed this convention before the adoption of the Treaty of Rome in 1957. Germany also signed this Convention in 1959. Thus, the founding member states of the EEC, except Luxemburg, had signed this Convention before the first Regulation on free movement of workers was adopted in 1961; International Labour Organisation, 'Ratifications of 1979 Migration for Employment Convention (No. 97)' <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312242:NO> [accessed 21 February 2021]; Netherlands 20 May 1952, Italy 22 Oct 1952, Belgium 27 July 1953, France 29 March 1954, Germany 22 June 1959.

[318] International Labour Organisation, Migration for Employment Convention (No. 97) (1949) Article 6.

CHAPTER 3. Achieving Free Movement of Self-employed Persons and Service Providers in the European Economic Community

1. Introduction

As mentioned in the two previous chapters, the EEC aimed to create a European Common Market which allowed free movement of goods, persons, services and capital.[319] To establish this Common Market, the Treaty of Rome specified in Article 3 that obstacles to the free movement of persons among member states would be abolished.[320] The term "persons" in Article 3 could be categorised into three groups. The first group, which is the worker, has been examined in the previous chapter. The other two groups are the main focus of this chapter. The terms "self-employed persons" and "service providers" was not defined in the Treaty of Rome. However, the Court of Justice developed the definition in subsequent case-law.

In terms of self-employed persons, the *Reyners* case clarified that they are entitled to the right of establishment to perform economic and social interpenetration in the sphere of self-employed activities.[321] The *Jany* case further explained that they bear the potential risk of their employment and they are directly paid in full.[322] Unlike workers, the *Asscher* case held that self-employed work takes place outside a relationship of subordination.[323] In terms of service providers, the *Bond* case clarified that they must provide services for remuneration.[324] According to the *Commission v Germany* case, service providers must carry out an economic activity for a temporary period in a member state in which they are not established.[325] This "temporarily" requirement distinguishes the right of service providers from the right of

[319] Molle (n 70) (1991) 12-14.
[320] Treaty of Rome (1957) Article 3 (c).
[321] Case 2-74 *Jean Reyners v Belgian State* [1974] ECR 632-657 [21].
[322] Case C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* [2001] ECR I-8657-8690 [38]; This research acknowledges that this case was related to the right of establishment of a Polish self-employed person in the Netherlands. The case had happened before Poland became a full member of the EU. The case related to the interpretation of 1994 Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part. However, the Court of Justice defined the definition of right the establishment in this case, as in the Treaty of Rome (1957). The Court mentioned that "no difference in meaning can be distinguished between the 'activities as self-employed persons' referred to in Article 52 of the Treaty and the 'economic activities as self-employed persons' referred to in Article 44 (4) (a) (i) of the Association Agreement between the Communities and Poland."
[323] Case C-107/94 *Asscher v Staatssecretaris van Financiën* [1996] ECR I-3113-3132 [26].
[324] Case 352/85 *Bond van Adverteerders and others v The Netherlands State* [1988] ECR 2124-2137 [12].
[325] Case 205/84 *Commission v Germany* [1986] ECR3793-3815 [21].

establishment (of self-employed persons) which entails the pursuit of an economic activity for an indefinite period.[326] Moreover, the *Van Binsbergen* case ruled that persons, who provide services in a member state but maintain their place of establishment outside that state to avoid its professional rules, may be subject to the provisions relating to the right of establishment and not of those on the provision of services.[327]

As for the free movement of workers, the objective in Article 3 of the Treaty of Rome led to regional legislation removing obstacles to the movement of self-employed persons and service providers among the six founding member states of the EEC. Unlike the free movement of workers, the development of the free movement of these two groups of persons could not be separated into three transitional periods.

During the EEC transitional period, Directive 64/220 of 1964[328] and Directive 73/148 of 1973[329] regarding the general movement and residence of self-employed persons and service providers were published. Additionally, there were a series of directives concerning the movement of specific service sectors within the member states from 1963 to 1985. It can be seen that the negotiations on the movement of self-employed persons and service providers ran on beyond the end of the transitional period of 31 December 1969.[330] The issues regarding the time frame and the causes of the delay will be discussed further in the next part of this chapter.

The introduction chapter examined academic literature to seek further explanation for the movement of persons and found six key obstacles which hinder labour migration. Similar to the free movement of workers, the movement of self-employed persons and service providers generally involves migration with the purpose of pursuing economic activities. Therefore, these obstacles hindering the movement of workers could also be applicable to the movement of self-employed persons and service providers. The obstacles include access to the labour market, permission to work, permission to reside, family reunification, working conditions and protection from expulsion. As mentioned in the previous chapter, the main objective of this research is to examine the possibility of the regional integration of labour

---

[326] Craig and De Búrca (n 10) (2015) 820; This was confirmed in Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I4186-4201 [27].
[327] Case 33-74 *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverhei* [1974] ECR 1300-1313 [13].
[328] Directive 64/220 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (25 February 1964).
[329] Directive 73/148 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (21 May 1973).
[330] Treaty of Rome (1957) Article 8 (1).

migration within the AEC by considering the experiences of the EEC. The AEC has started its plan to facilitate the movement of skilled labour in selected service sectors.[331] Therefore, it is also beneficial to understand the key steps to achieving the free movement of self-employed persons and service providers of the EEC which also started with specific service sectors. This chapter plans to do so by examining EEC legislation regarding self-employed persons and service providers from 1963 to 1973. The research acknowledges that the free movement of self-employed persons and service providers framework among the member states has been continuously developed since 1973. Nevertheless, the period from 1963 to 1973 was a crucial one in which the free movement of self-employed persons and service providers was achieved.

This chapter aims to examine the issues related to these two categories of persons in a similar way to the previous chapter on workers. This chapter begins with general information on the obstacles to the free movement of self-employed persons and service providers in the Treaty of Rome. The next part of the chapter analyses the template of the EEC framework including the ways in which the EEC set its objectives, timetable, and legislative form. Then, the chapter continues to examine the development of the provisions in EEC legislation from 1963 to 1973 regarding the six main obstacles set out above. If the AEC is going to facilitate the movement of persons to perform economic activities in specific service sectors, it will be useful to consider the development of the EEC framework on self-employed persons and service providers.

2. General Objectives on Free Movement of Self-employed Persons and Service Providers in the EEC

The free movement of persons is one of the four fundamental freedoms in the Treaty of Rome. As discussed in the previous chapters, persons in this context were separated into three groups: workers, self-employed persons, and service providers. Workers have been discussed in the previous chapter. This chapter focuses on the other two groups of persons. The objectives relating to the free movement of self-employed persons were set out in Articles 52 to 58 of the Treaty of Rome. For the service providers, the objectives are found in

[331] The current ACE framework is to facilitate the movement of goods, services, investment, capital, and skilled labour (not include low-skilled labour) within ASEAN. Therefore, free movement of workers does not currently exist in the ASEAN: AEC Blueprint 2025 (November 2015).

Articles 59 to 66 of the same Treaty. This chapter aims to investigate the development of the regional legislation related to the free movement of natural persons as self-employed persons and service providers during the EEC transitional periods. It is, therefore, necessary to examine the general objectives specified in the Treaty of Rome relating to the main principle of the framework, the time frame for the transitional periods, and the legislative forms setting out the measures in the EEC.

The Treaty of Rome stated that the free movement of self-employed persons and service providers shall be built upon the principle of non-discrimination based on grounds of nationality. Unlike the free movement of workers, the provisions which specifically regulate the free movement of self-employed persons and service providers did not include the word "discrimination". However, the second paragraph of Article 52 of the Treaty regarding self-employed persons states that:

> "Freedom of establishment shall include the right to take up and pursue activities as self-employed persons…under the conditions laid down for its own nationals by the law of the country where such establishment is affected."[332]

Likewise, Article 60 of the Treaty regarding service providers also provides that:

> "Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals."[333]

It can be seen from Article 52 and Article 60 of the Treaty of Rome that the host member state must apply the same conditions to the nationals of other member states as it does to its own nationals in the case of self-employed persons and service providers. The wording in these two articles implies the principle of non-discrimination based on grounds of nationality but only with regard to the domestic law of the host country.[334] Additionally, these two articles are also in accordance with Article 7 of the Treaty which is a general provision

---

[332] Treaty of Rome (1957) Article 52.
[333] Treaty of Rome (1957) Article 60.
[334] Brita Sundberg-Weitman, *Discrimination on Grounds of Nationality: Free Movement of Workers and Freedom of Establishment under the EEC Treaty* (North-Holland 1977) 183-184.

regarding prohibition of discrimination on the basis of nationality. As with the free movement of workers framework, the principle regarding the free movement of self-employed persons and service providers did not apply in all cases. The Treaty of Rome allowed member states to treat foreign nationals differently on the grounds of public policy, public security, or public health.[335] As with workers, justifications on these three grounds were further explained in Directive 64/221. The use of these grounds was limited because this directive did not allow the member states to invoke the grounds for economic reasons.[336] Moreover, it must be based exclusively on the personal conduct of the individual concerned.[337] Therefore, the member states could only use these three grounds to obstruct the movement of persons from other member states on a case-by-case basis.

In terms of the time frame, the Treaty of Rome set the same timetable and deadline for workers, self-employed persons, and service providers. Article 8 stated that "a transitional period should not be any longer than 12 years and it is divided into three stages of four years each."[338] As the Treaty of Rome came into force on 1 January 1958, the deadline for the completion of the negotiations was 31 December 1969. In the case of the free movement of workers, there were three transitional periods, and it was fully implemented by the adoption of Regulation 1612/68 and Directive 68/360 in August 1968. As mentioned in the previous chapter, the negotiations on the free movement of workers within the EEC followed the time frame of the Treaty of Rome and did not encounter any delays. However, negotiations on EEC legislation on the free movement of self-employed persons and service providers were delayed.

Unlike the free movement of workers, the development of free movement of the other two categories could not be separated into three transitional periods, as proposed by the Treaty of Rome.[339] In terms of the general movement and residence of self-employed persons and service providers and their family members, the first relevant directive was Directive 64/220 in 1964. It took almost ten years for the EEC to develop and publish the next piece of legislation on this issue, and that was Directive 73/148 of 1973. In terms of permission and working conditions in the host member state, there were a series of directives concerning specific service sectors from 1963 to 1985. These directives do not cover all trades and

[335] Treaty of Rome (1957) Article 56.
[336] Directive 64/221 Article 2 (2).
[337] Directive 64/221 Article 3 (1).
[338] Treaty of Rome (1957) Article 8 (1).
[339] Sundberg-Weitman (n 334) (1977) 194-204.

professions. Some of them contain provisions designed to exclude certain economic activity. The negotiations on the free movement of self-employed persons and service providers were not completed by the end of the transitional period. This delay prompted the Court of Justice to declare the direct applicability of the freedom of establishment and free movement of services. The cases of *Reyners*,[340]and *Van Binsbergen*[341]declared that provisions regarding the free movement of self-employed persons and service providers in the Treaty of Rome could be considered as directly applicable and that individuals could invoke these provisions against authorities and before the courts. These two cases confirmed the rights of persons who were self-employed or service providers, even though member states could not complete the negotiations by the deadline stated in the Treaty of Rome.

In terms of a legislative format for free movement, Article 57 in the case of self-employed persons and Article 63 in the case of service providers specified that the Commission and the Council could issue only one form of legislation, namely, a directive. This was different from the case of workers which Article 49 specified that the Commission and the Council could choose between a regulation and a directive. As mentioned in the previous chapter, a regulation is directly applicable in all member states while a directive must be transposed into domestic legislation.[342] In the case of a directive, member states are only bound to incorporate the spirit of the legislation and the national legislature can decide on the method of implementation. Thus, the transposition of directives in member states can be time consuming as the national authorities consider how to adapt the objectives to fit domestic law and practice. This could be one of the reasons behind the delayed progression of the negotiations on the free movement of self-employed persons and service providers.

To conclude, the Treaty of Rome provided the basis for the creation of the free movement of self-employed persons and service providers within the EEC member states. It required implementation to be based on the principle of non-discrimination based on grounds of nationality but only regarding the law of the host country. Moreover, the Treaty of Rome allowed the Council to issue EEC legislation in respect of the movement of self-employed persons and service providers only in the form of a directive. There were two main directives on movement and residence in 1964 and 1973. There were a series of directives concerning

---

[340] Case 2-74, *Jean Reyners v Belgian State* [1974] ECR 632-657. [on Freedom of establishment which related to Free movement of self-employed persons].
[341] Case 33-74, *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1300-1313. [on Freedom to provide services which related to Free movement of service providers]
[342] Treaty of Rome (1957) Article 189 (2), (3).

specific service sectors from 1963 to 1985. Although the explicit deadline and time frame for the transitional periods were set out in the Treaty, the negotiations on the free movement of self-employed persons and service providers were delayed.

3. Development of EEC Legislation on Free Movement of Self-employed Persons and Service Providers

This part of the chapter aims to examine the key steps that the EEC took regarding the framework for the objectives on the movement of self-employed persons and service providers in the Treaty of Rome in order to make it a reality. The main EEC legislation that will be analysed in this section is the two directives regarding movement and residence in 1963 and 1974, as well as the directives regarding permission to perform activities as self-employed persons and service providers in specific service sectors from 1963 to 1973. It will mainly focus on the way that the EEC developed these directives to abolish the six main obstacles to the free movement of self-employed persons and service providers as set out in the introduction. As these legal measures were implemented at a national level, there were instances of conflict between the member states and individuals. Thus, this chapter also explores certain case law which interpreted and clarified provisions on the issues regarding the obstacles to the free movement of self-employed persons and service providers.

3.1 Access to Labour Market

When the EEC wanted to liberalise its legislation on the free movement of self-employed persons and service providers, the crucial issue that it had to consider was access to the labour market of the host member states. Domestic laws in the member states were restrictive in terms of border and domestic market controls.[343] As with the case of workers, these restrictive rules were the result of two possible factors. The first related to frontier formalities. The foreign self-employed persons and service providers were often required to provide excessive levels of documentation and pay administrative fees, in order to obtain the necessary travel documents.[344] The second factor was national prioritisation. The authorities

[343] Christian (n 64) (1955) 385-386.
[344] Council of Europe, Consultative Assembly, fifth session, third part, 15-26 September 1953 Document No. 201; Council of Europe, Consultative Assembly, Eighth Session, Second part, 15th-26th October 1956

might offer priority access or special assistance to their own nationals who were already performing that economic activity in the host state.[345] In order to facilitate the movement of self-employed persons and service providers within the EEC member states, it was important to relax border controls and to abolish national prioritisation policies. In the case of the EEC, the issues relating to borders were addressed in the directives on the abolition of restrictions on movement and residence within the EEC for nationals of member states regarding establishment and the provision of services in 1964 and 1973. However, these two directives did not address the issues relating to national prioritisation.

In 1964, Directive 64/220 required member states to issue and renew identity cards or passports for their nationals who wished to pursue activities as self-employed persons or to provide services in other member states.[346] The passport that the state of origin issued had to be valid at least for all member states and transit countries.[347] The directive clearly stated that entry visas could not be made compulsory,[348] but it did not explicitly abolish exit visas. However, Article 2 of the directive stated that a valid identity card or passport was acceptable for nationals to enter into or depart from the countries of origin to work in other member states.[349] It could be implied that exit visas were not required to leave their home states. At this early stage, difficulties regarding administrative procedures at the border decreased because only national identity documents were required. These provisions regarding entry requirements in Directive 64/220 of 1964 were like those stated in the Directive of 16 August 1961 which were implemented during the first transitional period of the free movement of workers within the EEC.

Then in 1973, according to Directive 73/148, member states were still required to issue and renew identity cards or passports for self-employed persons or service providers.[350] Additionally, the passport needed to be valid at least for all member states and transit

---

Document No. 458; Daniel Turack, 'Freedom of Movement in Western Europe: The Contribution of the Council of Europe' (1966) 15 (4) The American Journal of Comparative Law 782-785; Maria Fernandes, 'The Free Movement of Persons: The Ever Changing Face of Europe' (1992) 3 (12) European Business Law Review 328-329.

[345] Lannes (n 38) (1956) 2-3; Council of Europe (n 340) (1956); Walter van Gerven, 'The Right of Establishment and Free Supply of Services within the Common Market' (1966) 3 (3) Common Market Law Review 358; Didier Bigo, 'Immigration controls and free movement in Europe' (2010) 91 (875) Cambridge University Press 579-591.

[346] Directive 64/220 Article 6 (1).

[347] Directive 64/220 Article 6 (2)

[348] Directive 64/220 Article 2 (2)

[349] Directive 64/220 Article 2 (1)

[350] Directive 73/148 Article 2 (1).

countries.[351] As in Directive 64/220, a valid identity card or passport was acceptable for departure from and entry into the member states.[352] Directive 73/148 also clearly stated that no entry visa[353] or exit visa[354] was required. Thus, this directive made it clear that self-employed persons or service providers could exit their states of origin and enter other member states with only their identity documents, and without any visa requirements. These provisions regarding entry formalities in Directive 73/148 were similar to those stated in Directive 64/240 which were implemented during the second transitional period of the free movement of workers.

In terms of national prioritisation, the approach of the EEC towards self-employed persons and service providers was different to its approach to workers. In the case of workers, national prioritisation was included in the three successive regulations which applied to all workers in any occupation. The first two regulations regarding the free movement of workers in 1961 and 1964 allowed member states to preserve priority for their nationals to access the labour market under certain conditions. Then, the third regulation regarding the free movement of workers in 1968 removed this priority. As this issue was set out in the regulations, workers could directly rely on it. However, there was no equivalent regulation regarding self-employed persons and service providers. Additionally, the issue of national prioritisation was not covered in Directive 64/240 or Directive 73/148.

Nevertheless, it did not mean that national prioritisation would be allowed regarding these two categories of persons. Even though national prioritisation was not expressly discussed in the secondary legislation, the Treaty of Rome stated in Article 52 that self-employed persons were entitled to take up and pursue their activities "under the conditions laid down for its own nationals by the law of the country"[355] and Article 60 of the Treaty stated that the service providers were entitled to "provide services under the same conditions as are imposed by that state on its own nationals."[356] Moreover, the case of *Reyners*[357]and the case of *Van Binsbergen*[358]declared that the provisions regarding the free movement of self-employed persons and service providers in the Treaty of Rome could be considered as

[351] Directive 73/148 Article 2 (3).
[352] Directive 73/148 Article 2 (1), 3 (1).
[353] Directive 73/148 Article 3 (1).
[354] Directive 73/148 Article 2 (4).
[355] Treaty of Rome (1957) Article 52.
[356] Treaty of Rome (1957) Article 60.
[357] Case 2-74, *Jean Reyners v Belgian State* [1974] ECR 632-657. [Freedom of establishment; Free movement of self-employed persons].
[358] Case 33-74, *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1300-1313. [Freedom to provide services; Free movement of service providers]

directly applicable law and could be directly invoked by individuals against authorities and before the courts. Therefore, self-employed persons and service providers could directly rely on Article 52 and Article 60 of the Treaty of Rome. Thus, these two cases in 1976 clarified that national prioritisation, which provided different treatment for self-employed persons and service providers from other member states performing the same economic activities, in terms of access to the labour market, was prohibited during the EEC transitional period.

The barrier to access to the host member states was abolished. The issue regarding border formalities was addressed in the form of the directives discussed above, so the member states could transpose the requirements and standards of the directives into their national legislation. This development of EEC legislation eased border formalities and abolished administrative procedures and practices, whether resulting from national legislation or from agreements previously concluded between member states, as stated in the third paragraph of Article 54 (c) of the Treaty of Rome. Although national prioritisation was not explicitly dealt with in the secondary legislation, the case of *Reyners* and the case of *Van Binsbergen* in 1974 confirmed that self-employed persons and service providers could directly rely on Article 52 and Article 60 of the Treaty, which also prohibited national prioritisation policies. This could encourage self-employed persons or service providers to utilise their right to establishment and their right to provide services in other member states.

3.2 Permission to Perform Economic Activities

Another concern for the member states, especially the destination states, was the granting of permission to perform economic activities. It is possible that host states had a national protectionist attitude and created restrictive domestic rules and policies for foreign self-employed persons and service providers from other states. Host states tended to control how foreigners performed economic activities as self-employed persons or service providers by requiring them to provide much more documentation or pay higher administrative fees than nationals performing the same activities.[359] Moreover, host states may have feared that their national standards on health, safety and welfare might be diluted.[360] Thus, foreigners

[359] Serge Hurtig, 'The European Common Market' (1958) 32 International Conciliation 356; Fernandes (n 344) (1992) 329; A Pieter Van der Mei, *Free Movement of Persons within the European Community* (Hart Publishing 2003) 41-42.

[360] Eric Stein, 'Assimilation of National Laws as a Function of European Integration' (1964) 58 (1) American Journal of International Law 33-34; This argument related to the issue of consumer protection. The host states

could be prohibited from performing certain professions in the host states.[361] This problem relates to professional qualification requirements. Different national rules on the qualifications required for each profession can create difficulties for migrants.[362] This divergence results from the varying levels of education, training, and other experience required among the member states.[363] While some member states might not require certain pre-requisites to obtain permission to perform economic activities, others may have such requirements. Consequently, the nationals of states that require fewer pre-requisites might face difficulties when providing their qualifications to other states.

In the case of the EEC, the Treaty of Rome provided for the mutual recognition of professional qualifications[364] and the coordination of legislation, regulations and administrative rules among the member states.[365] In 1961, the two General Programmes,[366] pursuant to Articles 54 and 63 of the Treaty, also prescribed the steps for the abolition of existing restrictions on the freedom of establishment and freedom to provide services within the EEC.[367] The development of EEC legislation regarding the movement of self-employed persons and service providers can be categorised within four groups of economic activities, as shown in the following table.

Table 2: Conditions to Obtain Permission to Perform Economic Activities in the Host Member States

Group	Economic Activities	Conditions
1	Agriculture, Trade and commerce, Manufacturing, Eating and lodging places, Fishing, Transport, Communication, Personal, Community, Recreation, Insurance, Travel agency, Hair dressing	• **Transitional Measures** (Performed concerned economic activities for the required years.)

may claim that they need to protect their national consumers from the underqualified foreign practitioners who had not obtained certain diplomas or training from the competent authority in the host state; Gerven (n 345) (1966) 353.

[361] Jacqueline Friedlander, 'Securing a Lawyer's Freedom of Establishment within the European Economic Community' (1987) 10 (4) Fordham International Law Journal 733-749.

[362] Polach (n 56) (1959) 157; Sawer and Doeker (n 56) (1962) 226.

[363] Stein (n 360) (1964) 15-16; Gerven (n 345) (1966) 353.

[364] Treaty of Rome (1957) Article 57 (1).

[365] Treaty of Rome (1957) Article 56 (2).

[366] "Since a General Programme was not one of the legal acts in Article 189 of the Treaty, its legal nature is uncertain. It is generally accepted, though, that the Programmes are binding upon the Community institutions which are obliged to ensure their execution, but not on outsiders, such as the member States or their nationals, who cannot derive rights therefrom." Gerven (n 345) (1966) 354.

[367] Treaty of Rome (1957) Articles 54 and 63.

2	Doctors, Nurses, Dentists, Veterinary surgeons, Midwives, Pharmacist	• **Mutual Recognition of Qualifications** (Held qualified diplomas, certificates and other evidence of formal qualifications issued by competent authorities in the country of origin.) • **Coordination on Training Requirements** (Passed the training with the specific minimum length of training courses for the general practice or the special practice.)
3	Architects	• **Mutual Recognition of Qualifications** (Held qualified diplomas, certificates and other evidence of formal qualifications issued by competent authorities in the country of origin.)
4	Lawyers	• **Special Measures for Lawyers** (Obtained qualified diplomas, certificates and other evidence of formal qualifications from the country of origin. Required to follow the regulations and rules of practice in the country of destination.)

The first group adopted the so-called transitional measure, as per the recommendations of the two General Programmes adopted in 1961.[368] Although it did not provide for the mutual recognition of qualifications or the co-ordination method,[369] the transitional measure required the state of destination to accept vocational experience of a reasonable duration, as equivalent to the professional knowledge required for nationals performing the same economic activities in the host member states.[370] In accordance with this measure, several directives concerning specific service sectors were adopted from 1963 to 1982. These directives covered 13 service sectors, which were: (1) agriculture,[371] (2) trade and commerce,[372] (3) manufacturing,[373] (4) eating and lodging places,[374] (5) fishing,[375]

[368] General programme on Services (1961) Title VI para.2, General programme on Establishment (1961) Title V [2]; "pending mutual recognition of diplomas, or coordination, and in order to facilitate the provision of services and to avoid distortions, a transitional system may be applied; such system may, where appropriate, include provision for the production of a certificate establishing that the activity in question was actually and lawfully carried out in the country of origin."
[369] Cesare Maestripier, 'Freedom of Establishment and Freedom to Supply Services' (1973) 10 (2) Common Market Law Review 156.
[370] Gerven (n 345) (1966) 353-354; Rolf Waegenbaur, 'Free Movement in the Professions; The New EEC Proposal on Professional Qualifications' (1986) 23 (1) Common Market Law Review 94-95; Wulf-Henning Roth, 'The European Economic Community's Law on Services: Harmonisation' (1988) 25 (1) Common Market Law Review 41.
[371] Directive 63/261.
[372] Directive 64/222, 68/364, 70/523, 74/556, 75/369

(6) transport,[376] (7) communication,[377] (8) personal,[378] (9) community,[379] (10) recreation,[380] (11) insurance,[381] (12) travel agency,[382] and (13) hair dressing.[383] The number of years required for vocational experience varied according to the service sectors concerned.

Subject to these conditions being met, the directives in this group nullified any legislation, regulation, or administrative practice that resulted in treatment that was discriminatory in comparison with that applied to nationals. This means that persons fulfilling the relevant conditions, were entitled to the same permission to perform their economic activities, as was granted to the nationals in the host member states. In other words, these persons needed to be subject to the same procedures regarding issuance, renewal, fees, and validity of permits, as were applicable to nationals in the host states. This measure can be considered as a quick yet less rigorous method.[384] It is evident from the rapid adoption of the first directive implementing this transitional measure, in 1963, only two years after the announcement of the two General Programmes. On the other hand, reaching a more comprehensive agreement on certain service sectors could take a longer period. Thus, some of the directives were adopted after the end of the transitional period.

The second group adopted both mutual recognition of qualifications and coordination methods. To obtain permission to perform economic activities in this group, a specific degree or diploma, which could only be awarded on the basis of education or training acquired in the host member states, was generally required.[385] It is therefore clear that the transitional measure, mentioned previously, did not adequately address this particular issue.[386] The first suitable method was the mutual recognition of degrees and diplomas. Another method required the member states to coordinate legislation, regulations and administrative rules

---

[373] Directive 64/427, 68/366.
[374] Directive 68/368.
[375] Directive 75/368.
[376] Directive 75/368.
[377] Directive 75/368.
[378] Directive 75/368.
[379] Directive 75/368.
[380] Directive 75/368.
[381] Directive 77/92.
[382] Directive 82/470.
[383] Directive 82/489.
[384] ibid.
[385] Ole Lando, 'The Liberal Professions in the European Communities' (1971) 8 (3) Common Market Law Review, 346.
[386] Anna-Juliette Pouyat, 'Freedom of Movement within the Common Market' (1968) 9 (2) Journal of the International Commission of Jurists 50; Maestripier (n 369) (1973) 156; H Bronkhorst, 'Freedom of Establishment and Freedom to Provide Services under the EEC-Treaty' (1975) 12 (2) Common Market Law Review 253.

concerning the pursuit of concerned economic activities.[387] Following these two methods, the directives in this second group were adopted from 1975 to 1985. These directives covered six service sectors, which were: (1) doctors,[388] (2) nurses,[389] (3) dentists,[390] (4) veterinary surgeons,[391] (5) midwives,[392] and (6) pharmacists.[393]

There were two types of directives for each sector. The first type concerned the mutual recognition of qualifications for the economic activities concerned. This type of directive specified the titles of beneficiaries,[394] in addition to listing the qualified diplomas, certificates and other evidence of formal qualifications that were mutually recognised by all member states.[395] For certain service sectors, including doctors and dentists, it listed those qualifications for the specialist practices that were recognised by fewer states.[396] It also specified the competent authorities in the state of origin that were authorised to issue such evidence of qualifications.[397]Additionally, the host state was obliged to recognise a certificate issued by a competent authority of the home state, as to good character and good repute, as equivalent to domestic standards in the host state.[398] This measure allowed graduates who held an equivalent degree or diploma to perform their professions,[399] despite not having had their education in the host member states.[400] The second type of directive concerned the coordination measures for the economic activities concerned. Such directive dealt with the definition of acceptable standards of training for basic and specialist qualifications, specifying the minimum length of the training courses for the general practice and special practice of each service sector.[401]This coordination requirement also reduced the risk of distortions that could arise from the elimination of discriminating provisions. Without such

[387] Maestripier (n 369) (1973) 156-157.
[388] Directive 75/362 and 75/633.
[389] Directive 77/452 and 77/453.
[390] Directive 78/686 and 78/687.
[391] Directive 78/1026 and 78/1027.
[392] Directive 80/154 and 80/155.
[393] Directive 85/432 and 85/433.
[394] Directive 75/362 Article1, Directive 77/452 Article 1 (2), Directive 78/686 Article 1, Directive 78/1026 Article 1, Directive 80/154 Article 1, and Directive 85/433 Article 1.
[395] Directive 75/362 Article 2, Directive 77/452 Article 3, Directive 78/686 Article 3, Directive 78/1026 Article 3, Directive 80/154 Article 3, and Directive 85/433 Article 4.
[396] Directive 75/362 Article 6 and Directive 78/686 Article 4.
[397] Directive 75/362 Article 5, Directive 77/452 Article 3, Directive 78/686 Article 3, Directive 78/1026 Article 3, Directive 80/154 Article 3, and Directive 85/433 Article 4.
[398] Directive 75/362 Article 11, Directive 77/452 Article 6, Directive 78/686 Article 9, Directive 78/1026 Article 6, Directive 80/154 Article 7, and Directive 85/433 Article 9.
[399] Maestripier (n 369) (1973) 157.
[400] Lando (n 385) (1971) 345-346.
[401] Directive 75/633, Directive 77/453, Directive 78/687, Directive 78/1027, Directive 80/155, and Directive 85/432.

coordination, there could be an influx of underqualified individuals who received their qualifications in states with more lenient rules into states with stricter rules.[402]

The directives in this second group applied to both self-employed persons and service providers.[403] Additionally, the application of these directives also extended to the employed persons performing the same economic activities.[404] Subject to the fulfilment of conditions regarding qualifications, all directives in this group similarly upheld that each member state should give such qualifications the same effect in its territory as was given to those which the member state itself awarded.[405] They also stated that any discriminatory treatment on the basis of nationality, with regard to the establishment and provision of services, was prohibited.[406] It can be seen that the liberalisation process for economic activities in this group was more complicated and time-consuming than the transitional measure. As a result, it took about 15 years after the announcement of the General Programmes to issue the first two directives in this group in 1975, which concerned doctors. It is worth noting that all directives in this group were adopted after the end of the EEC transitional period.

The third group of economic activities adopted only mutual recognition of qualifications. There was only one directive in this group, which concerned architects.[407] This directive applied to self-employed architects, persons providing architectural services and employed architects.[408] This directive, adopted in 1985, prescribed the required diplomas, certificates and other evidence of formal qualifications that were to be mutually recognised by all member states.[409] It also specified the competent authorities that were authorised to

---

[402] Gerven (n 345) (1966) 353, Stein (n 360) (1964) 33-34.
[403] Directive 75/362, Directive 77/452, Directive 78/686, Directive 78/1026, Directive 80/154 and Directive 85/433 Preamble.
[404] Directive 75/362, Directive 77/452, Directive 78/686, Directive 78/1026, Directive 80/154 and Directive 85/433; Final paragraph of the preamble "Whereas, as far as the activities of employed persons are concerned, Regulation 1612/68 lays down no specific provisions relating to good character or good repute, professional discipline or use of title for the professions covered; whereas, depending on the individual Member State, such rules are or may be applicable both to employed and to self-employed persons ; whereas activities in the field of (doctors/ nurses/ dentists/ veterinary surgeons/ midwives/ pharmacists) are subject in several member states to possession of a diploma, certificate or other evidence of formal qualifications; whereas such activities are pursued by both employed and self-employed persons, or by the same persons in both capacities in the course of their professional career; whereas, in order to encourage fully free movement of members of the profession within the Community, it therefore appears necessary to extend this Directive to employed persons."
[405] Directive 75/362 Article 2, Directive 77/452 Article 2, Directive 78/686 Article 2, Directive 78/1026 Article 2, Directive 80/154 Article 2, and Directive 85/433 Article 2.
[406] Directive 75/362, Directive 77/452, Directive 78/686, Directive 78/1026, Directive 80/154 and Directive 85/433 Preamble.
[407] Directive 85/384.
[408] Directive 85/384 Preamble.
[409] Directive 85/384 Article 11.

issue such evidence of qualifications.[410] As stated in the preamble of the directive, the methods of training for those practising professionally in the field of architecture varied greatly at the time the directive was adopted.[411] Instead of coordinating individual training courses, the directive required the completion of architectural training, leading to the award of degrees or diplomas.[412] The directive also set certain standards for such training at university level.[413] This approach contrasted with that in the second group, in which there was no coordination of training requirements. The basis of this distinction was the widely divergent rules for access to and training in the profession concerned among the member states.[414] Such differences in rules may also perhaps explain why it took over 20 years, from the announcement of the General Programmes, to issue a single directive on architects.

The fourth group did not adopt any of the previous measures. This approach was limited to only one profession, namely lawyers. Moreover, this directive, adopted in 1977, limited the scope of application to only service providers.[415] As there was no real mutual recognition of qualifications or coordination on training requirements, the directive granted the freedom to provide services to all legal practitioners, who were entitled under the regulations and rules of their state of origin to practise the activities of lawyers. Specifically, the directive listed the qualified titles that could be recognised as lawyers in each member state.[416] According to the directive, the rules and regulations of the home state were applied in their entirety to all issues regarding professional qualifications,[417] while those of the host state were applicable in governing relevant professional activities.[418] Therefore, the state of destination might require the lawyers from the other state to be introduced to the presiding judge or the president of the relevant Bar as well as to work in conjunction with a lawyer who had practised before the judicial authority in question.[419] This distinguishing feature of the

[410] ibid.
[411] Directive 85/384 Preamble.
[412] Directive 85/384 Article 3, 4.
[413] Directive 85/384 Article 3. "Such studies shall be balanced between the theoretical and practical aspects of architectural training and shall ensure the acquisition of: 1. an ability to create architectural designs that satisfy both aesthetic and technical requirements, 2. an adequate knowledge of the history and theories of architecture and the related arts, technologies and human sciences, 3. a knowledge of the fine arts as an influence on the quality of architectural design, …"
[414] Roth (n 370) (1988) 45.
[415] Directive 77/249.
[416] Directive 77/249 Article 1.
[417] Directive 77/249 Article 4.
[418] Directive 77/249 Article 4.
[419] Directive 77/249 Article 5.

final group came as a result of the different legal systems among the member states.[420] Therefore, the directive allowed lawyers entitled to practise the legal profession in the home state to provide services, provided they respected the rules governing their professional activities in the host state. Similar to the previous group, the directive in this group took a long time to negotiate, being adopted around 15 years after the General Programmes.

It can be noted that all directives in these four groups adopted a sectoral approach. In other words, the EEC attempted to deal with the permission to perform economic activities, profession by profession from 1963 to 1985. Although the specific directives did not liberalise all service sectors by the end of the transitional period specified in the Treaty of Rome (31 December 1969), the cases of *Reyners*[421] and *Van Binsbergen*[422] in 1974 confirmed that self-employed persons and service providers could rely directly on the principle of non-discrimination based on nationality, with regard to the national laws of the host member state, in Article 52 and Article 60 of the Treaty of Rome. However, for cases where no directive was issued on mutual recognition of qualifications, further clarification was required. The first such case concerned the situation where bilateral agreements or national laws of the host member state recognised qualifications obtained in another member state as equal to national professional qualifications, despite the absence of a directive on mutual recognition of qualifications. This type of case was examined by the Court of Justice in the case of *Patrick* in 1977. The Court decided that a member state that had recognised a certificate issued in another member state as equivalent to the corresponding national certificate may not require the applicant holding such certificate to satisfy any additional conditions other than those applicable to the nationals of the host member state.[423] The second case concerned situations where there was no relevant directive or national legislation on mutual recognition of qualifications. In 1979, the Court of Justice ruled in the case of *Auer* that the nationals of other member states could not practise the profession concerned on any condition other than those laid down by national legislation, if recognition of those professional qualifications was not regulated both at regional and national level.[424]

---

[420] Waegenbaur (n 370) (1986) 96-97.
[421] Case 2-74, *Jean Reyners v Belgian State* [1974] ECR 632-657. [Freedom of establishment; Free movement of self-employed persons].
[422] Case 33-74, *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1300-1313. [Freedom to provide services; Free movement of service providers].
[423] Case 11/77, *Patrick v Ministere des Affaires Culturelles* [1977] ECR 1199.
[424] Case 136/78, *Ministre Public v Auer* [1979] ECR 437.

From the above discussion, the obvious limitation of such a sectoral approach was its time-intensiveness. It took more than 15 years to adopt many of the sectoral directives.[425] Additionally, implementation of these directives could be problematic. There were about 40 cases that went to the Court of Justice on the implementation of such sectoral directives.[426] Moreover, it was difficult for the negotiations on certain economic activities. For instance, the discussions on the engineer's directive began with the initial proposal in 1969.[427] However, the member states could not reach an agreement on mutual recognition of engineering qualifications, even 20 years after the discussion began. Many parts of these proposals needed to be re-formulated, due to the changing multitude of education and training of engineers in Europe during the negotiation period.[428] Therefore, it would be impossible to meet the needs of the single integrated market by such a sectoral method.[429]

Consequently, a different approach was introduced in 1989 with the adoption of Directive 89/48. This directive concerned the recognition of higher education diplomas awarded on completion of professional education and training of at least three years' duration. It applied to all regulated professions not covered by the previous specific directives.[430] Established on the principle of mutual trust, it stipulated that the competent

---

[425] Kenneth Button and Michael Fleming, 'The Changing Regulatory Regime Confronting the Professions in Europe' (1992) 37 (2) Antitrust Bulletin 448-449.

[426] **Group 1**: Case 130/88, *van de Bijl* [1989] ECR 3057 (House painters); Case C-58/98, *Josef Corsten* [2000] ECR I-7942 (Skilled services in building trade); **Group 2**: Case 136/78, *Auer* [1979] ECR 437 (Veterinary surgeons); Case 246/80, *C Broekmeulen* [1981] ECR 2312; Case 271/82, *Auer* [1983] ECR 2729 (Veterinary surgeons); Case 5/83, *H G Rienks* [1983] ECR 4234 (Veterinary surgeons); Case 221/83, *Commission v Italy* [1984] ECR 3249 (Veterinary surgeons); Case 29/84, *Commission v Germany* [1985] ECR 1667 (Nurses); Case 306/84, *Commission v Belgium* [1987] ECR 675 (Doctors); Case 49/86, *Commission v Italy* [1987] ECR 3000 (Doctors); Case C-61/89, *Bouchoucha* [1990] ECR I-3552 (Doctors); Case C-54/88, C-91/88 and C-14/89, *Nino and others* [1990] ECR I-3545 (Doctors); Case C-167/90, *Commission v Belgium* [1991] ECR I-2537 (Pharmacists); Case C-168/90, *Commission v Luxembourg* [1991] ECR I-2541 (Pharmacists); Case C-319/92, *Salomone Haim* [1994] ECR I-439 (Dentists); Case C-154/93, *Tawil-Albertini* [1994] ECR I-45; Case C-277/93, *Commission v Spain* [1994] ECR I-5526 (Doctors); Case C-40/93, *Commission v Italy* [1995] ECR I-1328 (Dentists); Case C-17/94, *Gervais and others* [1995] ECR I-4368 (Veterinary surgeons); Case C-307/94, *Commission v Italy* [1996] ECR I-1021 (Pharmacists); Case C-158/96, *Raymond Kohl* [1998] ECR I-1935 (Dentists); Case C-93/97, *Fédération Belge des Chambres Syndicales de Médecins ASBL* [1998] ECR I-485 (Doctors); Case C-131/97, *Carbonari and Others* [1999] ECR I-1119 (Doctors); Case C-371/97, *Cinzia Gozza and Others* [2000] ECR I-7899 (Doctors); **Group 3 (Architect)**: Case C-296/90, *Commission v Italy* [1991] ECR I-3851; Case C-309/90, *Commission v Greece* [1991] ECR I-5312, Case C-310/90, *Ulrich Egle* [1992] ECR I-178, Case C-166/91, *Gerhard Bauer* [1992] ECR I-2789; Case C-447/93, *Nicolas Dreessen* [1994] ECR I-4095; Case C-421/98, *Commission v Spain* [2000] ECR I–10392; Case C-31/00, *Nicolas Dreessen* [2000] ECR I-677; **Group 4 (Lawyers)**: Case 107/83, *Onno Klopp* [1984] ECR 2972; Case C-55/94 *Reinhard Gebhard* [1995] ECR I-4186.

[427] Commission's Proposal for a Directive on the coordination of certain laws, regulations and administrative provisions concerning the training of engineers, May 1969, COM/69/334.

[428] Philippa Watson, 'Freedom of Establishment and Freedom to Supply Services; Some recent Development' (1983) 20 (4) Common Market Law Review 785.

[429] Button and Fleming (n 425) (1992) 448-449.

[430] Directive 89/48 Article 1,2; This directive extended its scope of application to the workers.

authorities could not refuse to recognise persons who had pursued the equivalent of a three-year higher education course and completed the necessary professional training as being qualified to take up the regulated profession in question.[431] For professions with major differences in education and training requirements, compensation mechanisms were introduced, including an adaptation period and an aptitude test.[432] This directive was supplemented by Directive 92/51, which concerned the diplomas for postsecondary courses of less than three years,[433] and Directive 99/42, which concerned vocational training leading to self-employment.[434] This shift from a "sectoral approach" to a "mutual recognition approach" has persisted since 1989. The early sectoral directives and the three general directives (Directives 89/48, 92/51 and 99/42) were then amended and replaced by Directives 2001/19 and 2005/36.

3.3 Permission to Reside

The permission to reside is another important issue for the receiving states. The host states tended to restrict the residence of these groups of persons. Such restrictions could relate to geographical areas and duration.[435] Specifically, foreign self-employed persons and service

---

[431] Craig and De Búrca (n 10) (2015) 843.

[432] Directive 89/48 Article 4. There have been 16 cases of the Court of Justice regarding this directive: Case C-340/89, *Vlassopoulou* [1991] ECR I-2358 (Lawyers); Case C-16/90, *Panagiotopoulou v European Parliament* [1992] ECR II-90 (Bachelor of arts); Case C-164/94, *Aranitis* [1996] ECR I-148 (Higher-education geology course); Case C-168/98, *Luxemburg v European Parliament* [2000] ECR I-9161 (Lawyers); Case C-285/01, *Isabel Burbaud* [2003] ECR I-8246 (Hospital managers); Case C-313/01, *Christine Morgenbesser* [2003] ECR I-13493 (Praticanti); Case C-330/03, Colegio de Ingenieros de Caminos, Canales y Puertos [2006] ECR I-826 (Engineers); Case C-506/04, *Wilson* [2006] ECR I-8643 (Lawyers); Case C-39/07, *Commission v Spain* [2008] ECR I-343 (Hospital pharmacist); Case C-286/06, *Commission v Spain* [2008] ECR I-8029 (Engineers); Case C-274/05, *Commission v Greece* [2008] ECR I-7792 (Workers in Technical Chamber); Case C-422/09, C-425/09 and C-426/09, *Vandorou and Others* [2010] ECR I-12413 (Professional experience); Case C-359/09, *Donat Cornelius Ebert* [2011] ECR I-271 (Lawyers); Case C-47/08, *Commission v Belgium* [2011] ECR I-4156 (Notaries); Case C-61/08, *Commission v Greece* [2011] ECR I-4033 (Notaries); Case C-51/08, *Commission v Luxemburg* [2011] ECR I-4235 (Notaries).

[433] Directive 92/51. There have been 6 cases of the Court of Justice regarding this directive: Case C-294/00, *Kurt Gräbner* [2002] ECR I-6540 (Medical training); Case C-110/01, *Tennah-Durez* [2003] ECR I-6258 (Medical training); Case C-496/01, *Commission v France* [2004] ECR I-2377 (Bio-medical analysists); Case C-102/02, *Ingeborg Beuttenmüller* [2004] ECR I-5438 (Primary and secondary school teachers); Case C-514/03, *Commission v Spain* [2006] ECR I-993 (Private security services); Case C-136/07, *Commission v Spain* [2008] ECR I-7795 (Air traffic controllers).

[434] Directive 99/42. There have been 1 case of the Court of Justice regarding this directive: Case C-215/01, *Bruno Schnitzer* [2003] ECR I-14871 (Skilled services in the plastering trade).

[435] Andre Philip, 'Social Aspect of European Economic Co-operation' (1957) 76 (3) International Labour Review 249-250; Mei (n 359) (2003) 41-42.

providers could be limited to residing in certain regions of the host states.[436] Additionally, they may have obtained a short-term residence permit which required them to renew and pay an administrative fee several times.[437] As in the case of workers, the reasons for the restrictions could have been related to issues regarding housing shortages in the host state.[438] The host state might also have restricted the geographical area in which self-employed persons or service providers from other states could stay because that state wanted to control the number of foreigners performing economic activities in that area.[439] In order to facilitate the movement of these groups of persons, the member states had to relax their domestic rules regarding the residence of self-employed persons and service providers from other member states. In the case of the EEC, this issue was addressed in the directives on the abolition of restrictions on movement and residence within the EEC for nationals of member states regarding establishment and the provision of services in 1964 and 1973.

In 1964, Directive 64/220 required member states to issue residence permits for self-employed persons and service providers.[440] In order to issue residence permits, there were only two documents that the host states could require. Firstly, the document with which the person had entered the host state:[441] a valid identity card or passport.[442] Secondly, the document which proved that person's status as self-employed or a service provider.[443] Therefore, member states could not demand excessive documentation to apply for permission to reside. These provisions regarding residence permits in Directive 64/220 were like those in the Directive of 16 August 1961 which were implemented during the first transitional period of the free movement of workers. In terms of residential area, the directive stated that the permit was valid for the whole territory of the member state concerned.[444] However, Directive 64/220 allowed member states to restrict the residential area in certain cases on grounds of public policy or public security.[445] This restriction is different from the Directive of 16 August 1961 on the free movement of workers, which did not have any restrictions in

[436] Robert Marjolin, 'Prospects for the European Common Market' (1957) 36 (1) Foreign Affairs 135; Gerven (n 345) (1966) 358.
[437] Robert S Whitlow, 'The European Economic Community: some aspect of judicial personality, sovereignty and international obligation' (1958) 13 (4) Business Lawyer 816; Turack (n 344) (1966) 796.
[438] Isaac (n 59) (1952) 194.
[439] ibid.
[440] Directive 64/220 Article 3.
[441] Directive 64/220 Article 5 (a).
[442] Directive 64/220 Article 2 (1).
[443] Directive 64/220 Article 5 (b).
[444] Directive 64/220 Article 4.
[445] ibid.

terms of residential area. In terms of administrative fees, the directives stated that residence permits must be issued and renewed free of charge or not exceeding their administrative cost.[446] The host member states could charge an administrative fee. Directive 64/220 did not specifically state that the rate of the fees had to be equal to the fees collected from national citizens. This implies that self-employed persons or service providers might have to pay administrative fees at a higher rate than the nationals in the host states. This provision regarding fees is different from the Directive of 16 August 1961 on the free movement of workers which clearly stated that the grant or renewal of residence permits shall be free or an amount not exceeding the dues and taxes charged for the issue of identity cards to nationals.

In terms of the validity of the residence permit, Directive 64/220 separated the issue into two cases. In the case of self-employed persons, they were entitled to permanent residence in the host state.[447] They should be issued with a residence permit valid for not less than five years and automatically renewable.[448] In the case of service providers, they were entitled to a residence permit of equal duration to the period during which the services were provided.[449] There was an exemption to the requirement for residence permits for service providers whose duration of employment did not exceed three months. In this case, the documents that the workers used to enter the territory of the member state (which was a valid national identity or passport) could be used instead of a residence permit, but they might be required to report their presence in the territory to the relevant authorities.[450] The provision regarding this exception in Directive 64/240 was similar to those stated in Directive 64/240 which was implemented during the second transitional period of the free movement of workers.

In 1973, Directive 73/148 confirmed the simplified application procedure[451] and validity[452] of the residence permit as stated in Directive 64/220. In terms of the residential area, the restrictions regarding public policy and public security were removed.[453] Therefore, self-employed persons and service providers were able to change their residential areas and move freely within the host state. In terms of administrative fees, the directive stated that residence permits must be issued and renewed free of charge or on payment of an amount not

[446] Directive 64/220 Article 7.
[447] Directive 64/220 Article 3 (1).
[448] ibid.
[449] Directive 64/220 Article 3 (2).
[450] ibid.
[451] Directive 73/148 Article 6.
[452] Directive 73/148 Article 4.
[453] Directive 73/148 Article 5.

exceeding the fees charged for the issue of identity documents for nationals in the host state.[454] From then on, this group might have had to pay administrative fees for the issue of a residence permit, but the payment could not exceed the amount that nationals normally paid for their identity documents. These provisions regarding residential areas and fees in Directive 73/148 are similar to the directives on free movement of workers, which were the Directive of 16 August 1961, Directive 64/240 and Directive 68/360.

Similar to the free movement of workers, the case of *Commission v Belgium* and the case of *Commission v Germany* were applicable to self-employed persons and service providers. In these two cases the Court of Justice clarified the function of residence permits and the right to reside. According to the case of *Commission v Belgium*, the right to reside originally came from the Treaty of Rome and the residence permit had only a declaratory function.[455] Additionally, the case of *Commission v Germany* stated that host member states could impose penalties on individuals who could not produce residence permits, but the penalties had to be comparable to those imposed on nationals who failed to carry identity cards.[456] If member states required self-employed persons or service providers to hold residence permits and they failed to do so, they should receive only a minor fine which must be comparable to that imposed on nationals of the host member states.

It can be seen that EEC legislation in 1961 regarding the residence of workers inspired the development of EEC legislation regarding the residence of self-employed persons and service providers. In a similar way to the free movement of workers, the directive was the only form of EEC legislation that dealt with the issue of permission to reside. This issue concerned administrative procedures, so a directive was the appropriate form of legislation. It allowed member states to transpose into domestic law those objectives regarding permission to reside in a way which matched their domestic laws and practices. The development of EEC legislation which simplified the administration of residence permits is stated in the third paragraph of Article 54 (c) of the Treaty of Rome. As a result, self-employed persons and service providers were no longer subject to excessive documentation requirements in order to obtain permission to reside in another member state. Moreover, they were also guaranteed the validity of residence permits both in terms of residential area and duration. This could encourage the movement of self-employed persons and service providers

[454] Directive 73/148 Article 7.
[455] Case 321/87 *Commission v Belgium* [1989] ECR1007-1012 [12].
[456] Case C-24/97 *Commission v Germany* [1998] ECRI-2140-2146 [15].

within the member states. Additionally, Directive 73/148 which allowed member states to collect administrative fees only at a comparable rate with nationals, and the two court cases regarding residence permits discussed above, were in line with the principle of non-discrimination based on nationality contained in Article 7, Article 52 and Article 60 of the Treaty of Rome.

3.4 Family Reunification

The issue of family members accompanying self-employed persons and service providers from other states is another crucial concern for the host state. There might be problems regarding housing shortages or overpopulation which could cause the host state to introduce restrictions regarding categories of relationships and numbers of family members allowed to enter and reside in that state.[457] Such restrictions tend to require the family members to submit documents and pay an administrative fee for the permission to enter and for residence.[458] In cases where the family members are third-country nationals, the receiving state tends to require entry visas and the conditions of residence for these persons could be limited.[459] In order to facilitate the flow of self-employed persons and service providers, member states should make it easier for families to stay together. In the case of the EEC, this issue was addressed in the directives on the abolition of restrictions on movement and residence within the EEC for nationals of member states regarding establishment and the provision of services in 1964 and 1973.

In 1964, Directive 64/220 stated that spouses and children under the age of 21 who were nationals of member states could accompany self-employed persons or service providers to host member states.[460] Moreover, the ascendants and descendants of the person concerned and their spouses who were dependent on them were also able to join them in the host member states.[461] Directive 64/220 permitted these family members regardless of their nationality. The requirements for entry depended on nationality.[462] If the family members were nationals of a member state, the required document was a valid identity card or

[457] Isaac (n 59) (1952) 194.
[458] Philip (n 435) (1957) 249-250.
[459] Gerven (n 345) (1966) 358; Turack (n 344) (1966) 796; Turack (n 53) (1968) 449; Fernandes (n 344) (1992) 328-329; Mei (n 359) (2003) 41-42.
[460] Directive 64/220 Article 1 (c).
[461] Directive 64/220 Article 1 (d).
[462] ibid.

passport.[463] If the authorised family members were third-country nationals, a valid identity card or passport was still required.[464] In addition, family members who were third-country nationals might be required to have entry visas, but member states had a responsibility to provide every assistance in obtaining the necessary visas.[465] The host state might require a visa fee from the family member who was a third-country national.[466] In terms of residence, all authorised family members were entitled to the same conditions regarding permission to reside in host states as the self-employed persons or service providers on whom they were dependent.[467] These provisions in Directive 64/220 regarding category, entry and stay of family members were similar to those set out in Directive 64/240 which was implemented during the second transitional period of the free movement of workers. However, the only difference was that the entry visa for the third-country national family members was free of charge in the case of the free movement of workers.

In terms of housing requirements, employment opportunities and education the family members, Directive 64/220 was completely different from any of the free movement of workers directives in 1961, 1964 and 1968. Specifically, there was no requirement regarding proper housing for the permitted family members of the self-employed persons or service providers. Additionally, Directive 64/220 did not provide for the right to employment or the right to education of the authorised family members.

In 1973, Directive 73/148 retained the similar category[468] and the requirements regarding entry[469] and residence[470] of family members of self-employed persons and service providers, as set out in Directive 64/220. Directive 73/148 still did not mention employment, training, and education of the family members of EEC self-employed persons and service providers. Therefore, the spouses and the children of the persons concerned might be treated differently from the nationals in the host member states in these areas. Nevertheless, Directive 73/148 changed the rules regarding the fees for the visa. Article 7 stated that the host member states could no longer collect administrative fees from third-county national family members.[471]

---

[463] Directive 64/220 Article 2 (1).
[464] Directive 64/220 Article 2 (2)
[465] ibid.
[466] Directive 64/220 Article 7.
[467] Directive 64/220 Article 3.
[468] Directive 73/148 Article 1 (c) (d).
[469] Directive 73/148 Article 3.
[470] Directive 73/148 Article 4.
[471] Directive 73/148 (1973) Article 7 (2).

Like the issues related to the permission to reside, legislation regarding the free movement of workers inspired the development of legislation regarding family members of self-employed persons and service providers, except on the issues related to the employment, training, and education of the family members. The development of EEC legislation simplified administrative procedures on entry requirements and permission to reside as stated in the third paragraph of Article 54 (c) of the Treaty of Rome. These family members were no longer subject to excessive conditions regarding entry and residence in another member state. Additionally, these persons also had a guarantee that their residence permits were valid as the self-employed persons and service providers on whom they were dependent. Directive 73/148 meant that host states could no longer collect administrative fees from third-country national family members. These developments regarding family reunification, which facilitated self-employed persons and service providers bringing their family members along with them to host states, could create incentives for them to perform their economic activities across member states.

3.5 Working Conditions

The host states must consider the conditions that apply to foreign self-employed persons and service providers to perform their economic activities. The host states might enforce restrictive domestic regimes on the working conditions of these groups of persons. Such restrictive regimes could result in unequal treatment in the destination state regarding rights and obligations such as the right to join professional or trade organisations.[472] These unfair practices could discourage self-employed persons and service providers from moving from their home state to perform economic activities in another state.[473] In order to facilitate the movement of these groups of persons between member states, the obstacles should be removed, and the receiving states should consider providing equal treatment in allowing them to perform their economic activities in the same way as nationals of that host state. In the case of the EEC, this issue was set out in a series of directives on specific service sectors between 1963 and 1985.

[472] Gerven (n 345) (1966) 359; Vassilios Skouris, 'Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance' (2006) 17 (2) European Business Law Review 226-228.
[473] Whitlow (n 437) (1958) 816; Fernandes (n 344) (1992) 329.

Between 1963 and 1985, directives relating to self-employed persons and service providers did not cover all trades and professions. As discussed previously in section 3.2 of this chapter, around 21 service sectors had been liberalised and the permission for self-employed persons or service providers to perform their activities varied between service sectors. In terms of working conditions, equal treatment with nationals was achieved for those liberalised service sectors. These directives similarly confirmed the right to perform economic activities, as self-employed persons, or service providers, with the same rights and obligations as the nationals in the host member states.[474] It can be implied that working conditions which included the set of rights and obligations could vary among the member states. In other words, the host member states could keep their domestic rules for their own nationals regarding rights and obligations to perform economic activities as self-employed persons or service providers in these service sectors. However, the directives stated that the member states could no longer provide self-employed persons or service providers from other member states with a different set of working conditions, compared to their own nationals performing the same activities.

Among the liberalised service sectors, the only exception appeared in the case of lawyers. As discussed in section 3.2, Directive 77/249 specified that the host member states were allowed to require the lawyers from other states to be introduced to the presiding judge or the president of the relevant Bar as well as to work in conjunction with a lawyer who practiced before the judicial authority in question.[475] It can be concluded that the lawyers from other member states might face different working conditions compared to the lawyers who were the nationals of the host member states.

The development of EEC legislation regarding the conditions for performing economic activities as self-employed persons and service providers could reduce the barriers to the free movement of persons. Specifically, the sectoral directives from 1963 to 1985 confirmed that persons performing economic activities in host member states should be entitled to the same set of rights and obligations as the nationals in host member states. This could encourage the movement of these groups of persons among the member states. Such self-employed persons and service providers were no longer at a disadvantage when

[474] Directive 63/262 (Agriculture), 64/223 (Trade), 64/224 (Trade), 68/364 (Trade), 70/522 (Trade), 64/429 (Trade), 68/365 (Manufacturing), 68/367 (Eating and Lodging Places), 75/369 (fishing, transport, communication, personal, community, recreation), 77/92 (Insurance), 82/470 (Travel agency), 82/489 (Hairdressing), 75/632 (Doctors), 77/452 (Nurses), 78/686 (Dentists), 78/1026 (Veterinary surgeons), 80/154 (Midwives), 85/433 (Pharmacists), 85/384 (Architects) and 77/249 (Lawyers).
[475] Directive 77/249 Article 5.

performing economic activities, compared to the nationals of the host member states. This development follows the main principle of non-discrimination based on nationality as set out in Article 52 and Article 60 of the Treaty of Rome.

3.6 Protection from Expulsion

The protection from expulsion is another crucial concern that member states must consider when they want to facilitate the free movement of self-employed persons and service providers. Domestic rules that allow the authorities to issue expulsion orders against foreigners performing economic activities in the territory without clear and fair justification could discourage the movement of self-employed persons and service providers.[476] The host member states might allow the authorities to suddenly terminate the permission to perform economic activities without prior notification. Additionally, the host states might not provide foreigners issued with expulsion orders access to proper legal assistance or to appeal the expulsion decision.[477] Protection from expulsion for self-employed persons and service providers was set out in Directive 64/221 on the co-ordination of special measures concerning the movement and residence of foreign nationals.

This Directive 64/221 was also applicable to the case of workers. As for the workers, host member states were able to expel EEC self-employed persons and service providers when justified only on the specified grounds of public policy, public security and public health.[478] As mentioned in the previous chapter, member states could use these grounds only on a case-by-case basis.[479] The issues regarding the definition of each ground, the justification for expulsion decisions and the remedies have already been explained and can be found in section 3.6 of the previous chapter.

As in the case of workers, the protection from expulsion appears in only one directive during the transitional period of the EEC. As the legislation took the form of a directive, member states could transpose the aim of the directive in such a way as to fit with their domestic laws and practices regarding the expulsion of foreign self-employed persons or service providers. Directive 64/221 aimed to abolish the obstacles to the free movement of

---

[476] Christian (n 64) (1955) 386; Nial Fennelly, 'The European Union and Protection of Aliens from Expulsion' (1999) 1 (3) European Journal of Migration and Law 317-318; Policy Department C (n 57) (2016) 12.
[477] ibid.
[478] Directive 64/221 Article 2 (1).
[479] Directive 64/221 Article 3 (1), Case 67-74 *Carmelo Angelo Bonsignore v Oberstadtdirektor der Stadt Köln* [1975] ECR 297-308 [6].

workers as regards protection from expulsion. Specifically, it limited the scope of justification by the member states for ordering expulsion from their territory. It also provided remedies for persons receiving an expulsion order, namely a minimum period to prepare to leave the country and the right to submit the case for review by a competent authority. These developments reduced the obstacles to the movement of self-employed persons or service providers. Additionally, the provisions that confirmed the same legal remedies as those available to nationals of the host state were in line with the main principle of non-discrimination based on nationality contained in Article 7, Article 52 and Article 60 of the Treaty of Rome.

4. Controversial Economic Activities and Free Movement of Self-employed Persons and Service Providers

Similar to the free movement of workers framework, the development of the EEC framework on the free movement of self-employed persons and service providers was built upon the principle of non-discrimination based on nationality. This principle was confirmed in Article 7, Article 52 and Article 60 of the Treaty of Rome. As discussed in the previous section on the development of EEC legislation, the member states were still allowed to secure their own domestic rules regarding each profession or economic activity. The principle of non-discrimination based on nationality only guarantees the same treatment for self-employed persons and service providers from other member states, as nationals performing the same professions in the host member states. Nevertheless, the member states may have different views on one specific economic activity. This controversial profession might be legal in one member state but may be condemned as a form of human trafficking or human rights abuse in another member state.[480] As discussed in the previous chapter regarding the free movement of workers, an example can be drawn from the case of *Adoui and Cornuaille* in 1982. In that case, a waitress working in a bar and displaying herself in the window for clients was held to be contrary to Belgian domestic law on the ground that it was harmful from a social and moral point of view.[481] The Court of Justice and the Advocate General in

[480] Fairfield (n 308) (1959) 164-173; Shoham and Rahav (n 308) (1968) 402-411; Richards (n 308) (1979) 1195-1287.
[481] Case 115, 116/81 *Rezguia Adoui v Belgian State and City of Liège; Dominique Cornuaille v Belgian State* [1982] ECR 1707 [2]-[3].

this case only discussed EEC legislation regarding the free movement of workers but did not raise an issue regarding trafficking in persons.

In the case of self-employed persons, the issue of controversial economic activities was illustrated by the case of *Aldona Malgorzata Jany and others v Staatssecretaris van Justitie* in 2001.[482] This case was related to prostitution which may be recognised as a legal economic activity in one member state but may be banned in another member state. Although this case occurred long after the EEC transitional period, it is a good example of the issue regarding non-discrimination based on nationality, concerning the national laws of the host member states and conditions regarding economic activities as self-employed prostitutes.

The opinion of the Advocate General in this case also referred to the case of *Reyners* of 1974 which held that the principle of non-discrimination in the Treaty of Rome had long been recognised as having a direct effect on the provisions relating to the free movement of persons including self-employed persons in this case.[483] According to the Court, prostitution was permitted in the Netherlands, which was the host state, so the migrant prostitute who was a national of another member state could be recognised as a self-employed person in the Netherlands under the free movement of persons framework.[484] The destination state still has the discretion to permit or ban economic activities regarding certain service sectors. According to the opinion of the Advocate General in the *Jany* case, "it is not for the Court to substitute its assessment for that of the legislatures of the member states in which that activity is practised legally," and "it goes without saying that the dividing line between prostitution and human trafficking is not always easy."[485] However, "once a member state forms the view that a professional activity may lawfully be carried out within its territory, it is legitimate."[486]

---

[482] Case C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* [2001] ECR I-8657-8690 [38]; This research acknowledges that this case was related to the right of establishment of a Polish self-employed person in the Netherlands. The case had happened before Poland became a full member of the EU. The case related to the interpretation of 1994 Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part. However, the Court of Justice defined the definition of right the establishment in this case, as in the Treaty of Rome (1957). The Court mentioned that "no difference in meaning can be distinguished between the 'activities as self-employed persons' referred to in Article 52 of the Treaty and the 'economic activities as self-employed persons' referred to in Article 44 (4) (a) (i) of the Association Agreement between the Communities and Poland."

[483] Opinion of Advocate General of case *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* delivered on 8 May 2001 [45].

[484] Case C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* [2001] ECR I-08615.

[485] Opinion of Advocate General of case *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* delivered on 8 May 2001 [119].

[486] ibid [120].

Following the *Jany* case, self-employed prostitutes from other member states were entitled to perform activities in Netherlands under the same conditions as nationals in the host state because the Netherlands permitted their nationals to do so. Despite the potential risks of trafficking in persons in countries with legalised prostitution,[487] several studies have shown that the recognition of prostitution as a legal economic activity tends to be accompanied by stringent administrative regulation of prostitution, aiming to protect the prostitute and the society from harm.[488] In other words, prostitutes in the country that recognises prostitution might be at risk of trafficking in persons but the domestic protections provided by the state are also possible to lower their risk. On the other hand, where the host state prohibits economic activities relating to prostitution, the migrant self-employed prostitutes would be prohibited from performing these economic activities. Because prostitution is banned, there is no domestic organisation representing their interests regarding working conditions.[489] Prohibition of prostitution may discourage the prostitutes from seeking assistance, due to their fear of sanctions for violating prostitution laws.[490] Additionally, prostitutes tend to be aware that they are considered untrustworthy and powerless by the authorities when reporting violence against them.[491] Therefore, such a ban could attract trafficking as it increases the prostitutes' dependence on pimps or other kinds of go-betweens.[492] From the *Jany case*, it can be concluded that the host member state is still entitled to its discretion to permit or prohibit controversial economic activities such as prostitution. As the prohibition of prostitution could deter the prostitutes from seeking assistance and attract trafficking in persons, it can be said

---

[487] Joyce Outshoorn, 'Pragmatism in the Polder: Changing Prostitution Policy in The Netherlands' (2004) 12 (2) Journal of Contemporary European Studies 165–176; Hendrik Wagenaar and Sietske Altink, 'Prostitution as Morality Politics or Why It Is Exceedingly Difficult to Design and Sustain Effective Prostitution Policy' (2012) 9 (3) Sexuality Research and Social Policy 279–292.

[488] Jody Miller and Martin D Schwartz, 'Rape myths and violence against street prostitutes' (1995) 16 (1) Deviant Behavior 1-23; Wim Huisman and Edward R Kleemans, 'The challenges of fighting sex trafficking in the legalized prostitution market of the Netherlands' (2014) 61 (2) Crime, Law and Social Change 215–228; Teela Sanders and Rosie Campbell, 'Criminalization, protection and rights: Global tensions in the governance of commercial sex' (2014) 14 (5) Criminology & Criminal Justice 535–548; Che Post, Jan Brouwer and Michel Vols, 'Regulation of Prostitution in the Netherlands: Liberal Dream or Growing Repression?' (2019) 25 (2) European Journal on criminal policy and research 99-118.

[489] Christine Harcourt and others, 'Sex work and the law' (2005) 2 (3) Sexual Health 121-128; Ine Vanwesenbeeck, 'Sex Work Criminalization Is Barking Up the Wrong Tree' (2017) 46 (6) Archives of Sexual Behavior 1631–1640.

[490] Miller and Schwartz (n 488) (1995); J Fawkes, 'Sex working feminists and the politics of exclusion' (2005) 24 Social Alternatives 22-23; J Sallman, 'Living with stigma: Women's experiences of prostitution and substance use' (2010) 25 (2) Journal of Women & Social Work 146-159; Katie Bloomquist, 'Sex worker affirmative therapy: conceptualization and case study' (2019) 34 (3) Sexual and relationship therapy 329-408.

[491] Penelope Saunders, 'Traffic Violations: Determining the Meaning of Violence in Sexual Trafficking Versus Sex Work' (2005) 20 (3) Journal of Interpersonal Violence 343-360; Fawkes (n 490) (2005).

[492] Vanwesenbeeck (n 489) (2017).

that exploitation in terms of human trafficking is a condition made possible by the state's decision to exclude certain economic activities.

It is also interesting that the *Jany* case was challenged in the Court of Justice in 2001 which was one year after the adoption of the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (TIP Protocol), supplementing the United Nations Convention against Transnational Organized Crime (UNCTOC). Nevertheless, the issue relating to human trafficking was mentioned only in the opinion of the Advocate General, not in the official decision of the Court of Justice. This also illustrates that the free movement of persons framework of the EEC could be considered as the dominant regional framework. Specifically, the Court of Justice, which was a crucial regional institution of the EEC, resisted the use of international law on trafficking in persons (TIP protocol) by referring merely to the free movement of persons framework.

5. Conclusion

As seen with the free movement of workers framework, the main objectives including the time frame and a programmatic approach for the EEC framework of the free movement of self-employed persons and service providers were also set out in the Treaty of Rome. Specifically, it set the objective based on the principle of non-discrimination based on nationality. This principle illustrates that the member states have adjusted their attitudes of cooperation from exclusion of foreign workers to non-discrimination based on nationality of EEC self-employed persons and service providers.

During the EEC transitional period, Directive 64/220 and Directive 73/148 regarding the general movement and residence of self-employed persons and service providers were published. Additionally, there was a series of directives concerning specific service sectors from 1963 to 1985. Unlike the case of free movement of workers, the legal framework of free movement of these two groups of persons was not achieved by the deadline of 31 December 1969, as set out in the Treaty of Rome. In other words, the free movement of self-employed persons and service providers was not successfully executed during the EEC transitional period. The main reason for this was that member states could not negotiate a directive to cover all service sectors by the deadline of 1969 as required by the Treaty of Rome. Such a sectoral approach was the possible cause for the delay.

From this chapter, it can also be seen that the Court of Justice played an important role in confirming the rights of self-employed persons and service providers, especially when there was a delay in agreement between the member states, through its decisions in cases such as *Reyners*, *Van Binsbergen, Patrick* and *Auer*. Additionally, it can also be seen from the development of the free movement of self-employed persons and service providers that there was a gap in the principle of non-discrimination based on nationality, with regard to the national laws of the host member states. Specifically, this principle still allowed the host member states to permit or ban economic activities regarding certain service sectors such as prostitution. As a result, self-employed persons or service providers might be considered as legal migrants in one state but illegal migrants in another state. It can be said that exploitation in terms of human trafficking is a condition made possible by a state's decision. Nevertheless, the Court of Justice did not refer to the available international law on human trafficking in the case of self-employed prostitutes. It also proves the hypothesis of the new regionalism theory that international law plays an insignificant role in the EEC free movement of persons framework.

As mentioned previously, this research aims to further examine the feasibility of regional integration on labour migration within the AEC by considering the experiences of the EEC. Therefore, the attitude of cooperation among the member states, the approach of labour liberalisation, the relationship with international law, and the role of regional institutions[493] examined in this chapter could provide valuable lessons for the AEC.

[493] This research acknowledges that the roles of regional institutions such as the Court of Justice and other regional institutions were important in the achievement of the free movement of persons framework. The discussion related to the institutional framework of the EEC will be examined further in chapter 6.

CHAPTER 4. Labour Migration in the ASEAN Economic Community

1. Introduction

The ASEAN was established by the ASEAN Declaration in 1967.[494] The five founding member states were Indonesia, Malaysia, the Philippines, Singapore, and Thailand.[495] Subsequently, Brunei joined in 1984, Vietnam in 1985, Myanmar and Laos in 1997 and Cambodia in 1999, comprising the present 10 member states.[496] The ASEAN Declaration provided that the ASEAN aims to promote collaboration and mutual assistance on matters of common interest in several areas including economic, social, cultural, agriculture and industries, scientific and transport.[497] However, it still affirmed the importance of national independence[498] and the principle of non-interference.[499] In the first forty years, the ASEAN was a loose association without a clear institutional framework.[500] Then, in 2007, the heads of the ASEAN member states signed the ASEAN Charter which established the ASEAN Communities comprising the ASEAN Security Community (ASC), the ASEAN Socio-Cultural Community (ASCC) and the ASEAN Economic Community (AEC).[501] The Charter aimed to strengthen regional cooperation[502] and the institutional framework[503] of the three ASEAN communities.

In terms of the AEC, it aims to create a single market in which there is a flow of goods, services, skilled labour and capital.[504] In addition to the ASEAN Charter, there have been two AEC blueprints, endorsed by the leaders of the member states, specifying actions to be achieved by the AEC.[505] These blueprints do not have a legally binding effect but

---

[494] ASEAN Declaration (1967).
[495] ibid.
[496] ASEAN, 'Establishment' (2018) <https://asean.org/asean/about-asean/overview> [accessed 28 February 2021].
[497] ASEAN Declaration (1967) [2].
[498] ASEAN Declaration (1967) Preamble.
[499] Surin Pitsuwan, *ASEAN: A better understanding of ASEAN from the experiences of Secretary-General of ASEAN* (Amarin Publisher 2013) 8.
[500] Donald E Weatherbee, *International Relations in Southeast Asia: the Struggle for Autonomy* (Kiatichai Pongpanich, Seangdao Publisher 2013) 153.
[501] ASEAN Charter (2007) Preamble.
[502] ASEAN Charter (2007) Preamble.
[503] The issues related to institutional framework of the ASEAN will be further discussed in Chapter 6.
[504] ASEAN Charter (2007) Article5.
[505] Stefano Inama and Edmund W Sim, *The foundation of the ASEAN Economic Community: an institutional and legal profile* (Cambridge University Press 2015) 48.

completing further legal instruments among the member states could be one of the goals in the blueprints.[506]

According to the first AEC Blueprint 2015, the member states agreed to "hasten the establishment of the AEC and to transform ASEAN into a region with flow of goods, services, investment, skilled labour, and capital."[507] It also set a strategic approach in terms of the free flow of skilled labour that the AEC member states planned to negotiate and complete MRAs to facilitate the migration of the selected professionals within the region.[508]

According to the second AEC Blueprint 2025, the current objective of the AEC is to facilitate the movement of goods, services, skilled labour, and capital.[509] In respect of labour, it states that the AEC member states would consider further improvements to existing MRAs and consider the feasibility of additional new MRAs. It also aims to complete the Agreement on Movement of Natural Persons (MNP) that would allow for the movement of businesspersons.[510]

As seen from the ASEAN Charter and the AEC blueprints, the current labour migration in the ASEAN is limited to the movement of skilled labour. The term "skilled labour" was not defined by the ASEAN Charter. However, the recent AEC Blueprint 2025 stated that the current AEC movement of skilled labour covers the movement of natural persons under the MRAs and the MNP.[511]

In terms of the MRAs, there have been eight MRAs that would allow the temporary movement of the practitioners in eight professions to practice in other AEC member states.[512] Currently, the MRAs cover the movement of engineers,[513] nurses,[514] architects,[515] surveyors,[516] dentists,[517] doctors,[518] accountants,[519] and tourism professionals.[520] These natural persons who move under the MRAs could be comparable to the workers of the EEC because they could be considered as the persons who perform services under the direction of

---

[506] ibid 48.
[507] AEC Blueprint 2015 (January 2008) [4].
[508] AEC Blueprint 2015 (January 2008) [A5].
[509] AEC Blueprint 2025 (November 2015) [7].
[510] AEC Blueprint 2025 (November 2015) [19-A5].
[511] ibid.
[512] ibid.
[513] ASEAN Mutual Recognition Arrangement on Engineering Services (2005).
[514] ASEAN Mutual Recognition Arrangement on Nursing Services (2006).
[515] ASEAN Mutual Recognition Arrangement on Architectural Services (2007).
[516] ASEAN Framework Arrangement for the Mutual Recognition of Surveying Qualifications (2007).
[517] ASEAN Mutual Recognition Arrangement on Dental Practitioners (2009).
[518] ASEAN Mutual Recognition Arrangement on Medical Practitioners (2009).
[519] ASEAN Mutual Recognition Arrangement on Accountancy Services (2012).
[520] ASEAN Mutual Recognition Arrangement on Tourism Professional (2012).

employers in host member states for a certain period of time.[521] They could also be comparable to service providers of the EEC because they could be seen as the persons that provide services for remuneration[522] and for a temporary period[523] in a member state in which they are not established.[524] As the recent AEC Blueprint 2025 stated that these MRAs aim to facilitate the "temporary" movement of professionals, the natural persons who move under the current MRAs could not be comparable to the self-employed persons of the EEC. The reason is that self-employed persons of the EEC perform an economic activity for an indefinite period on a "stable and continuous" basis,[525] not on a "temporary" basis.

In terms of the MNP, natural persons under this agreement are business visitors, intra-corporate transferees and contractual service suppliers in selected service sectors who temporarily move to perform their economic activities in other AEC member states.[526] According to the MNP, the business visitor refers to "a natural person seeking to enter or stay in the territory of another member state temporarily, whose remuneration and financial support for the duration of the visit is derived from outside of that other member state."[527] Intra-corporate transferee refers to "a natural person who is an employee of a juridical person established in the territory of a member state, who is transferred temporarily for the supply of a service through commercial presence in the territory of another member state."[528] Contractual service supplier refers to a "natural person who is an employee of a juridical person established in the territory of a member state which has no commercial presence in the territory of the other member state."[529] It can be seen that these groups of persons who move under the MNP are not comparable to the self-employed persons in the EEC because they do not perform economic and social interpenetration in the sphere of self-employed activities.[530] However, they could be comparable to the service providers of the EEC because they are

---

[521] Case 66/85 *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2139-2148; Case C-107/94 *Asscher v Staatssecretaris van Financiën* [1996] ECR I-3113-3132 [26].
[522] Case 352/85 *Bond van Adverteerders and others v The Netherlands State* [1988] ECR 2124-2137 [12].
[523] This 'temporarily' requirement distinguishes service providers from self-employed persons who perform an economic activity for an indefinite period (on a stable and continuous basis); Craig and De Búrca (n 10) (2015) 796, 820. This was confirmed in Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I4186-4201 [27]; the temporary nature of the activities in question has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity.
[524] Case 205/84 *Commission v Germany* [1986] ECR 3793-3815 [21].
[525] Craig and De Búrca (n 10) (2015) 796, 820. This was confirmed in Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I 4186-4201 [27].
[526] ASEAN Agreement on the Movement of Natural Persons (2012).
[527] ASEAN Agreement on the Movement of Natural Persons (2012) Article 3 (a).
[528] ASEAN Agreement on the Movement of Natural Persons (2012) Article 3 (e).
[529] ASEAN Agreement on the Movement of Natural Persons (2012) Article 3 (b).
[530] Case 2-74 *Jean Reyners v Belgian State* [1974] European Court Reports 632-657 [21].

persons that provide services for remuneration[531] and for a temporary period[532] in a member state in which they are not established.[533]

It can be seen that the categorisation of persons under the AEC labour migration framework is different from that of the EEC because the AEC does not clearly separate the persons into three groups. As discussed in the previous chapters, the free movement of persons framework of the EEC covered workers, self-employed persons, and service providers.[534] However, the persons under the current AEC labour migration framework are persons under the MRAs and the MNP who could be comparable to two groups of persons who are workers and service providers.

As mentioned in the previous chapters, the main objective of this research is to examine the possibility of the regional integration of labour migration within the AEC by considering the experiences of the EEC. The two previous chapters have analysed the key steps to achieving the free movement of workers, self-employed persons, and service providers of the EEC by looking at how the EEC dealt with the six obstacles hindering labour migration. The six obstacles are: access to the labour market, permission to perform economic activities, permission to reside, family reunification, working conditions and protection from expulsion. Although the scope of persons under the AEC labour migration framework is narrower than that of the EEC, it also involves migration with the purpose of pursuing economic activities. Specially, the persons under the AEC labour migration framework could be comparable to two groups of EEC persons who are workers and service providers. Therefore, the six obstacles hindering labour migration discussed in the two previous chapters on the free movement of persons in the EEC could also be applicable to the movement of labour under the current AEC labour migration regime.

This chapter aims to examine the issues related to labour migration in the AEC in a similar framework as the two previous chapters. The next part of the chapter analyses the general objectives of labour migration in the AEC including the main principles of the AEC

---

[531] Case 352/85 *Bond van Adverteerders and others v The Netherlands State* [1988] ECR 2124-2137 [12].
[532] See Footnote 501.
[533] Case 205/84 *Commission v Germany* [1986] ECR 3793-3815 [21]; The overlap between workers and service providers can be seen in the case of posted workers. This case involved companies' temporarily providing services in other member states and taking their own workforce (posted workers) with them to do a particular job; Catherine Barnard and Steve Peers, *European Union Law* (2nd edn, Oxford University Press 2016) 379; The Court in *Finalarte* held that posted workers falls under the scope of service providers, not workers; Case C-49/98 *Finalarte Sociedade de Construção Civil Ld* [2001] ECR I-7884-7913.
[534] Treaty of Rome (1957) Article 3 (c).

framework and legislative form. Then, the chapter continues to examine the development of the provisions in the current AEC legislation regarding the six main obstacles set out above.

2. General Objectives on Labour Migration in the AEC

The objective regarding labour migration in the AEC was initiated by the ASEAN Charter which could be considered as a foundational basis for the ASEAN endeavours. [535] As mentioned in the introduction, the ASEAN Charter declared that the AEC aims to create a single market with a flow of goods, services and investment and a freer movement of capital.[536] In respect of labour, the ASEAN Charter declared that the AEC aims for "a facilitated movement of businesspersons, professionals, talents and labour."[537] This illustrates that the AEC seems to be less ambitious when it comes to the free movement of persons.[538] Unlike the EEC, the ASEAN Charter avoids using the words "free movement of persons" or "free movement of workers." Instead, the AEC focuses only on the movement of "skilled labour."

In order to understand the objectives of labour migration in the AEC, it is necessary to examine the main principles of the AEC framework, the time frame and the legislative form setting out the regional measures on labour migration. These principles, time frame and legislative forms will also be useful in the next part of this chapter, which explores the development of regional legislation related to labour migration in the AEC.

In terms of the main principles, the ASEAN Charter stated that the AEC member states respect the principle of non-interference and consensus.[539] These two principles constitute an "ASEAN Way"[540] which could be considered as a tradition[541] and normal practice[542] of the ASEAN. Specifically, these two principles have remained in the ASEAN since the ASEAN Declaration which established the ASEAN in 1967. They also remained in the ASEAN Charter entering into force in 2008. The principle of non-interference respects

---

[535] Eugene K B Tan, 'The ASEAN Charter as Legs to Go Places: Ideational Norms and Pragmatic Legalism in Community Building in Southeast Asia' (2008) 12 Singapore Year Book of International Law 181.
[536] ASEAN Charter (2007) Article 5.
[537] ASEAN Charter (2007) Article 5.
[538] Fabian Gülzau, Steffen Mau and Natascha Zaun, 'Regional Mobility Spaces? Visa Waiver Policies and Regional Integration' (2016) 54 (6) International Migration 168.
[539] ASEAN Charter (2007) Preamble.
[540] Surakiart Sathirathai, *ASEAN Community* (Chulalongkorn University Press 2014) 5.
[541] ibid 107.
[542] ibid 114.

the sovereignty of member states and avoids intrusion into the internal affairs of member states.[543] Consensus has been fundamental to the decision-making and policymaking of the AEC.[544] Specifically, unanimity is not a necessary requirement in order to reach every final conclusion.[545] Nevertheless, it only means that none of the member states objects to the decision "so strongly that it feels compelled to register its dissent." [546]

The principles of non-interference and consensus are seen by literature as appropriate principles for the AEC. These two principles are suitable for the diversity among the AEC member states.[547] Specifically, the AEC member states have different political systems as well as economic status.[548] It allows every issue to be gradually considered and scrutinized until every member state is satisfied with the final result.[549] This is a political way to avoid conflict during negotiations and allows the AEC to peacefully reach the common interests.[550] However, these principles were critiqued as the reason for a slow conclusion of the negotiations among the member states.[551] This resulted in a loose cooperation[552] and a slow development of the AEC framework.[553] This could also result in a lack of continuity and stability in the AEC policies.[554] These two principles are the possible explanation for the limited scope of persons under the labour migration framework of the AEC. According to Pitsuwan, who served as the Secretary General of the ASEAN from 2008 (which was the year that the ASEAN Charter came into force) to 2012, the ASEAN member states could not reach a consensual agreement on the movement of all types of labour, so the AEC only prioritises the temporary movement of skilled labour.[555]

In terms of the time frame, the ASEAN Charter does not set any transitional period or time limit for the development of the AEC labour migration framework. However, the strategic schedule for the development of the AEC labour migration framework regarding skilled labour was specified in the two AEC blueprints. According to the first AEC Blueprint

---

[543] Weatherbee (n 500) (2013) 153.
[544] Sathirathai (n 540) (2014) 5.
[545] Tan (n 535) (2008) 189; Inama and Sim (n 505) (2015) 43-44.
[546] Tan (n 535) (2008) 189.
[547] Pitsuwan (n 499) (2013) 27-29; Narong Phophueksanand, *ASEAN Studies* (McGraw Hill Publishing 2013) 33, 164; Hermawan Kartajaya and Hooi Den Huan, *Think ASEAN* (Pussadee Polsaram and Panuchart Bunyakiati, McGraw Hill Publishing 2013) 60.
[548] ibid.
[549] Sathirathai (n 540) (2014) 68.
[550] Weatherbee (n 500) (2013) 216.
[551] Sathirathai (n 540) (2014) 67.
[552] Weatherbee (n 500) (2013) 153.
[553] Sathirathai (n 540) (2014) 5.
[554] Pitsuwan (n 499) (2013) 4-5.
[555] Pitsuwan (n 499) (2013) 121-122.

announced in 2007, the AEC aimed to complete the MRAs for major professionals and to develop core competencies for the job or occupational skills required in all sectors by 2015.[556] According to the second AEC Blueprint announced in 2015, the AEC envisioned improving the existing MRAs, to consider the feasibility of additional new MRAs to facilitate the migration of professionals and skilled labour in the region, to deepen commitments under the MNP, and to reduce documentation requirements by 2025.[557]

In terms of the legislative forms, the AEC legal instruments are classified as ordinary international law. In contrast to EEC legislation, there is no direct effect of the regional legal instruments in the AEC.[558] Instead, the binding effect of the AEC legal instruments depends on the constitutional mechanisms within each member state.[559] The majority of the constitutions of the AEC member states require the enactment or amendment of the national legislation to give effect to the AEC legal instruments.[560] The ASEAN Charter also stated that member states shall take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of the ASEAN Charter and to comply with all obligations of membership.[561]

As mentioned in the introduction, the main legal instruments for the movement of skilled workers in the AEC are the MRAs and the MNP. There are eight MRAs on the movement of eight practitioners in the AEC including engineers,[562] nurses,[563] architects,[564] surveyors,[565] dentists,[566] doctors,[567] accountants,[568] and tourism professionals.[569] These MRAs mostly stated the process to be followed regarding obtaining a permit or license to work in the host member states. Nevertheless, the issues regarding access to the labour

---

[556] AEC Blueprint 2015 (January 2008) [A5].
[557] AEC Blueprint 2025 (November 2015) [19-21].
[558] The principle of direct effect and the principle of supremacy of EEC legislation will be discussed further in Chapter 6 regarding the role of the Court of Justice. See also; Case 6/62 *Van Gend and Loos v Netherlands Inland Revenue Administration* [1963] ECR 4-16.
[559] Diane A Desierto, 'ASEAN's Constitutionalization of International Law: Challenges to Evolution under the New ASEAN Charter' (2011) 49 (2) Columbia Journal of Transnational Law 299-303: Among the ten AEC member states, only Cambodia's 1999 Constitution, the domestic courts could directly refer to international treaties and laws in the field of human rights.
[560] ibid 299-303: Among the ten AEC member states, only Cambodia's 1999 Constitution, the domestic courts could directly refer to international treaties and laws in the field of human rights.
[561] ASEAN Charter Article 5 (2).
[562] ASEAN Mutual Recognition Arrangement on Engineering Services (2005).
[563] ASEAN Mutual Recognition Arrangement on Nursing Services (2006).
[564] ASEAN Mutual Recognition Arrangement on Architectural Services (2007).
[565] ASEAN Framework Arrangement for the Mutual Recognition of Surveying Qualifications (2007).
[566] ASEAN Mutual Recognition Arrangement on Dental Practitioners (2009).
[567] ASEAN Mutual Recognition Arrangement on Medical Practitioners (2009).
[568] ASEAN Mutual Recognition Arrangement on Accountancy Services (2012).
[569] ASEAN Mutual Recognition Arrangement on Tourism Professional (2012).

market, permission to reside, family reunification, working conditions, and protection from expulsion are not included in the MRAs. The MNP allowed the movement of business visitors, intra-corporate transferees, and contractual service suppliers in selected service sectors.[570] The MNP covers the issues regarding access to the labour market and permission to perform economic activities in the host member states. However, it does not include the issues regarding permission to reside, family reunification, working conditions, and protection from expulsion.

Apart from the MRAs and the MNP, there are other instruments regarding the rights of migrant workers. The first instrument is the 2007 ASEAN Declaration on the Protection and Promotion of the Rights of the Migrant Workers. It is the first AEC instrument that proposes the intention of the member states regarding the rights of migrant workers and their family members. It calls for cooperation and sets certain obligations for the sending states and the receiving states in the AEC.[571] However, this instrument was critiqued as a weak regional instrument. The main reason is that it is a rather loose non-binding declaration on labour rights.[572] The progress of creating a legally binding instrument on this issue in the AEC was slow. It took about ten years for the AEC to announce the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (Consensus).[573] This Consensus covers wider issues on the rights of migrant workers and their family members, including access to the labour market, permission to reside, family reunification and working conditions. The ASEAN Consensus also provided the definition of a migrant worker as "a person who is to be engaged or employed, is engaged or employed, or has recently been engaged or employed in a remunerated activity in a state of which he or she is not a national."[574] It can be seen that the term "migrant worker" under the Consensus has a wide definition. Specifically, the scope of migrant workers under the Consensus is wider than that of workers under EEC legislation. The practitioners under the MRAs and the businesspersons under the MNP could also be considered as persons who are to be engaged or employed in a remunerated activity in other AEC member states. Therefore, the Consensus also applies to all "skilled labour" labour under the current AEC labour migration framework.

---

[570] ASEAN Agreement on the Movement of Natural Persons (2012).
[571] ASEAN Declaration on the Protection and Promotion of the Rights of the Migrant Workers (2007).
[572] Sandra Lavenex, 'Regional migration governance – building block of global initiatives?' (2019) 45 (8) Journal of Ethnic and Migration Studies 1284.
[573] Linda Quayle, ''Rubbery' ASEAN: mediating people-movement in Southeast Asia' (2019) 5 (3) International Journal of Migration and Border Studies 176.
[574] ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (2017) Article 3.

3. Development of AEC Legislation on Labour Migration

This part of the chapter aims to examine the current AEC framework on the movement of skilled labour. The main AEC legal instruments that will be analysed in this section are the eight MRAs on the movement of eight professions, the MNP on the movement of businesspersons and the ASEAN Consensus. This chapter will mainly focus on the way in which these legal instruments of the AEC deal with the six main obstacles hindering labour migration which are: access to the labour market, permission to perform economic activities, permission to reside, family reunification, working conditions and protection from expulsion.

3.1 Access to Labour Market

As discussed in the two previous chapters, access to the country of destination is one of the major obstacles to labour migration. Specifically, the frontier formalities often require an excessive level of documentation and the payment of administrative fees, in order to issue the travel documents and visas.[575] Another issue is that the host member state might offer priority access to the labour market for its own nationals who are already performing that economic activity in the host state.[576] These problems result from restrictive domestic laws or border control policies of the state of origin as well as the state of destination.[577] In the case of the AEC, there has only been the ASEAN Framework Agreement on Visa Exemption since 2006, which exempts visa requirements for the AEC member states' citizens, allowing for social visits to the other member states for a minimum of 14 days.[578] Member states could extend the visa exemption period, but, in practice, the maximum period is only 30 days.[579] Nevertheless, this visa exemption scheme does not cover the movement of skilled labour under the current MRAs and MNP, in the AEC.

In terms of frontier formalities, the issue regarding access to the host member state was included in the Consensus, which covers the movement of skilled labour under the

[575] Chia Siow Yue, 'Free Flow of Skilled Labor in the AEC', in S Urta and M Okabe (eds*): Toward a Competitive ASEAN Single Market: Sectoral Analysis* (ERIA Research Project Report 2011) 208; Gülzau, Mau and Zaun (n 538) (2016) 170-174; Lavenex (n 572) (2019) 1284.
[576] Yue (n 575) (2011) 245.
[577] Lavenex (n 572) (2019) 1284.
[578] ASEAN Framework Agreement on Visa Exemption (2006).
[579] ASEAN Secretariat, 'Study of the Implementation of Visa Exemption for ASEAN Nationals and the Possible Establishment of an ASEAN Common Visa for Non-ASEAN Nationals' (2012) <https://bit.ly/3j87kYl> [accessed 28 February 2021].

MRAs and the MNP. In terms of travel documents for migrant workers, the Consensus states that the sending state will set reasonable, transparent, and standardised fees for passport issuance and other relevant documents.[580] Additionally, the sending states will take all necessary action to simplify the administrative processes for overseas placements such as, but not limited to, a one stop service centre where appropriate.[581] In terms of frontier formalities of the host member states, the Consensus also calls for the sending state, in close coordination with the receiving state, to organise pre-departure assistance in order to enable migrant workers to comply with the administrative or other formalities of the receiving state.[582]

As mentioned in the introduction, none of provisions in the eight MRAs on the movement of professionals in the AEC mentioned access to host member states or the frontier formalities. However, the MNP on the movement of business visitors, intra-corporate transferees and contractual service suppliers included the issues related to frontier formalities. It stated that any fees imposed in respect of the processing of an immigration formality shall be reasonable and in accordance with domestic law.[583] Additionally, where an application for an immigration formality is required by a member state, that member state shall promptly process complete applications for immigration formalities.[584] These provisions in the MNP are similar to those in the Consensus that the fees should be reasonable, and the administrative procedure should be facilitated. Nonetheless, the frontier formalities in the host member states are still allowed.

It can be seen that the requirements regarding entry visas for the host member states may remain for the skilled labour under the AEC framework. Specifically, business or employment visas are still required for skilled labour seeking employment in the AEC member states.[585] These varying visa standards among the AEC member states incentivize neither the AEC labour to move nor the employers to hire the skilled labour from within the region.[586] Additionally, none of provisions in the Consensus, the MRAs or the MNP mentioned national prioritisation. Therefore, the AEC legal instruments allow the host

[580] ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (2017) Article 23 (a).
[581] ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (2017) Article 24.
[582] ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (2017) Article 21.
[583] ASEAN Agreement on the Movement of Natural Persons (2012) Article 4 (2).
[584] ASEAN Agreement on the Movement of Natural Persons (2012) Article 5 (1).
[585] Yue (n 575) (2011) 208-260; Elisabetta Gentile, 'Skilled migration in the literature: what we know, what we think we know, and why it matters to know the difference', in Elisabetta Gentile (ed): *Skilled Labor Mobility and Migration: Challenges and Opportunities for the ASEAN Economic Community* (Edward Elgar Publishing 2019) 47.
[586] ibid.

member states to preserve priority for their nationals to access the labour market. These illustrate that the Consensus, the MNP and the MRAs rely on the principle of non-interference: that these instruments still respect the sovereignty of the AEC member states in determining their own migration policies including entry into their territory and access to the labour market. Even though the AEC instruments state reasonable fees and simplified administrative procedures, the obstacles regarding access to the labour market, especially in respect of visa requirements remains. This is in contrast to EEC legislation which had abolished entry visa requirements for persons who moved under the free movement of persons framework since the first EEC transitional period.[587] As discussed in the two previous chapters, these persons in the EEC could go through border controls in the state of destination on presentation of only the valid identity documents issued by their host member states.[588] Additionally, the obstacle regarding national prioritisation was diminished by EEC legislation during the EEC transitional period.[589]

3.2 Permission to Perform Economic Activities

As discussed in the two previous chapters, host states could have a national protectionist attitude and create restrictive domestic rules and policies for foreigners. The domestic laws might prohibit foreigners from performing certain occupations.[590] Even though foreigners are allowed to work in the country, they might have to face obstacles regarding administrative fees, documentation requirements, or additional examinations in order to

[587] Directive 68/360 Article 3 (1), 3 (2), 2 (4); Directive 73/148 Article 2 (4) and Article 3 (1).
[588] Directive 68/360 Article 3 (1), 3 (2), 2 (4); Directive 73/148 Article 2 (1) and Article 3 (1).
[589] See Chapter 2 – Section 3.1 and Chapter 3 - Section 3.1: Regulation 1612/68 Article1 for the case of EEC workers. Even though national prioritisation in the case of self-employed persons and service providers was not expressly discussed in the secondary legislation, the Treaty of Rome stated in Article 52 that self-employed persons were entitled to take up and pursue their activities "under the conditions laid down for its own nationals by the law of the country" and Article 60 of the Treaty stated that the service providers were entitled to "provide services under the same conditions as are imposed by that state on its own nationals." Moreover, the case of *Reyners* and the case of *Van Binsbergen* declared that the provisions regarding free movement of self-employed persons and service providers in the Treaty of Rome could be considered as directly applicable law and could be directly invoked by individuals against authorities and before the courts. Therefore, self-employed persons and service providers could directly rely on Article 52 and Article 60. Thus, these two cases in 1976 clarified that national prioritisation, which provided different treatments for self-employed persons and service providers from other member states performing the same economic activities in terms of access to the labour market, was prohibited during the EEC transitional period.
[590] Yue (n 575) (2011) 245, 250, 258-259.

obtain a permit or license to work in the host state.[591] In the case of the AEC, the member states have agreed on the movement of skilled labour under the MRAs and the MNP.

In terms of the MRAs, there have been MRAs on the movement of engineers,[592] nurses,[593] architects,[594] surveyors,[595] dentists,[596] doctors,[597] accountants,[598] and tourism professionals.[599] Among the eight professions, the permission to perform economic activities in the host states can be organised into four different groups, as seen in the following table.

Table 3: Conditions to Obtain Permission to Perform Economic Activities in the Host Member States

Group	Professions	Conditions
1	Engineers, Architects, Accountants	• Recognised by Professional Regulatory Authority (PRA) in the country of origin • Meet the regional standards and register with registries at a regional level • Register as Registered Foreign Professional Engineer, Registered Foreign Architects and Registered Foreign Professional Accountant with the PRA in the country of destination
2	Nurses, Dentists, Doctors	• Recognised by PRA in their country of origin • Meet the regional standards and register as Foreign Nurse, Foreign Dental Practitioner, and Foreign Medical Practitioner with the PRAs in the country of destination (The PRA in the country of destination can impose extra examinations, assessments, or requirements)
3	Surveyors	• Recognised by Competence Authority (CA) in their country of origin • Register as surveying professionals directly with the CA in the host member state (The CA in the country of destination can impose extra examinations, assessments or requirements)

[591] ibid.
[592] ASEAN Mutual Recognition Arrangement on Engineering Services (2005).
[593] ASEAN Mutual Recognition Arrangement on Nursing Services (2006).
[594] ASEAN Mutual Recognition Arrangement on Architectural Services (2007).
[595] ASEAN Framework Arrangement for the Mutual Recognition of Surveying Qualifications (2007).
[596] ASEAN Mutual Recognition Arrangement on Dental Practitioners (2009).
[597] ASEAN Mutual Recognition Arrangement on Medical Practitioners (2009).
[598] ASEAN Mutual Recognition Arrangement on Accountancy Services (2012).
[599] ASEAN Mutual Recognition Arrangement on Tourism Professional (2012).

4	Tourism Professionals	• Pass training programme and obtain certificate from Tourism Professional Certification Board in the country of origin • Apply for their jobs though the regional Tourism Professional Registration System (An online platform allowing direct communication between tourism professionals and potential employers in countries of destination)

The first group is comprised of engineers, architects and accountants. There is a three-step process for the practitioners to undergo in order to obtain permission to perform economic activities in other AEC member states. Firstly, the practitioners have to be assessed by the respective Professional Regulatory Authority (PRA) in their country of origin as being technically, morally, and legally qualified to undertake a professional engineering,[600] architectural[601] or accountancy practice.[602] The PRA refers to the designated government body or its authorised agency in charge of regulating the related practice in the country of origin.[603] Additionally, the MRAs also stated that each member country may have different requirements for this assessment. Secondly, the practitioners who meet the regional qualifications have to apply to become ASEAN Chartered Professional Engineers (ACPEs),[604] ASEAN Architects (AAs)[605] or ASEAN Chartered Professional Accountants

[600] ASEAN Mutual Recognition Arrangement on Engineering Services (2005) Article 2.10.
[601] ASEAN Mutual Recognition Arrangement on Architectural Services (2007) Article 2.2.
[602] ASEAN Mutual Recognition Arrangement on Accountancy Services (2012) Article 2.9.
[603] ASEAN Mutual Recognition Arrangement on Engineering Services (2005) Article 2.11, ASEAN Mutual Recognition Arrangement on Architectural Services (2007) Article 2.12, and ASEAN Mutual Recognition Arrangement on Accountancy Services (2012) Article 2.10.
[604] ASEAN Mutual Recognition Arrangement on Engineering Services (2005) Article 3.1.1 Completed an accredited engineering degree recognised by the professional engineering accreditation body whether in the country of origin or host country or assessed and recognised as having the equivalent of such a degree; 3.1.2 Possess a current and valid professional registration or licensing certificate to practice engineering in the country of origin issued by the PRA; 3.1.3 acquired practical and diversified experience of not less than seven years after graduation, at least two years of which shall be in responsible charge of significant engineering work as stipulated in Appendix IV; 3.1.4 in compliance with Continuing Professional Development (CPD) policy of the country of origin at a satisfactory level; and 3.1.5 obtained certification from the PRA of the country of origin with no record of serious violation on technical, professional or ethical standards, local and international, for the practice of engineering.
[605] ASEAN Mutual Recognition Arrangement on Architectural Services (2007) Article 3.1.1 completed an accredited architectural degree recognised by the professional architectural accreditation body whether in the country of origin or host country or assessed and recognised as having the equivalent of such a degree. The education for architects should be no less than five years duration delivered on a full time basis in an accredited program in an accredited/ validated university in the country of origin while allowing flexibility for equivalency; 3.1.2 a current and valid professional registration or licensing certificate to practise architecture in the country of origin issued by the PRA; 3.1.3 acquired practical and diversified experience of not less than ten years of continuous practice of architecture after graduation, of which at least five years shall be after licensure/ registration and at least two years of which shall be in responsible charge of significant architectural works as stipulated in Appendix D; 3.1.4 complied with the CPD policy of the country of origin at a satisfactory level;

(ACPAs).[606] The application can be submitted to the PRAs which will be passed to the registries at a regional level. These are: the ACPE Coordinating Committee, the AA Council, and the ACPA Coordinating Committee. These regional registries have the authority to confer the title of ACPE, [607] AA[608] or ACPA.[609] Finally, the successful applicants have to apply to become Registered Foreign Professional Engineers (RFPEs), Registered Foreign Architects (RFAs) and Registered Foreign Professional Accountants (RFPAs) with the PRAs in the state of destination. These RFPEs, RFAs, and RFPAs shall be subject to the domestic laws and regulations of the host member states.[610] The MRAs for engineers and accountants also stated that the RFPEs and RFPAs are not permitted to work in independently, but are only allowed to work in collaboration with designated professional engineers or professional accountants in the host member state, within such area of his own competence as may be recognised and approved by the PRAs of the host member states.[611] However, the MRAs on architects work allowed the RFAs to work either in independent practice or in collaboration with local licensed architects in the host country, where appropriate, subject to the domestic laws and regulations of the host country governing the practice of architecture.[612]

The second group is comprised of nurses, dentists, and doctors. There is a two-step process for these health-related practitioners. Firstly, they have to be assessed by the respective PRAs in the country of origin as being technically, ethically and legally qualified to undertake professional nursing,[613] dental,[614] and medical,[615] practice. Additionally, the

---

3.1.5 obtained certification from the PRA of the country of origin with no record of serious violation on technical, professional or ethical standards, local and international, for the practice of architecture.

[606] ASEAN Mutual Recognition Arrangement on Accountancy Services (2012) Article 4.1.1. has completed an accredited accountancy degree or professional accountancy examination programme recognised by the PRA of the country of origin or host country, or has been assessed and recognised as having the equivalent of such a degree; 4.1.2 possess a current and valid professional registration certificate in the country of origin issued by the national accountancy body and/or PRA of the country of origin and in accordance with its policy on the registration, licensing and/or certification of the practice of accountancy; 4.1.3 has acquired relevant practical experience of not less than three years cumulatively within a five year period following the qualification referred to in Article 4.1.1 above; 4.1.4. has complied with the continuing professional development policy of the country of origin and; 4.1.5 has obtained certification from the PRA of the country of origin that has no record of any serious violation of technical, professional or ethical standards, local and international, applicable to the practice of accountancy.

[607] ASEAN Mutual Recognition Arrangement on Engineering Services (2005) Article 4.3.1.

[608] ASEAN Mutual Recognition Arrangement on Architectural Services (2007) Article 4.3.1.

[609] ASEAN Mutual Recognition Arrangement on Accountancy Services (2012) Article 7.1.

[610] ASEAN Mutual Recognition Arrangement on Engineering Services (2005) Article 3.3.2; ASEAN Mutual Recognition Arrangement on Architectural Services (2007) Article3.3.2; ASEAN Mutual Recognition Arrangement on Accountancy Services (2012) Article 4.3.2.

[611] ASEAN Mutual Recognition Arrangement on Engineering Services (2005) Article 3.3.2; ASEAN Mutual Recognition Arrangement on Accountancy Services (2012) Article 4.3.2.

[612] ASEAN Mutual Recognition Arrangement on Architectural Services (2007) Article 3.3.1.

[613] ASEAN Mutual Recognition Arrangement on Nursing Services (2006) Article 2.1.

MRAs also stated that each member country may have different requirements for this assessment. The second step for these health-related practitioners is to register as Foreign Nurses (FNs), Foreign Dental Practitioners (FDPs), and Foreign Medical Practitioners (FMPs) in the host member states. The MRAs also set the regional qualifications for nurses,[616] dentists[617] and doctors[618] before submitting the applications to the PRAs in the host member states. Additionally, the MRAs allow the PRAs to impose extra examinations, assessments, or requirements on the applicants. In contrast to the first group, the health-related practitioners are not required to register with regional registries. However, they still have to meet the regional qualifications before submitting the applications to become FNs, FDPs, and FMPs in the host member states. In other words, the FRAs in the destination state also have the responsibility to examine the qualifications of the applicants before issuing the

---

[614] ASEAN Mutual Recognition Arrangement on Dental Practitioners (2009) Article 2.1.

[615] ASEAN Mutual Recognition Arrangement on Medical Practitioners (2009) Article 2.1.

[616] ASEAN Mutual Recognition Arrangement on Nursing Services (2006); 3.1.1 Granted a nursing qualification; 3.1.2 Possession of a valid professional registration and/or licence from the country of origin and a current practising licence or certificate or any relevant certifying documents; 3.1.3 Minimum practical experience in the practice of nursing of not less than three continuous years prior to the application; 3.1.4 Compliance with satisfactory continuing professional development in accordance with the Policy on continuing professional development in nursing as may be mandated by the PRA of the country of origin; 3.1.5 Certification from the PRA of the country of origin of no record or pending investigation of having violated any technical, professional or ethical standards, local and international, for the practice of nursing; and 3.1.6 Compliance with any other requirements, such as to submit for a personal medical examination or undergo an induction program or a competency assessment, as may be imposed on any such application for registration and/or licence as deemed fit by PRA or any other relevant authority or the government of host country concerned.

[617] ASEAN Mutual Recognition Arrangement on Dental Practitioners (2009); 3.1.1. in possession of a dental qualification recognised by the PRA of the country of origin and host country; 3.1.2. in possession of a valid professional registration and current practising certificate to practise dentistry issued by the PRA of the country of origin; 3.1.3. has been in active practice as a general dental practitioner or specialist, as the case may be, for not less than five continuous years in the country of origin; 3.1.4. in compliance with CPD at satisfactory level in accordance with the policy on CPD mandated by the PRA of the country of origin; 3.1.5. has been certified by the PRA of the country of origin of not having violated any professional or ethical standards, local and international, in relation to the practice of dentistry in the country of origin and in other countries as far as the PRA is aware; 3.1.6. has declared that there is no investigation or legal proceeding pending against him/her in the country of origin or another country; and 3 3.1.7. in compliance with any other assessment or requirement as may be imposed on any such applicant for registration as deemed fit by the PDRA or other relevant authorities of the host country.

[618] ASEAN Mutual Recognition Arrangement on Medical Practitioners (2009); 3.1.1 in possession of a medical qualification recognised by the PMRA of the country of origin and host country; 3.1.2 in possession of a valid professional registration and current practising certificate to practise medicine issued by the PMRA of the country of origin; 3.1.3 has been in active practice as a general medical practitioner or specialist, as the case may be, for not less than five (5) continuous years in the country of origin; 3.1.4 in compliance with CPD at satisfactory level in accordance with the policy on CPD mandated by the PMRA of the country of origin; 3.1.5 has been certified by the PMRA of the country of origin of not having violated any professional or ethical standards, local and international, in relation to the practice of medicine in the country of origin and in other countries as far as the PMRA is aware; 3.1.6 has declared that there is no investigation or legal proceeding pending against him/her in the country of origin or another country; and 3.1.7 in compliance with any other assessment or requirement as may be imposed on any such applicant for registration as deemed fit by the PMRA or other relevant authorities of the host country

title of FN, FDP, and FMP. Additionally, there are joint coordinating committees which facilitate the implementation of the MRAs in each health-related practitioner. These joint committees are operated under the Healthcare Services Sectoral Working Group, which has an online platform that provides information on regional qualifications in each practice and allows the PRAs in all member states to share information regarding additional domestic requirements for each practice.[619]

The third group consists of surveying professionals. There is a two-step process for the surveying professionals. Firstly, they have to be assessed as surveyors who have satisfactorily completed an undergraduate education at an institution in a recognised surveying programme that has been assessed as meeting the required criteria in a discipline of surveying services determined by a Competent Authority (CA) in the country of origin.[620] Similar to the PRA, a CA refers to the designated government regulatory body or its authorised agency in charge of regulating the practice of surveying services in the member state.[621] The second step is to register as surveying professionals directly with the CA in the host member state. Unlike other groups, there are no detailed regional standards or qualifications for the surveying professionals. The MRA only required that the experience or technical expertise of the surveying professionals must have been acquired over an aggregate of not less than two years.[622] Additionally, the MRA stated that the member states recognise that there may be a need to require the applicants to pass an examination or examinations designed to ensure that the applicants have satisfactory knowledge of relevant local and national legislation, standards and practices in the host member state.[623] Therefore, the CA can impose additional examinations, assessments or requirements.

The final group is comprised of tourism professionals. This group is different from the first two groups because it consists solely of non-regulated jobs, covering 32 job titles in hotel and travel services.[624] The AEC created the ASEAN Common Competency Standards for Tourism Professionals (ACCSTP) which set minimum requirements of competency

---

[619] ASEAN, 'ASEAN Healthcare Services' (2016) <http://aseanhealthcare.org> [accessed 21 February 2020].
[620] ASEAN Framework Arrangement for the Mutual Recognition of Surveying Qualifications (2007) Article 2.9.
[621] ASEAN Framework Arrangement for the Mutual Recognition of Surveying Qualifications (2007) Article 2.2.
[622] ASEAN Framework Arrangement for the Mutual Recognition of Surveying Qualifications (2007) Article 2.9.
[623] ASEAN Framework Arrangement for the Mutual Recognition of Surveying Qualifications (2007) Article 3.2 (a).
[624] ATPRS, 'ASEAN Tourism Curriculum and Qualifications Framework' (2018) <https://s3-ap-southeast-1.amazonaws.com/asean-asia/documents/RQFSRS_52_Quals_AtAGlance.pdf> [accessed 21 February 2021].

standards for each job title.[625] Instead of the PRA, there is the Tourism Professional Certification Board (TPCB), which is the government board and/or agency authorised by the government of each AEC member state primarily responsible for the assessment and certification of tourism professionals, in each country of origin.[626] The TPCBs are allowed to develop national standards and training programmes based on regional standards.[627] There is a two-step process for the tourism professionals who would like to work in other member states. Firstly, they have to complete the training programme and obtain the certification of tourism professional from the TPCB in their country of origin.[628] Secondly, they can apply for their jobs though the ASEAN Tourism Professional Registration System. This is a platform allowing direct communication between tourism professionals and potential employers in the countries of destination.[629] This website can be used as a job-matching platform between tourism professionals and their employers across the AEC.

In terms of the MNP, business visitors, intra-corporate transferees and contractual service suppliers are the three groups of persons who are allowed to move to provide services in other member states.[630] Member states are not bound to make commitments for all categories of natural persons in the MNP. According to the Schedule of Commitments attached to the MNP, the AEC member states tend to focus on the first two categories of persons, which are business visitors and intra-corporate transferees. All the AEC member states are committed to intra-corporate transferees. The AEC member states, except for Brunei Darussalam, Myanmar, and Singapore, are committed to business visitors. Only Vietnam, the Philippines, and Cambodia are committed to contractual service suppliers. The MNP facilitates the temporary movement of the three groups of persons performing in 11 main service sectors which are: business services, communication services, construction services, distribution services, educational services, environmental services, financial services, health-related services, tourism services, recreational services, and transport services.[631] There are sub-sectors for each service sector and there are 154 sub-sectors in total. However, the AEC member states are not bound to be committed in all sectors and sub-

[625] ASEAN Mutual Recognition Arrangement on Tourism Professional (2012) Article2.1.
[626] ASEAN Mutual Recognition Arrangement on Tourism Professional (2012) Article5.2.
[627] ATPRS (n 620) (2018).
[628] ASEAN Mutual Recognition Arrangement on Tourism Professional (2012) Article 2.13.
[629] ASEAN Tourism Professional Registration Website <https://www.atprs.org/?state=account> [accessed 21 February 2021].
[630] ASEAN Agreement on the Movement of Natural Persons (2012).
[631] ibid.

sectors.[632] According to the publication by the ASEAN Secretariat, the MNP was developed and inspired by the international rules of the General Agreement on Trade in Services (GATS) of the World Trade Organisation (WTO).[633] Specifically, the MNP also includes similar service sectors and sub-sectors as those in the GATS.

In terms of the degree of commitment, there is a methodology called the Hoekman Index for the evaluation. The Index specifies the value of commitment in each service sector from "value 1" to "value 0."[634] Referring to the Index, "value 1" means the fully liberalised service sectors in which the member state commits to all the sub-sectors, "value 0.5" means the service sectors in which the member state commits to, with restrictions, half of the sub-sectors, and "value 0" means the service sector in which the member state commits to none of the sub-sectors. In 2015, the study by Fukunaga and Ishido applied the same methodology to analyse the degree of commitment by the AEC member states to the MNP.[635] Table 4 below shows the degree of commitment in each service sector.

Table 4: AEC Commitments on MNP

Service Sectors	AEC Member States										
	Brunei	Cambodia	Indonesia	Laos	Malaysia	Myanmar	Philippines	Singapore	Thailand	Vietnam	**Average**
1.Business	0.50	0.50	0.21	0.30	0.45	0.23	0.35	0.50	0.27	0.30	**0.36**
2.Communication	0.50	0.50	0.73	0.38	0.33	0.40	0.48	0.50	0.35	0.40	**0.46**
3.Construction	0.50	0.50	1.00	0.50	0.50	0.50	0.50	0.50	0.50	0.50	**0.55**
4.Distribution	0.50	0.50	0.40	0.00	0.50	0.00	0.40	0.50	0.00	0.40	**0.32**
5.Education	0.50	0.50	0.50	0.50	0.50	0.50	0.10	0.50	0.50	0.40	**0.45**

[632] ASEAN Secretariat, 'ASEAN Integration in Services' (2015) Public Outreach and Civil Society Division.
[633] ibid.
[634] Bernard Hoekman, 'Assessing the General Agreement on Trade in Services' (1995) World Bank Discussion Paper No. 307.
[635] Yoshifumi Fukunaga and Hikari Ishido, 'Values and Limitations of the ASEAN Agreement on the Movement of Natural Persons' (2015) 1 (20) Economic Research Institute for ASEAN and East Asia Discussion Paper Series 1-103.

6.Environment	0.50	0.50	0.00	0.50	0.25	0.00	0.38	0.50	0.25	0.50	**0.36**
7.Financial	0.47	0.47	0.38	0.44	0.38	0.60	0.00	0.50	0.38	0.50	**0.36**
8.Health-related and Social	0.50	0.50	0.38	0.13	0.38	0.00	0.25	0.50	0.13	0.50	**0.33**
9.Travel-related	0.50	0.38	0.25	0.38	0.50	0.13	0.38	0.50	0.25	0.38	**0.36**
10.Recreation, Culture, Sport	0.50	0.50	0.10	0.00	0.30	0.00	0.30	0.50	0.20	0.20	**0.26**
11.Transport	0.50	0.50	0.33	0.39	0.19	0.11	0.56	0.47	0.17	0.29	**0.35**
Total	**0.50**	**0.49**	**0.39**	**0.32**	**0.39**	**0.17**	**0.33**	**0.50**	**0.30**	**0.40**	**0.38**

From the table, it can be seen that the majority of the AEC member states are not fully committed to any service sector. The "value 1" which refers to the commitment without restriction appears only in the case of the construction service in Indonesia. The top three service sectors among the AEC member states are the construction service, the communication service and the education service for which the average value of commitment in these service sectors is 0.55, 0.46 and 0.45, respectively. Additionally, the average value of commitment in general is only 0.38. This illustrates that the AEC member states tend to maintain restrictions on several service sectors and the average degree of commitment is quite low.

It can be seen that the AEC prioritises the movement of limited groups of skilled labour. In the case of the MRAs, there are only eight professions that are allowed to move. Additionally, the practitioners who would like to move under the MRAs might be required to obtain certification from regional registries, to meet the regional standards, and to face further assessment in the host member states. In the case of the MNP, the host member states have the discretion on the category of businesspersons and the degree of commitment in each service sector, specified in the Schedule of Commitments of each member state. Therefore, the persons who are allowed to move under the MRAs and the MNP can not rely only on the regional legal instrument. Nevertheless, they still have to respect the domestic rules and policies of the host member states. This illustrates that the MRAs and the MNP rely on the principle of non-interference among the member states. Although these AEC instruments share the positive goal of facilitating the migration of skilled labour, they still respect the

sovereignty of the AEC member states in determining their own degree of commitment in each instrument.

This current AEC legislation regarding permission to perform economic activities in the host member states is similar to the early legislation on the free movement of self-employed persons and service providers of the EEC to some extent. Specifically, the AEC and the early EEC frameworks (during the transitional period) adopted a sectoral approach which liberalised permission to perform economic activities, sector by sector. The liberalised service sectors can be categorised into different groups, depending on the level of liberalisation agreed by the member states. Additionally, the MRAs of the AEC and the sectoral directives of the early EEC liberalised five similar service sectors which are: architects, nurses, dentists, doctors, and tourism professionals.

Nevertheless, there are differences between AEC and EEC legislation. The first difference is the types of service sectors under the MNP of the AEC. While the 11 service sectors of the MNP are similar to the GATS, which is the international framework regarding trade in services with the commitment of the WTO, the EEC framework did not mainly develop from existing international law at that time. The possible reason is that there was no international law related to the movement of service providers during the 1960s which was the EEC transitional period. Specifically, the GATS was signed in 1994 and entered into force in January 1995. Therefore, the EEC designed its own types of service sectors that would be liberalised under its regional framework.

Another difference between AEC and EEC legislation is the right to perform economic activities after the conditions in the regional legislation have been met. In the case of the AEC, the persons under the first three groups of the MRAs may still face further restrictions in the host member states when the conditions in the AEC legislation have been met. The examples of further restrictions are extra examinations, assessments or other requirements which are imposed by the professional authority in the host member states. Only AEC labourers under the fourth group (tourism professionals) can directly apply for their jobs with potential employers in the host member states, after meeting the regional standards. It can be seen that the majority of labourers under the current AEC labour migration framework have to respect not only the regional legislation but also the domestic laws of the host member state. Additionally, the host member states in the AEC are allowed to treat other AEC labourers under the MRAs and the MNP differently from their own nationals performing the same economic activities. However, when the conditions in the EEC legislation were met, the host member states could not impose extra requirements for the

majority of labourers under the EEC free movement of persons framework. As seen in chapter 3, only EEC lawyers could face further limitations in the host member states. Specifically, host states might require lawyers from other states to be introduced to the presiding judge or the president of the relevant Bar as well as to work in conjunction with local lawyers. Therefore, the majority of persons moving under the early EEC framework faced fewer obstacles regarding permission to perform economic activities than those under the current AEC framework.

3.3 Permission to Reside

As discussed in the two previous chapters, the permission to reside is another obstacle to labour migration. The host countries could restrict the residence permit of foreigners both in terms of length of stay and geographical areas.[636] In other words, foreigners might obtain a short-term residence permit or a limited residency area in the host country. These might cause problems for foreigners regarding the renewal process and administrative fees in order to obtain or extend their residence permits. The issue regarding the permission to reside under the AEC framework is stated in the Consensus and the MNP.

According to the Consensus, migrant workers have the right to adequate or reasonable accommodation subject to the national laws, regulations and policies of the receiving state.[637] Additionally, the Consensus also stated that the receiving state will, in accordance with its national legislation, regulations, and policies, ensure that migrant workers are provided with adequate or reasonable accommodation.[638] As discussed in section 2 of this chapter, a migrant worker under the Consensus refers to "a person who is to be engaged or employed, is engaged or employed, or has recently been engaged or employed in a remunerated activity in a state of which he or she is not a national."[639] Therefore, persons under the MRAs and the MNP are considered to be migrant workers under the Consensus.

In terms of the MNP, Article 6 states that each member state shall set out in a schedule containing its commitments for the temporary stay in its territory of natural persons of other member states covered in Article 2, which are business visitors, intra-corporate

[636] Yue (n 575) (2011) 250-262.
[637] ASEAN Declaration on the Protection and Promotion of the Rights of the Migrant Workers (2007) Article8.
[638] ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (2017) Article 39.
[639] ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (2017) Article 3.

transferees and contractual service suppliers.[640] As discussed in the previous section, the member states are not bound to make commitments for all categories of natural persons in the MNP. According to the Schedule of Commitments attached to the MNP, all AEC countries are committed to intra-corporate transferees. The initial length of stay allowed for this natural person ranges from one month in Laos;[641] one year in Myanmar,[642] the Philippines,[643] and Thailand;[644] two years in Cambodia,[645] Indonesia,[646] and Singapore;[647] three years in Brunei Darussalam[648] and Vietnam;[649] and a maximum of ten years in Malaysia.[650] AEC member states, except for Brunei Darussalam, Myanmar, and Singapore, are committed to business visitors. The length of stay ranges from 30 days in Cambodia[651] and Laos,[652] 59 days in the Philippines,[653] 60 days in Indonesia,[654] and 90 days in Malaysia,[655] Thailand[656] and Vietnam.[657] Only Vietnam, the Philippines, and Cambodia are committed to contractual service suppliers, allowing for initial stays of 90 days,[658] one year,[659] and two years,[660] respectively.

It can be seen that the Consensus only requires the host member states to ensure that the migrant workers are provided with adequate or reasonable accommodation. It does not state the minimum length of stay or the geographical residency area of the migrant workers. In terms of the MNP, the member states have the discretion to set their own initial lengths of stay. Therefore, the minimum period for the residence permit of natural persons under the MNP can be varied among the AEC member states. Additionally, the Consensus keeps referring to the domestic legislation, regulations and policies of the host member states. This

---

[640] ASEAN Agreement on the Movement of Natural Persons (2012) Article 6.
[641] Lao's Schedule of MNP Commitments.
[642] Myanmar's Schedule of MNP Commitments.
[643] Philippines's Schedule of MNP Commitments.
[644] Thailand's Schedule of MNP Commitments.
[645] Cambodia's Schedule of MNP Commitments.
[646] Indonesia's Schedule of MNP Commitments.
[647] Singapore's Schedule of MNP Commitments.
[648] Brunei Darussalam's Schedule of MNP Commitments.
[649] Vietnam's Schedule of MNP Commitments.
[650] Malaysia's Schedule of MNP Commitments.
[651] Cambodia's Schedule of MNP Commitments.
[652] Laos's Schedule of MNP Commitments.
[653] Philippines' Schedule of MNP Commitments.
[654] Indonesia' Schedule of MNP Commitments.
[655] Malaysia's Schedule of MNP Commitments.
[656] Thailand's Schedule of MNP Commitments.
[657] Vietnam's Schedule of MNP Commitments.
[658] Vietnam's Schedule of MNP Commitments.
[659] Philippines' Schedule of MNP Commitments.
[660] Cambodia's Schedule of MNP Commitments.

could imply that AEC legislation does not prohibit the host member states from providing a short-term residence permit or limiting the residency area for migrant workers. It also does not prohibit the member states from requiring excessive documents or collecting administrative fees for the issuance or the renewal of the residence permit.

This is in contrast to the case of the EEC in that EEC legislation simplified the administrative process for EEC workers by reducing the documentation requirements for the residence permit to the identity document and the document that proved their status as workers,[661] self-employed persons[662] or service providers.[663] Additionally, it also stated that the residence permit was valid for the whole territory of the member state concerned.[664] In terms of administrative fees, EEC legislation stated that the resident permit must be issued and renewed free of charge or on payment of an amount not exceeding the fees charged for the issue of identity documents for nationals.[665] In terms of length of stay, the directive stated that self-employed persons should be issued with a residence permit valid for not less than five years and automatically renewable.[666] The service providers were entitled to a residence permit of equal duration to the period during which the services were provided.[667] In the case of workers, they were entitled to a residence permit with a duration at least equal to that of the work permit from the second transitional period.[668] In the final transitional period, workers were entitled to a residence permit for at least five years from the date of issue, which was automatically renewable.[669] It can be seen that EEC legislation had liberalised the rules regarding permission to reside in the member states on several issues including the administrative procedures, fees, and initial length of stay for the persons under the EEC free movement of persons framework.

---

[661] Directive of 16 August 1961 Article 3 (1) and 5 (2b); Directive 64/240 Article 7, Article 4 (2a), Article 3 (1), Article 4 (2b); Directive 68/360 Article 9, Article 6 (2a), Article 3 (1), Article 6 (2b).
[662] Directive 64/220 Article5; Directive 73/148 Article 6.
[663] Directive 64/220 Article5; Directive 73/148 Article 6.
[664] Directive of 16 August 1961 Article 5 (3); Directive 64/240 Article 5 (1a); Directive 68/360 Article 6 (1a); Directive 64/220 Article 4; Directive 73/148 Article 4.
[665] Directive of 16 August 1961 Article 6 (1); Directive 64/240 Article 7 (1); Directive 68/360 Article 9 (1); Directive 73/148 Article 7.
[666] Directive 64/220 Article 3 (1); Directive 73/148 Article 4.
[667] Directive 64/220 Article 3 (2); Directive 73/148 Article 4.
[668] Directive 64/240 Article 5 (1b).
[669] Regulation 1612/68 Article 6 (1).

3.4 Family Reunification

The issue regarding family members of migrant workers or service providers is another obstacle to labour migration. There are several concerns, including accommodation for the whole family,[670] education for the children[671] and employment of other family members[672] in the country of destination. The host member states might consider these family members to be an extra burden for states. Thus, there might be restrictive domestic rules and policies in the host state for family members. The issue regarding permission for labourers to reside under the AEC framework are stated in the Consensus.

As mentioned previously, the definition of migrant workers in the Consensus covers the skilled labourer under the current AEC framework. However, this Consensus does not provide the definition of family members of the migrant workers. Therefore, the scope of family members under the Consensus can be varied depending on the regulations and policies of the receiving states. This is in contrast to EEC legislation regarding the free movement of persons which had specified a clear scope of family members.

There are only two articles in the Consensus regarding family members of migrant workers. Article 8 stated that migrant workers may be visited by their family members for the purposes and length of time that the national legislation, regulations and policies of the receiving state may allow.[673] According to Article 44, member states will take into account the fundamental rights and dignity of migrant workers and family members already residing with them without undermining the application by the receiving states of their laws, regulations and policies.[674]

The two articles in the Consensus do not guarantee the right for migrant workers to be accompanied by family members. Instead, it only states that migrant workers "may be visited" by their family members. Such visits by family members are also subject to further conditions under the domestic laws of the state of destination. Therefore, family members might obtain a shorter permission to reside in the host member states compared to migrant workers. Where the domestic laws of the receiving states allow family members to

---

[670] Nongyao Nawarat, 'Education obstacles and family separation for children of migrant workers in Thailand: a case from Chiang Mai' (2018) 38 (4) Asia Pacific Journal of Education 489.
[671] K Kusakabe and R Pearson, 'Cross-border childcare strategies of Burmese migrant workers in Thailand' (2012) 20 (8) Gender, Place and Culture 960-978.
[672] N Rabibhadana and Y Hayami, 'Seeking haven and seeking jobs: Migrant workers' networks in two Thai locales' (2013) 2 (2) Southeast Asian Studies 243–283.
[673] ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (2017) Article 8.
[674] ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (2017) Article 44.

accompany migrant workers, the fundamental rights and dignity of family members will be taken into account. Nevertheless, the Consensus still states that the laws, regulations and policies of the receiving states shall not be undermined. Therefore, the domestic rules can be different among the member states not only in respect of the category of family members but also other domestic policies regarding the fundamental rights of these family members. This can imply that the family members of the skilled labourer who move under the current AEC framework may face different domestic rules regarding entry, stay, education, accommodation, and employment. Therefore, the obstacles to labour migration regarding family reunification remain in the current AEC framework. These obstacles could deter labour migration.[675] Moreover, these difficulties, such as the access to education, could separate children from their parents, when migrant workers decide not to bring their children with them to the host member states.[676] This is in contrast to the development of EEC legislation on the free movement of persons even in the first transitional period where there were provisions regarding a clear scope of family members,[677] access to proper housing,[678] entitlement to vocational training courses,[679] and the same conditions regarding permission to enter and reside as the worker on whom they were dependent.[680]

3.5 Working Conditions

As mentioned in the previous chapters, working conditions for foreigners are another concern for the host states. The receiving country might have restrictive domestic regulations which provide unfair treatment to foreign labourers. For example, they might be prohibited from joining professional organisations or trade unions.[681] Additionally, the host member states might not provide appropriate protection regarding payment of wages, decent working conditions or dismissal for foreigners performing economic activities in their territory.[682] The issues regarding working conditions are included in the Consensus.

---

[675] Nawarat (n 670) (2018) 498.
[676] ibid.
[677] Regulation 15/61 Article 11 (1).
[678] Regulation 15/61 Article 11 (3).
[679] Regulation 15/61 Article 15.
[680] Directive of 16 August 1961 Article 4.
[681] Ronald C Brown, 'ASEAN: Harmonizing Labor Standards for Global Integration' (2016) 33 (1) CLA Pacific Basin Law Journal 57.
[682] ibid 50-63.

In terms of remuneration and benefits, the Consensus states that migrant workers have a right to fair and appropriate remuneration and benefits in accordance with the laws, regulations, and policies of the receiving state.[683] Additionally, the receiving state will ensure that migrant workers are provided with fair and appropriate remuneration and other benefits in accordance with the applicable national legislation, regulations, and policies of the receiving state.[684]

In terms of the other working conditions, migrant workers have the right to fair treatment in the workplace[685] and the right to join trade unions and associations subject to the national laws, regulations and policies of the receiving state.[686] Moreover, the Consensus states that the receiving state will, in accordance with its applicable national legislation, regulations and policies, provide fair treatment to migrant workers in respect of: (a) working conditions, and remuneration, (b) occupational safety and health protection, (c) protection from violence and sexual harassment; and (d) gender and nationality in the workplace.[687]

In terms of dismissal, the receiving state will make every effort to issue authorisation for migrant workers to stay and engage in employment for at least the same period of time for which they are authorised to engage in the remunerated activity.[688] Where there is a termination of employment or a breach of an employment contract, migrant workers shall have the right to file a complaint or make a representation under the law relating to labour disputes in the receiving state.[689] If the decision on appeal is favourable to the migrant workers, they shall be entitled to any relief for loss of their rights arising from the employment contract.[690]

Additionally, the Consensus also provides the definition of fair treatment as: a just and reasonable treatment applied to migrant workers in the workplace with respect to working conditions, safety, and access to recourse in the event of employment subject to the prevailing national laws, regulations and policies of the receiving state.[691] It can be seen that the Consensus contains several provisions regarding the rights of migrant workers and obligations of the receiving state in terms of working conditions. This is similar to EEC

[683] ASEAN Declaration on the Protection and Promotion of the Rights of the Migrant Workers (2007) Article 8.
[684] ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (2017) Article 37.
[685] ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (2017) Article 15.
[686] ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (2017) Article 20.
[687] ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (2017) Article 40.
[688] ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (2017) Article 31.
[689] ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (2017) Article 19 (a).
[690] ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (2017) Article 19 (b).
[691] ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (2017) Article 7.

legislation on the free movement of workers which stated that EEC workers are entitled to the same protection and treatment as national workers in the host states regarding remuneration and dismissal from the first transitional period.[692] Additionally, they were entitled to the same social benefits and tax advantages as national workers from the third transitional period.[693]

3.6 Protection from Expulsion

Protection from expulsion is another obstacle to labour migration. The state of destination may not provide proper protection or assistance for foreigners who are subject to an expulsion order. Additionally, the receiving state might not provide a clear justification for the expulsion order or a way for foreigners to challenge such an order with the competent authority. The issues regarding protection from expulsion are stated in the Consensus.

In terms of justification of the expulsion order, there is no direct provision regarding the fair grounds for expelling migrant workers in the Consensus. However, there is only a general provision stating that receiving states shall promote fair and appropriate employment protection.[694] As the Consensus does not specify the scope of fair and appropriate grounds of an expulsion order, the grounds may be varied among the AEC member states. This is in contrast to the case of EEC legislation. To be specific, there was Directive 64/221 which allowed member states to expel EEC workers when justified only on the three grounds of public policy, public security, and public health.[695] The use of these grounds was restrictive because they cannot be invoked to service economic ends[696] and must be based exclusively on the personal conduct of the individual concerned.[697]

In terms of remedies for migrant workers who receive expulsion decisions from the host member states, the Consensus states that migrant workers have the right to file their grievances with the relevant authorities of the receiving states and seek assistance from their respective embassies, consulates, or missions located in the receiving states.[698] It can be seen that the Consensus requires the host member states to allow the migrant workers to challenge their expulsion order before the competent authority. This is similar to Directive 64/221

[692] Regulation 15/61 Article 8 (1).
[693] Regulation 1612/68 Article 7 (2).
[694] ASEAN Declaration on the Protection and Promotion of the Rights of the Migrant Workers (2007) Article 8.
[695] Directive 64/221 Article 2 (1).
[696] Directive No.64/221 Article 2 (2).
[697] Directive 64/221 Article 3 (1).
[698] ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (2017) Article 11.

which provided the right for workers, self-employed persons or service providers of the EEC who receive expulsion decisions to refer the case to a competent authority in the host state.[699]

Additionally, the Consensus also states that the receiving state will protect the employment rights of migrant workers during repatriation, including ensuring compliance with the applicable or relevant repatriation processes of the receiving state upon termination of the employment contract or work pass.[700] This provision by the Consensus requires the authorities in the member state to follow the repatriation process of each receiving state, but it does not specify a common repatriation process among the member states. This is in contrast to Directive 64/221 which clearly sets out the obligations of the host member states on the process of the expulsion order. EEC member states were obliged to officially notify the EEC worker and the notification must state the period of time allowed for leaving the territory.[701] It also specified the minimum for such time period, in general, not less than one month.[702] Additionally, such orders should not be executed by administrative authorities until an opinion had been obtained from a competent authority on appeal or review. [703]

4. Conclusion

This chapter illustrates that the AEC has made an effort to facilitate the movement of skilled labour through the MRAs, the MNP and the Consensus. However, several obstacles to labour migration still remain within the AEC framework.

In terms of access to the labour market, the AEC instruments require a simplified administrative procedure with reasonable fees for frontier formalities. However, entry visas may remain, and visa standards can be varied among the member states.

In terms of permission to perform economic activities, the current AEC framework prioritises skilled labourers. Nevertheless, these persons may be required to obtain certification from regional registries, and to face further assessment in the host member states.

---

[699] Directive 64/221 Article 9.
[700] ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (2017) Article 43.
[701] Directive 64/221 Article 7.
[702] ibid.
[703] Directive 64/221 Article 8, 9.

In terms of permission to reside, the host member states are only required to ensure adequate or reasonable accommodation. Nonetheless, it does not prohibit the host member states from providing a short-term residence permit or limiting the residency area.

In terms of family reunification, the AEC legislation does not provide the right for migrant workers to be accompanied by family members. Instead, it only states that migrant workers may be visited by their family members.

In terms of working conditions, the AEC legislation contains several provisions regarding the labour rights and obligations of receiving states in terms of working conditions, such as fair remuneration, decent working locations, and protection from dismissal.

In terms of protection from expulsion, there is protection regarding the remedies available for the persons who receive the expulsion order. However, there are no provisions regarding common grounds on the issuance of such order.

These remaining obstacles possibly result from several reasons.

The first reason is an attitude of cooperation among the AEC member states. As mentioned previously, AEC legislation is based on the principle of non-interference. Thus, it tends to respect sovereignty and highly avoids an intrusion into the internal affairs of the member states.

The second reason is that some of AEC instruments have been developed from existing international law. For instance, the Consensus was developed from UDHR, CEDAW, and CRC.[704] The MNP also shared similarities with the GATS of the WTO. Relying on international law could be another reason why these AEC instruments only call for minimum cooperation and leave many issues to the discretion of the member states.

The third reason is the approach of labour liberalisation. It can be seen from this chapter that the AEC has adopted a sectoral approach. Similar to the approach of the early EEC, the AEC liberalises permission to perform economic activities, sector by sector. However, the sectoral approach by the AEC is different from the EEC to some extent. When the conditions in the EEC instruments were met (i.e., length of experience, evidence of qualifications, or length of training), host states could not impose extra requirements on the persons who moved under the EEC framework.[705] However, most of persons under the

[704] ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (2017) Preamble.
[705] See Chapter 3 – Section 3.2: Except for the case of lawyers.

MRAs of the AEC could still face further restrictions set by local authorities in host member states.[706]

[706] Interview with Prasert Tapaneeyangkul, Secretary-General, Council of Engineers Thailand (Bangkok, Thailand, 8 July 2020) and Kanithaaryn Phongkasetchai, Head of Foreign Affairs Department, Council of Engineers Thailand (Bangkok, Thailand, 9 July 2020): This research interviewed the representatives from Council of Engineering in Thailand. The MRA on engineering services was signed in 2005. However, as of March 2020, there are only 15 engineers who have moved under the MRA [Brunei (0), Cambodia (0), Indonesia (0), Laos (0), Malaysia (7), Myanmar (7), the Philippines (0), Singapore (1), Thailand (0), Viet Nam (0)]. The representatives of the Council of Engineers reported that there are numerous steps for the engineers to complete under the MRAs. Additionally, the permission to work in the host member states may not incentivize the movement of AEC engineers. Specifically, the MRA requires these engineers to work only in collaboration with designated professional engineers in the host member states, not in independent practice. Moreover, it also took a long period of time for the member states such as Thailand to prepare for AEC engineers. In Thailand, civil engineering had been a prohibited occupation for foreigners since 1973 by the 1973 Supplement Decree on Prohibited Occupations for Foreigners and the 1979 Royal Decree on Prohibited Occupation for foreign workers. The reason for this prohibition is that civil engineering is related to the basic public utilities of the country which tend to be considered as a megaproject or large-scale project. Thus, reserving civil engineering professions for Thai engineers is a good way to support the domestic supply chain and national income. Moreover, civil engineering concerns long-term public safety, health, well-being, property and environment. This prohibition has just been relaxed since 21 April 2020. One of the reasons for the delay is that the officials in the Council of Engineers tend to be conservative. Additionally, this approval has to be made by a majority vote of the General Meeting of the Council which is conducted only once a year. Apart from the approval by the Council, the Council also has to prepare for the registration process and the application process of the AEC engineers.

CHAPTER 5. Bilateral Approach on Low-skilled Labour supplementing Regional Labour Migration Framework in the ASEAN Economic Community

1. Introduction

To begin with, labour migration could be considered to be a basic condition for economic progress.[707] From the experiences of the EEC, the free movement of persons was one of the key requirements for the creation of the European Common Market.[708] As discussed in chapters 2 and 3, EEC legislation on the free movement of persons gradually abolished the obstacles to labour migration within the regional context in order to facilitate the free movement of workers, self-employed persons and service providers within the EEC member states. Before the introduction of such regional or multilateral systems, the usual management of labour migration in the western European countries were in the form of bilateral agreements.[709] In other words, the method of transferring labour from one country to another was commonly conducted by means of an agreement between the two countries concerned.[710] This agreement confirmed the principles of the Migration for Employment Convention No. 97 and Recommendation No. 86 adopted by the International Labour Organisation (ILO) in 1949. According to these principles, bilateral agreement was suggested as a model for cooperation between the sending and receiving states to facilitate the movement of migrants for employment purposes.[711] From the experiences of labour migration in Europe, these bilateral labour migration agreements could be categorised into two types.

The first type was the reciprocal bilateral agreement. When this type of agreement was made, both parties to the agreement were considered to be the sending and receiving countries.[712] This type of agreement was intended to encourage the movement of labour

[707] Lannes (n 38) (1956) 1.
[708] Lewis (n 31) (1954) 139; Molle (n 72) (1988) 68-69; Molle (n 70) (1991) 12-14; Barnard (n 10) (2016) 203.
[709] Lannes (n 80) (1959) 183.
[710] ibid.
[711] Migration for Employment Convention (Revised) (No. 97) and Migration for Employment Recommendation (Revised) (No. 86) (1949).
[712] Interview with Professor Kees Groenendijk, Professor of Sociology and Migration Law, Radboud University (Nijmegen, Netherlands, 27 March 2020) and Professor Herwig Verschueren, Professor of International and

between the two countries. An example of this reciprocal agreement was the bilateral agreement between Belgium and France.[713] In 1949, a bilateral agreement was provided that Belgian and French nationals could travel between the two countries on the presentation of only a national passport or an identity card issued by the home state.[714] Consequently, another bilateral agreement between Belgium and France was adopted in 1952.[715] Both countries agreed to issue, free of charge, a residence permit for national workers from the other country.[716] The scope of the application of this agreement also extended to the spouses and under-aged children accompanying the workers to the receiving country.[717] It can be concluded that these two agreements shared the objectives of facilitating the movement of workers between the two countries and reducing the cost of providing labour from one country to another.

This first type of bilateral agreement is based on the concept of reciprocity. This can be seen from the wording in the bilateral agreement itself. For instance, the 1952 agreement stated that "the French authorities would be prepared, on the basis of reciprocity, to take the necessary action to issue, free of charge, the residence visas required by Belgian nationals authorised to work in France as wage-earners."[718] This can also be seen from the results of the agreement which provided mutual advantages to both parties.[719] According to the literature on international relations theory, reciprocity refers to exchanges of roughly equivalent values in which the actions of each party are contingent on the prior actions of the other.[720] To be specific, reciprocity requires bilateral balancing between two particular parties.[721] The concept of reciprocity is often invoked as an appropriate means of achieving

---

European Labour and Social Security Law, University of Antwerp (Antwerp, Belgium, 3 April 2020); Lannes (n 80) (1959) 175.

[713] Groenendijk (n 712) (2020).

[714] United Nations Treaty Series Vol. 30, Agreement No. 447, Agreement between Belgium and France designed to Facilitate the Movement of Persons (April 1949) Page 45-51. <https://treaties.un.org/doc/Publication/UNTS/Volume%2030/v30.pdf> [accessed 2 March 2021].

[715] United Nations Treaty Series Vol. 160, Agreement No. 2110, Agreement between Belgium and France for the Issue Free of Charge of a Temporary Residence Visa to Wage-Earners, (October and November 1952) Page 261-265.
<https://treaties.un.org/doc/Publication/UNTS/Volume%20160/v160.pdf> [accessed 2 March 2021].

[716] ibid.

[717] ibid.

[718] Agreement No. 2110 (n 715) (1952) Page 261; "…The Belgian Government, for its part, would issue free of charge a temporary residence visa to French nationals authorized to work in Belgium as wage-earners as soon as the French authorities enter into a similar engagement in respect of Belgian wage-earners…"

[719] Lannes (n 80) (1959) 175, 185.

[720] Robert O Keohane, 'Reciprocity in International Relations' (1986) 40 (1) International Organization 8; Carolyn Rhodes, 'Reciprocity in trade: the utility of a bargaining strategy' (1989) 43 (2) International Organization 276.

[721] ibid.

cooperation in international politics.[722] In addition, such concept of reciprocity can foster cooperation between sovereign states.[723] This research interviewed legal experts in the field of European labour migration. From the interviews, it is evident that this reciprocal agreement reflects the equal status of both parties involved in the bilateral agreement.[724] They also agreed that the concept of reciprocity is an important characteristic of the bilateral agreement, which could possibly have been a model for the framework of free movement of workers in the EEC because the EEC framework was reciprocal among the member states.[725] Therefore, the bilateral agreement that falls into this first type could be developed further to become a multilateral agreement or regional framework for facilitating the movement of persons within several states.

The second type of bilateral agreement was the one-sided agreement.[726] It provided for the movement of labour in only one direction. One country would be considered the receiving country, while the other would be considered the sending country. In general, this agreement was caused by labour shortages in the country of destination and labour surpluses in the country of origin.[727] An example of this one-sided agreement is the guest-worker agreement that was in place between Germany and Italy. From the mid-1950s, the rapid industrialisation of Germany led to a shortage of workers in the manufacturing and agricultural sectors in the country.[728] Simultaneously, Italy had issues with overpopulation and unemployment.[729] Therefore, Germany and Italy signed the guest-workers agreement with Italy in 1955.[730] This bilateral agreement between Germany and Italy resulted in groups of Italian low-skilled workers temporarily working in the manufacturing and agricultural sectors in Germany.[731]

---

[722] ibid 1-2.
[723] Robert Axelord, *The Evolution of Cooperation* (Basic Books 1984) 136-140.
[724] Groenendijk (n 712) (2020); Verschueren (n 712) (2020).
[725] ibid.
[726] Lannes (n 80) (1959) 175; Groenendijk (n 712) (2020); Verschueren (n 712) (2020).
[727] ibid.
[728] Horst Reimann and Helga Reimann, 'Labour-Importing Countries: Germany' in Ronald E Krane (ed), *International Labour Migration in Europe* (Prager Publishers 1979) 64-65.
[729] Federico Romero, 'Migration as an Issue in the European Interdependence and Integration: the Case of Italy in Alan S Milward (ed), *The Frontier of National Sovereignty History and Theory 1945-1992* (Routledge 1994) 35-36.
[730] Vereinbarung zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Italienischen Republik über die Anwerbung und Vermittlung von italienischen Arbeitskräften nach der Bundesrepublik Deutschland [Agreement Between the Government of the Federal Republic of Germany and the Government of the Italian Republic on the Recruitment and Placement of Italian Workers in the Federal Republic of Germany] (December 1955).
[731] Barbara Schmitter, 'Sending States and Immigrant Minorities—the Case of Italy' (1984) Comparative Studies in Society and History 26 (3) 325-334; Reimann and Reimann (n 728) (1979) 81; The term "guest

This one-sided bilateral agreement has been viewed by authors and legal experts as a non-reciprocal agreement. Horst Reimann and Helga Reimann commented in their literature that this kind of bilateral agreement depended on a demand and labour market situation in the country of destination.[732] Romero mentioned in his literature that when the demand was very high, the economic priorities of the receiving countries would occasionally coincide with the needs of the sending countries, but the agreement did not assure any reversible rights to the latter.[733] He pointed out that such unbalanced guest-worker agreements did not always fulfil Italy's need for sending unemployed workers abroad.[734] Professor Groenendijk and Professor Verschueren viewed the one-sided bilateral agreements, such as the guest-worker agreement, as lacking reciprocal characteristics and could only be seen as a temporary solution for labour shortage in the receiving country.[735] Thus, it could not be a potential model for the EEC regional framework on the free movement of persons.

As discussed in the preceding chapters, the AEC aims to create a single market with a flow of goods, services, skilled labour and capital.[736] In terms of labour, the current AEC labour migration framework only covers the movement of selected professions under the MRAs[737] and businesspersons of selected service sectors under the MNP.[738] While the AEC mainly focuses on facilitating the free mobilising of high-skilled labour, it does not have any current regional plans to facilitate the movement of low-skilled labour. Nevertheless, Thailand, being the most preferred destination of low-skilled AEC labour,[739] has entered into bilateral agreements on low-skilled workers with other four AEC member states, namely Myanmar, Laos, Cambodia and Vietnam, to supplement the regional labour migration framework.

As mentioned in the first chapter, this research also aims to prove the hypothesis of the new regionalism theory that following only the standards in international law might not

---

workers (Gastarbeiter)" which was given to these migrant workers implies the attitude of German government towards migrant workers. The migrant workers were presumed to be only "guests" or to temporary stay in the country.

[732] Reimann and Reimann (n 728) (1979) 81.

[733] Romero (n 729) (1994) 41.

[734] ibid.

[735] ibid.

[736] ASEAN Charter (2007) Article 5; AEC Blueprint 2015 (January 2008) [4].

[737] See Chapter 4 - Section 3.2: there are eight Mutual Recognition Arrangements in the AEC on the movement of engineers (2005), nurses (2006), architects (2007), surveyors (2007), dentists (2009), doctors (2009), accountants (2012), and tourism professionals (2012).

[738] Agreement on Movement of Natural Persons (2012) Article 3; The MNP covers the movement of business visitors, intra-corporate transferees, and contractual service suppliers in selected service sectors who temporarily move to perform their economic activities in other ASEAN member states.

[739] ILO (n 7) (2015); ILO (n 7) (2020).

be a suitable technique for a regional economic association to achieve regionalism, especially on the issue of intra-regional labour migration. Therefore, this chapter examines other possible foundations of regional cooperation on labour migration, apart from international law. As mentioned previously, the AEC labour migration regime does not cover the movement of low-skilled labour. Instead, there are bilateral agreements between Thailand and the four AEC member states on the movement of low-skilled labour. Accordingly, this chapter aims to examine whether these domestic efforts among the five AEC member states can promote regionalism on a bottom-up basis via bilateralism. Specifically, this chapter aims to understand whether such bilateral agreements could become a potential model for the AEC framework on the movement of low-skilled labour, considering the European experiences and the concept of reciprocity, as discussed above.

This chapter begins with the development of the management of low-skilled migrant workers between Thailand and its neighbouring countries. It outlines Thailand's unilateral approach to dealing with low-skilled migrant workers before the adoption of the bilateral agreements. Then, this chapter continues to examine the mechanisms resulting from the bilateral agreements between Thailand and other four AEC member states, namely, Myanmar, Laos, Cambodia and Vietnam. The two main mechanisms discussed in this chapter are the nationality verification process and the legal recruitment channel. Consequently, the chapter aims to summarise whether these bilateral labour migration agreements between Thailand and other AEC countries could form the foundation for regional regimes, in the case of low-skilled labour migration within the AEC.

2. Management of Low-skilled Migrant Workers in Thailand Before the Bilateral Agreements

Thailand's unilateral approach to dealing with the movement of low-skilled migrant workers is examined in relation to three AEC countries: Myanmar, Laos and Cambodia.[740] Beginning with an overview of the Thai legal system to provide the background knowledge on the sources and the hierarchy of the domestic laws, this section of the chapter then

[740] The reason that Vietnam was not included in this section is because management of low-skilled migrant workers in Thailand before the bilateral agreements only covered the migrants from the three main countries of origin (Myanmar, Laos and Cambodia). Vietnam has just cooperated with Thailand regarding the movement of low-skilled labour in the form of bilateral agreement since 2015.

examines the management of low-skilled migrant workers in Thailand prior to the adoption of the bilateral agreements. The management can be divided into two specific phases, the first of which ran from 1972 to 1991 and marked the time when low-skilled migrant workers were subject to strict controls. Meanwhile, the second phase, which ran from 1992 to 2001, was a time when Thailand loosened its control over these groups of workers.

2.1 Overview of Thai Legal System

The legal system in Thailand is based on the civil law system, so the written law serves as the primary source of law.[741] In Thailand, there are three main hierarchies of written law. The first hierarchy is the Constitution which is the supreme law of the state. Any provisions of law which are contrary to the Constitution are unenforceable.[742]

The second hierarchy consists of acts, codes, and decrees. In general, the legislative branch which is the National Assembly of Thailand enacts acts and codes such as the 1950 Immigration Act, the 1978 Working of Alien Act, and the 1979 Immigration Act. In an emergency circumstance, the executive branch (the Council of Ministers) is allowed to issue emergency decrees, which have the same level of force as acts and codes, for the purpose of maintaining national economic security, national or public safety or averting a public calamity. However, the emergency decree has to be submitted to the National Assembly for consideration without delay. If the National Assembly rejects the emergency decree, it will lapse, but the rejection will not affect any act that had already been implemented during the enforcement of the emergency decree.[743] In terms of low-skilled migrant workers, the government of Thailand has raised the purpose of maintaining national economic security to enact the Emergency Decree on Recruitment of Foreigners in 2016 and the Foreigners' Working Management Emergency Decree in 2017.

However, during a certain period of time in Thailand, the military was in charge of the executive branch due to a coup d'etat. This military government had the authority to announce the laws in the second hierarchy without the approval of the legislative branch. For instance, the military government announced the 1972 Declaration of the Revolutionary Party No. 322 to register foreign workers in Thailand.

---

[741] Somyod Chuathai, *Introduction to Law and Legal Systems,* (24th edn Winyuchon 2018).
[742] ibid.
[743] ibid.

The third hierarchy is the subordinate legislation which consists of the supplement decrees, the ministerial regulations, and the notifications of ministry. The laws at this level are enacted by the executive branch in order to provide further details for the laws in the second hierarchy or to provide guidance for the related officials or individuals.[744] In terms of migrant workers, the 1979 Supplement Decree which prescribed the list of occupations prohibited for migrant workers was enacted to provide further details for the 1978 Working of Alien Act. Additionally, following the announcement of the Cabinet's resolutions regarding low-skilled migrant workers in Thailand, the related ministries, such as the Ministry of Interior, published ministerial regulations and notifications by ministries to provide detailed guidance and rules for the related officials and migrant workers and their employers in order to pursue the purpose of each cabinet resolution.

2.2 First Phase: 1972-1991: Strict Controls Towards Low-skilled Migrant Workers

Before December 1972, there had not been any employment law that specifically controlled migrant workers in Thailand. Migrant workers had been subject only to the 1950 Immigration Act. Thereby, migrant workers who entered the country with travel documents and through the legal immigration channels,[745] had been allowed to perform any occupation in Thailand without the requirement of work permits.

In 1972, the first employment law was the 1972 Declaration of the Revolutionary Party No. 322, which was adopted to control the employment of migrant workers. The Thai government was concerned that the job opportunities for nationals would be reduced by allowing migrant workers to work freely in the country.[746] Therefore, this employment law required migrant workers to register for a work permit.[747] In the following year, the 1973 Supplement Decree prohibited 39 occupations for foreigners, including being a labourer which is a low-skilled job.[748] Violations of the law resulted in criminal sanctions on unregistered migrant workers and their employers, including criminal fines and

[744] Chiranit Havanond, *Administrative Law: General Principles* (8th edn, Thai Bar Association Press) 99-100.
[745] Immigration Act, Thailand (1950) Article 15 (1).
[746] Declaration of the Revolutionary Party No. 322, Thailand (1972) Preamble.
[747] ibid Article 26 and 30.
[748] Decree on Prohibited Occupations for Foreigners, Thailand (1973).

imprisonment.[749] Then, the 1978 Working of Alien Act and the 1979 Supplement Decree replaced the previous employment laws. The main contents of the former laws remained, in that migrant workers were still prohibited from registering as labourers. However, the criminal penalties were significantly increased. Specifically, the maximum criminal fine was increased a hundredfold for the workers and tenfold for their employers.[750] In 1979, the Immigration Act was revised. It specified that migrant workers who entered the country to perform low-skilled jobs were subject to expulsion.[751] It also criminalised persons who harboured or assisted these low-skilled migrants.[752]

It can be seen that the domestic laws in Thailand in the first phase tended to be strict towards low-skilled migrant workers. There was no legal employment channel for low-skilled migrant workers in Thailand. These workers were prohibited from registering for work permits from 1972 and from entering the country from 1979. Additionally, an increase in the criminal fine was inconsistent with an increase in the minimum wage during that period of time.[753] Instead, such an extreme rise in the criminal fine illustrated the government's purpose of using this high criminal penalty to deter the employment of low-skilled migrant workers in Thailand.

2.3 Second Phase: 1992-2001: Controls Loosened Towards Low-skilled Migrant Workers

The Thai economy has developed since 1990 due to investments from Singapore, Japan, and Western countries.[754] Specifically, Thailand adopted the dual economy system,

---

[749] Declaration of the Revolutionary Party No. 322, Thailand (1972) Article 26, 30; Unregistered migrant workers were liable to a maximum criminal fine of 1,000 Baht (about 25 GBP). Employers who employed unregistered workers would be liable to a criminal fine of 6,000 Baht (about 150 GBP) or imprisonment of 3 years or both.

[750] Working of Alien Act, Thailand (1978) Article 22, 33, 39. Unregistered migrant workers were liable to a criminal fine of 2,000-100,000 Baht (about 50-2,500 GBP) or a maximum of 5-year imprisonment or both. Employers who employed unregistered workers would be liable to a criminal fine of 60,000 Baht (about 1,500 GBP) or maximum imprisonment of 3 years or both.

[751] Immigration Act, Thailand (1979) Article 12 (3) and 29.

[752] ibid Article 64.

[753] Notification of the Ministry of Interior, Thailand Regarding the Minimum Wage Rate (14 February 1972); minimum wage rate was 12 Baht per day (360 Baht per month). Notification of the Ministry of Interior Regarding the Minimum Wage Rate (30 August 1978); minimum wage rate was 35 Baht per day (1,050 Baht per month). Therefore, the minimum wage rate was three-time increased from 1972 to 1978.

[754] Srawooth Paitoonpong, 'Different Stream, Different Needs, and Impact: Managing International Labor Migration in ASEAN: Thailand (Immigration)' (2011) Philippine Institute for Development Studies Discussion Paper Series No. 2011-28.

which involved a capitalist-based industrial sector and a labour-intensive sector.[755] This resulted in an increased demand for low-skilled workers in several sectors including manufacturing, construction, fishery and agriculture.[756] However, these low-skilled jobs, which tend to be dirty, dangerous and difficult, have become undesirable to Thai nationals.[757] During the same period of time, internal conflicts occurred as a result of political uncertainty and high unemployment rates in the three neighbouring countries, namely, Myanmar, Laos and Cambodia.[758] Although the low-skilled migrant workers were prohibited from working legally in Thailand, many of them unlawfully entered the country through natural borders or overstayed their visas so as to seek their job opportunities.[759] Many Thai employers and industries were dependent on these illegal low-skilled migrant workers to maintain their businesses.[760]

In response, the Thai government implemented an exception under the immigration law, which stated that the Council of Ministers was authorised to permit any foreigners to enter and remain in Thailand under certain conditions.[761] Since 1992, the Thai government had announced a series of cabinet resolutions, approved by the Council of Ministers, to allow low-skilled migrant workers from neighbouring countries to temporarily work as labourers in the country.[762] The following table shows detailed information regarding the cabinet resolutions and low-skilled migrant workers in Thailand from 1992 to 2001.

Table 5: Low-skilled Migrant Workers (Before the Bilateral Agreements)

Cabinet Resolution (Year)	Working Area (Provinces: Total of 77)	Length of Work Permit (Years)	Number of Low-skilled Migrant Workers (Myanmar, Laos and Cambodia)
1992	9	1	1,286 (only from Myanmar)

[755] Kiriya Kulkonkarn, *Management of Foreign Workers in Thailand and other Countries* (Thailand Research Fund 2014) 14.
[756] Yongyuth Chalanwong, *The study of an effective demand for and management of Alien Workers in Agriculture, Fisheries and Related sectors and Construction Sectors* (2008 Development Research Institute of Thailand) 6-16.
[757] Kulkonkarn (n 755) (2014)12-14, Supachai Srisuchart and Kaewkwan Tangtipongkul, *Management of Foreign Workers in Thailand,* (Ministry of Labour 2015) 15.
[758] Kulkonkarn (n 755) (2014) 14.
[759] ibid.
[760] ibid.
[761] Immigration Act, Thailand (1979) Article 17.
[762] Government of Thailand, Cabinet Resolution (March 1992, June 1996, April 1998, March 1999, March 2000, April 2001).

1996	43	1	293,654
1998	54	1	90,911
1999	37	1	99,974
2000	37	1	99,656
2001	77	1	568,249

From Table 5, it can be seen that the number of low-skilled migrant workers in 1992 was low. The reason for this low number was that the first cabinet resolution in 1992 was limited in terms of both the country of origin and the working area. To be specific, the 1992 cabinet resolution only allowed low-skilled migrants from Myanmar to work as labourers in 9 provinces. In 1996, the government extended the scope of the cabinet resolution. It allowed low-skilled migrant labourers from Myanmar, Laos and Cambodia to work in 43 provinces.[763] Therefore, the number of registered low-skilled migrant workers was significantly increased to 256,492.

As seen from Table 5, there was no cabinet resolution on registration of low-skilled workers in 1997 due to an economic crisis in Thailand. In that year, there were mass layoffs, a significant devaluation of Thai currency[764] and a fall in the stock market.[765] In August 1997, the International Monetary Fund provided a rescue package with conditions on improving banking and other policies.[766] In response, the Thai government recapitalised its financial institutions and improved banking regulations. Regarding workers, the Thai government decided to no longer issue or extend work permits for low-skilled migrant workers in order to secure the availability of jobs for Thai nationals.[767] However, the number of Thai nationals who were interested in the available low-skilled jobs was still low and could not fulfil the demand from employers.[768] In 1997, research sponsored by the Thailand Research Fund interviewed 47 officers in the provincial employment offices, 23 officers in the provincial chamber of commerce, 39 members of the House of Representatives and 27 senators in

[763] Notification of the Ministry of Labour and National Service on Regarding the Occupations Allowed to the Migrant Workers (29 August 1996).
[764] Shalendra Sharma, 'Beyond the IMF Medicine: Thailand's Response to the 1997 Financial Crisis' (2002) 5 (1) International Area Review 27.
[765] ibid; Lukas Menkhoff and Chodechai Suwanaporn, '10 Years after the crisis: Thailand's financial system reform' (2007) 18 (1) Journal of Asian Economics 4.
[766] ibid.
[767] Kulkonkarn (n 755) (2014) 37; Srisuchart and Tangtipongkul (n 757) (2015) 16.
[768] ibid.

Thailand. The majority agreed that hiring low-skilled migrants could solve the economic crisis by reducing the low-skilled labour shortage in the country.[769]

With pressure from several sectors including entrepreneurs, the Chamber of Commerce and Board of Trade, the Thai Bankers' Association, and the Federation of Thai Industries,[770] the Thai government decided to reopen the domestic labour market to low-skilled workers from Myanmar, Laos, and Cambodia. In 1998, the government announced another cabinet resolution that would allow low-skilled migrant workers from the three neighbouring countries to register for work permits. The number of registered migrant workers was 90,911 in 1998 and remained constant for the following two years. Then, in 2001, the government revised the policy and allowed low-skilled migrant workers to register as labourers in all 77 provinces of Thailand. This resulted in a significant increase in the number of migrant workers registered in the system – rising to 568,249.

It can be seen that the management of low-skilled migrant workers in Thailand before the bilateral agreement was critiqued and was viewed as being less effective. The policy had a temporary nature. Specifically, a yearly announcement of cabinet resolutions could cause confusion for migrant workers and their employers.[771] According to the research performed by Mahidol University in 1997, there were about one million unregistered low-skilled migrant workers in Thailand, including around 970,000 migrants who had unlawfully entered the country for employment purposes, and about 100,000 workers who had overstayed their visas to work illegally in the country.[772] However, the number of registered migrant workers from 1997 to 2001, as seen from Table 5, was much lower than the approximate number of unregistered migrant workers. These unregistered migrant workers were at risk of trafficking in persons which involved defective working conditions, low wages and use of violence in the workplace.[773]

It is clear that Thailand's unilateral approach to dealing with the movement of low-skilled migrant workers took the form of an exceptional measure. For almost ten years during

---

[769] Pisawat Sukonthapan and Patamaporn Busapathamrong, *The Study of Related Laws on Employment of Foreign Workers* (Thailand Research Fund 1997) 97-98.
[770] Kritaya Archavanitkul and Kulapa Vajanasara, *Employment of migrant workers under the Working of Alien Act 2008 and the list of occupations allowed to foreigners* (IPSR, Mahidol University Thailand 2009).
[771] Department of Employment, *Research Report of the Implementation of the Management of Foreign Workers from Myanmar, Lao, Cambodia under the 2007 Cabinet Resolution* (Ministry of Labour 2007) 99.
[772] Kritaya Archavanitkul, Wanna Charusomboon, and Anchalee Varangrathna, *Complexities and Confusions on Migrants in Thailand* (IPSR, Mahidol University Thailand 1997).
[773] Department of Employment (n 771) (2007) 92-93; Nitipoom Navaratna and others, *The Study of Protection of Migrant Workers in Thailand and Solutions* (Graduate School of Public Administration, Burapha University Thailand 2011) 2-3.

the second phase, the executive branch constantly implemented exceptions under domestic law to issue several short-term cabinet resolutions to allow low-skilled workers from the three neighbouring countries to work in the country. This unique measure allowed for promptly responding to the changing situation, with the government able to announce the cabinet's motion to control the migrant workers without consultation with the legislative branch. However, the measure also had negative effects due to its intrinsic instability. In short, the unstable domestic rules could confuse both the employers and the workers. Table 5 shows how the working area of low-skilled migrant workers varied depending on the ad hoc cabinet resolution issued in that year. The working area was extended from 43 provinces in 1996 to 54 provinces in 1998. However, it was then limited to 37 provinces in 1999 and 2000. Moreover, an exceptional measure may not have been particularly well thought out. As was seen during the 1997 economic crisis, the government abruptly shut down the labour market for low-skilled migrant workers in order to secure jobs for Thai nationals. However, the low-skilled jobs were undesirable to the Thai nationals and the demand for low-skilled migrant workers remained high. As such, the instant decision based on the exceptional measure was proven to be a mistake, and the government was forced to reverse its decision.

3. Bilateral Agreements Between Thailand and Neighbouring Countries on Low-skilled Migrant Workers

3.1 Rationale and Background

In 1999, the Thai government hosted an international symposium entitled "Towards Regional Cooperation on Irregular and Undocumented Migration." Representatives from the ten member states of the AEC joined this symposium. It stressed the importance of migration control and the urgent need to tackle irregular migration and trafficking in persons.[774] The symposium resulted in the ASEAN Declaration on Irregular Migration, which called for international, regional, or bilateral cooperation[775] to resolve the problem of illegal

[774] United Nations Action for Cooperation against Trafficking in Persons, 'International Symposium on Migration' (1999) <https://www.iom.int/sites/default/files/jahia/webdav/site/myjahiasite/shared/shared/mainsite/policy_and_research/rcp/APC/BANGKOK_DECLARATION.pdf> [accessed 2 March 2021].
[775] ASEAN Declaration on Irregular Migration (1999).

employment and trafficking in persons.[776] The ASEAN Declaration inspired bilateral agreements between Thailand and its neighbouring countries on the movement of low-skilled migrant workers.[777]

Thailand and other AEC countries decided to use a Memorandum of Understanding (MOU) as a form of bilateral agreement. An MOU is a non-binding mechanism, working as an executive agreement between countries, and it tends to clarify a purpose for a common line of action, instead of setting out legal commitments.[778] Specifically, an MOU records selected matters between the states in written form but it does not create a legal commitment under international law.[779] In the early 2000s, Thailand initially signed MOUs regarding bilateral cooperation on the movement of low-skilled migrant workers with Laos in October 2002,[780] Cambodia in May 2003,[781] and Myanmar in June 2003.[782] A later MOU was signed with Vietnam in 2015.[783] The MOUs shared similar purposes, setting out systematic measures on labour migration, especially for low-skilled migrant workers who were at risk of exploitation.

Since the three MOUs were signed in the early 2000s, there have been improvements in labour migration policies and administrative procedures in the participating countries, especially Thailand, which is the main country of destination for low-skilled migrant workers in the AEC.[784] Specifically, two main mechanisms have been introduced. The first mechanism is the nationality verification process (NV process) which regularises irregular migrant workers who had worked and resided in Thailand. The second mechanism is the

---

[776] ibid.
[777] Bongkot Napaumporn, *Analysis of Nationality Verification of Migrant Workers in Thailand* (Thesis M.A. Human Rights, Mahidol University Thailand 2012); ILO Regional Office for Asia and Pacific, *Review of the effectiveness of the MOUs in managing labour migration between Thailand and neighbouring countries* (GMS Triangle Project 2015).
[778] Robert Jennings and Arthur Watts, *Oppenheim's International Law* (9th edn Longman 1992) 1202.
[779] ibid.
[780] Memorandum of Understanding between the Royal Thai Government and the Government of Lao PDR on employment cooperation (18 October 2002) <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/genericdocument/wcms_160929.pdf> [accessed 2 March 2021].
[781] Memorandum of Understanding between Cambodia and Thailand on cooperation in the employment of workers (31 May 2003) <https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=93356&p_country=THA&p_count=441&p_classification=17&p_classcount=59> [accessed 2 March 2021].
[782] Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the Union of Myanmar on cooperation in the employment of workers (21 June 2003) <https://www.ilo.org/asia/info/WCMS_160932/lang--en/index.htm> [accessed 2 March 2021].
[783] Memorandum of Understanding between the Government of the Socialist Republic of Viet Nam and the Government of the Kingdom of Thailand on Labour Cooperation (23 July 2015) <https://icb2.mol.go.th/wp-content/uploads/sites/10/2020/06/MOU-Viet-Nam.pdf> [accessed 2 March 2021].
[784] ILO (n 7) (2015).

legal recruitment channel for low-skilled migrant workers. The implementation of these two mechanisms is discussed in the following sections.

3.2 Nationality Verification Process

The NV process was initiated under the three MOUs as a diplomatic channel for regularising low-skilled migrant workers from Myanmar, Laos and Cambodia.[785] The main objective of this NV process was to increase the number of legal and registered low-skilled migrant workers in Thailand. One of the main reasons for unregistered migrant workers in Thailand was that these migrant workers from the three neighbouring countries tended to be undocumented.[786] As mentioned previously, internal conflicts had resulted from political uncertainties in Myanmar, Laos and Cambodia in the 1980s-1990s. Many low-skilled workers from the three countries fled from their home countries and illegally crossed the natural border into Thailand to seek job opportunities.[787] Due to not carrying any identity documents or travel documents, they tended not to enter official registration in Thailand.

According to the chief of the Section on Migrant Workers Administration in the Ministry of Labour, Thailand as a main country of destination for irregular migrant workers raised the initiative of the NV process during the senior official meetings and ministerial meetings between the government of Thailand and the governments of the three neighbouring countries, after signing the MOUs.[788] Specifically, there have been six senior official meetings and two ministerial meetings between Thailand and Laos, since 2003. Similarly, there have been seven senior official meetings and four ministerial meetings between Thailand and Cambodia Laos, since 2003. However, the negotiations with Myanmar began a year later. There have been six senior official meetings and two ministerial meetings between Thailand and Myanmar, since 2004. From these meetings, it was clear that Thailand and its neighbouring countries were concerned that the NV process would regularise undocumented

[785] Nationality Verification process does not apply to low-skilled migrant workers from Vietnam. The reason was that Vietnam does not have a connecting natural boundary with Thailand. Thus, the risk of workers legally crossing the natural boundary to Thailand is much lower than the workers from Myanmar, Laos and Cambodia; Interview with Nareekarn Srichainak, the third secretary of the Department of East Asian Affairs, Ministry of Foreign Affairs (Bangkok, Thailand, 22 August 2019).
[786] Interview with Associate Professor Dr Phunthip Kanchanachitra Saisoonthorn, Lecturer of Private International Law and Human Rights Law, Thammasat University (Bangkok, Thailand, 15 September 2020).
[787] ibid.
[788] Napaumporn (n 777) (2012) 68-70.

migrant workers in Thailand who were vulnerable to violence and were at risk of being involved in trafficking in persons.[789]

In fact, the term "nationality verification process" was not actually specified in the MOUs between Thailand and Myanmar, Laos and Cambodia. However, this term could be inferred as one of the mechanisms that would fulfil the purpose of Article 4 of the MOUs, which states that "the parties shall take all necessary measures to ensure a proper procedure for employment of workers." The NV process provides identity documents from the country of origin to migrant workers, which can also be used for the application for work permits. Therefore, the NV process could be considered as an important mechanism that enables migrant workers from the three neighbouring countries to be properly employed in Thailand, as required by Article 4 of the MOUs.

Additionally, the NV process could also achieve some part of Article 1 (4) of the three MOUs which states that "the parties shall apply all necessary measures to ensure effective action against illegal border crossing, trafficking of illegal workers and illegal employment of workers." It can be seen that the NV process would not ensure the prevention of illegal border crossing because the NV process was available for migrant workers who had already illegally crossed the border and resided in Thailand. However, the NV process could be considered as a measure to ensure "the prevention of and the effective action, against the illegal employment of workers" because it provides them with identity documents and the access to work permits. As the NV process puts irregular migrant workers into the civil registration system both in Thailand and the country of origin, they would be recognised as registered workers; thus, the risk of trafficking in persons is diminished. Therefore, the NV process could be considered as a measure of ensuring effective action against the trafficking of illegal workers.

According to a cabinet resolution in 2004, low-skilled migrant workers who completed the NV process were allowed to register as labourers in two subsectors, which were general labour and domestic work.[790] The NV process for low-skilled migrant workers from Laos and Cambodia began in 2005. It took a longer time to negotiate with Myanmar, so

---

[789] ibid.

[790] Notification of the Ministry of Labour Regarding the Occupations Allowed to the Migrant Workers (2 September 2003); Once the low-skilled migrant workers completed the NV process, they would obtain their identity documents that they could use to apply for the work permits in 2 sectors; namely general labour and domestic work. The workers who completed the NV process are allowed to apply and renew their work permit in these 2 sectors without re-entering the NV process.

the process began in 2009. Moreover, the NV process for workers from Myanmar was more complicated than that for workers from Laos and Cambodia.

For the workers from Laos and Cambodia, the process starts with the employers bringing their workers to Bangkok or the Provincial One Stop Service Centre (OSSC)[791] with the workers' personal profiles and employment contracts. The workers have to submit their application to the authority from the country of origin at the OSSC. For the successful applicants, the authority will issue a "temporary passport" (TP) for Laotian workers and a "certificate of identity" (CI) for Cambodian workers. The workers have to use their TP or CI to apply for a visa from the officers from the Immigration Bureau at the OSSC. Then, the employers must take the workers for a health check-up at a hospital specified by the Ministry of Health. Within seven days of receiving the result of the health check-up, the employers take the workers to officers in the Bangkok or the Provincial Employment Office near to where the workers have been employed, to request work permits.[792]

For the workers from Myanmar, the process starts with the employers applying for the NV process, which is completed by the workers and sent to Bangkok or the nearest Provincial Employment Office. The application is passed to the Foreign Workers Administrative Office (FWAO) and the Embassy of Myanmar in Thailand. The FWAO sets a date, time, and location for the NV process and informs the employers. The employers have to take their workers to a specified coordination centre in Thailand to obtain temporary permission to cross the border for the NV process.[793] The employers have to take their workers to verify their nationality at a specified NV Centre in Myanmar.[794] The successful applicants will obtain a TP from the authority in Myanmar. Then, the employers have to take the workers to a Thai Immigration Checkpoint to request a visa and to a specified hospital to undergo a health check-up process. Within seven days after receiving the results of the health check-up,

---

[791] Srisuchart and Tangtipongkul (n 757) (2015); The One Stop Service Centre (OSSC) was established by Department of Employment in 2013. Initially, there were 12 OSSCs in 12 provinces of Thailand. In 2014, there were 7 additional OSSCs in 7 provinces of Thailand and 6 additional OSSCs in Bangkok. Before the OSSC (2004-2012), the NV process for workers from Laos and Cambodia began with employers submitting applications and documents, which included the migrants' personal profiles and employment contracts of workers to Thai provincial employment offices in all the provinces of Thailand. The applications would then be forwarded to the embassy of the country of origin in Thailand. Afterwards, the country of origin would verify the documents. For successful applicants, the country of origin would provide migrant workers with TP or CI. Then, the employers had to bring the workers to obtain visas, health check-up and apply for a work permit.

[792] Foreign Workers Administrative Office, 'Official Manual for Employers and Business Enterprises; Process of Nationality Verification for Foreign Workers from Myanmar, Laos and Cambodia' (Department of Employment Thailand 2009) 49-63.

[793] There were 3 Coordination Centres located in the frontier provinces of Thailand: Chiangrai, Tak, and Ranong.

[794] There were 3 NV Centres located in the frontier provinces of Myanmar; Tha Kheelek, Myawaddy, Kohsong.

the employers must take the workers to Bangkok or the nearest Provincial Employment Office to where the workers have been employed to request a work permit.[795]

The following table shows the number of low-skilled migrant workers from Myanmar, Laos and Cambodia who passed the NV process and obtained work permits in Thailand from 2006 to 2020.

Table 6: Low-skilled Migrant Workers Completed the NV Process and Hold Work Permits in Thailand

Year	Myanmar	Laos	Cambodia	Total
2006[796]	-	920	761	1,591
2009[797]	905	39,882	37,127	77,418
2010[798]	122,751	36,097	51,196	210,044
2011[799]	395,848	47,035	62,355	505,238
2012[800]	630,185	29,625	73,793	733,603
2013[801]	717,167	34,491	95,472	847,130
2014[802]	831,235	33,054	107,172	971,461
2015[803]	854,756	39,261	95,357	989,374
2016[804]	737,677	60,926	99,225	897,828

[795] Foreign Workers Administrative Office (n 792) (2009) 3-48.

[796] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (2006) <https://www.doe.go.th/prd/assets/upload/files/alien_th/d3390d3de75da8d717407c7a92990fcf.pdf> 148 [accessed 2 March 2021].

[797] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (2009) <https://www.doe.go.th/prd/assets/upload/files/alien_th/0d84c155a7b24af91bd63b4643dbea55.pdf> 11 [accessed 2 March 2021].

[798] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (2010) <https://www.doe.go.th/prd/assets/upload/files/alien_th/f51f1de7d1fe32c1086af6c77cdf00e7.pdf> Table 19, 58 [accessed 2 March 2021].

[799] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (2011) <https://www.doe.go.th/prd/assets/upload/files/alien_th/512ca06076423ca92b7128b598a3bfaa.pdf> Table 19, 41 [accessed 2 March 2021].

[800] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (2012) <https://www.doe.go.th/prd/assets/upload/files/alien_th/de207faef896013d98242b3149fa1d80.pdf> Table 19, 41 [accessed 2 March 2021].

[801] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (2013) <https://www.doe.go.th/prd/assets/upload/files/alien_th/06f47d520fee81270a315f7c84d4e7ae.pdf> Table 4, 31 [accessed 2 March 2021].

[802] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (2014) <https://www.doe.go.th/prd/assets/upload/files/alien_th/5f790ebd8469fb89efbe60674b585459.pdf> Table 4, 30 [accessed 2 March 2021].

[803] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (2015) <https://www.doe.go.th/prd/assets/upload/files/alien_th/cea979ea00fbb2f2ad2b6d5e53d5dde8.pdf> Table 24, 54 [accessed 2 March 2021].

2017[805]	1,038,048	76,141	134,422	1,248,611
2018[806]	1,120,003	95,772	172,167	1,387,942
2019[807]	599,743	45,869	63,048	708,660
2020[808]	1,585	54	61	1,701

From 2005-2007, low-skilled migrant workers who passed the NV process obtained one-year renewal work permits.[809] The 2008 cabinet resolution indicated that all registered workers who passed the NV process were allowed to annually renew their work permits until 2010.[810] The 2010 cabinet resolution extended the deadline of the policy to 2012.[811] In January 2013, another cabinet resolution stated that the permits would be valid until 2015 and could be extended to 2017, if the migrant workers still had active employment contracts.[812]

Consequently, in 2014, the United States annual report on trafficking in persons (TIP Report) downgraded Thailand from the "Tier 2 Watch List" to "Tier 3".[813] The TIP report mentioned that a high risk of labour trafficking among unregistered migrant workers who performed low-skilled jobs such as labourers in low-end garment production, factories, and fishing-related industries as well as domestic workers, was one of the reasons for the downgrade. Consequently, the Thai government announced a policy to boost the NV process for low-skilled migrant workers. Specifically, there were seven additional OSSCs created in

---

[804] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (December 2016) <https://www.doe.go.th/prd/assets/upload/files/alien_th/b579b43c5c135321afec8d83c4ed4aa4.pdf> Table 27, 71 [accessed 2 March 2021].
[805] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (December 2017) <https://www.doe.go.th/prd/assets/upload/files/alien_th/94ec1760f83293298787bf9d0fd3496a.pdf> Table 27, 72 [accessed 2 March 2021].
[806] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' June 2018) <https://www.doe.go.th/prd/assets/upload/files/alien_th/16bed499a1338fc3219355b6ddea8ba8.pdf> Table 4, 14 [accessed 2 March 2021].
[807] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (December 2019) <https://www.doe.go.th/prd/assets/upload/files/alien_th/c33cea75dc3c81eb7497c3eb809327e9.pdf> Table 26, 4 [accessed 2 March 2021].
[808] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (September 2020) <https://www.doe.go.th/prd/assets/upload/files/alien_th/720399013704bebb95073b457d9b4ed5.pdf> [accessed 2 March 2021].
[809] Cabinet Resolution, Government of Thailand (10 May 2005, 19 July 2005 and 19 December 2006).
[810] Cabinet Resolution, Government of Thailand (18 December 2008).
[811] Cabinet Resolution, Government of Thailand (10 January 2010).
[812] Cabinet Resolution, Government of Thailand (15 January 2013).
[813] US Department of State, The Trafficking in Persons Report (2014) <https://2009-2017.state.gov/documents/organization/226849.pdf> 372-374 [accessed 2 March 2021].

seven provinces of Thailand and six additional OSSCs in Bangkok in 2014.[814] Additionally, migrants who didn't show up to appointments would be arrested and expelled.[815]

In February 2016, a cabinet resolution extended permits for migrants, from three neighbouring countries, who had completed the NV process and held permits that would expire in 2017, so that they were valid up until 31 March 2018. This cabinet resolution also enabled migrant workers from three neighbouring countries to be able to renew their work and residence permits every two years - not exceeding eight years in total.[816]

In June 2017, the Foreigners' Working Management Emergency Decree came into force. This law was enacted in the form of an emergency decree instead of a normal act due to the rapid need to tackle the problems of irregular migration for employment purposes in Thailand. It came into force in June 2017, replacing the previous employment law - the Working of Alien Act. According to the meeting report of the National Legislative Assembly, the government designed this new law to promote the registration of low-skilled migrant workers in Thailand and to lead to an upgrade in the status of Thailand in the next TIP report.[817] In terms of criminal penalties, an unregistered migrant worker, who was not a victim of trafficking in persons, was to be subject to a fine of 2,000 -100,000 Baht (about 50-2,500 GBP), a maximum of five years' imprisonment or both.[818] However, the workers had the option to voluntarily depart the country instead of serving the sanction under the law. The sanction of the employers was significantly increased to a fine of 400,000-800,000 Baht for each foreigner (about 10,000-20,000 GBP).[819]

According to academic literature in 2017, the introduction of this new law was viewed as having the potential to cause a negative impact among employers and migrant workers.[820] Employers, who had already hired the unregistered migrant workers, did not expect the sudden increase in the penalty. Thus, they laid off the unregistered migrant workers to avoid incurring such a severe penalty.[821] A week after the new decree had entered into force, there

---

[814] Announcement of the National Council for Peace and Order (2014) No. 117/2557; Srisuchart and Tangtipongkul (n 757) (2015).
[815] Announcement of the National Council for Peace and Order (2015) No. 100/2558 and 101/2558.
[816] Cabinet Resolution, Government of Thailand (23 February 2016).
[817] National Legislative Assembly session 42/2560 (6 July 2007).
[818] Foreigners' Working Management Emergency Decree (2017) Section 101.
[819] Foreigners' Working Management Emergency Decree (2017) Section 103.
[820] Punnada Songitthisuk, *The impact of the promulgation of the Emergency Decree to the management of the foreigners in B.E. 2560 for workers strange in Mae Sot district in Tak Province* (Kamphaeng Phet Rajabhat University 2017).
[821] ibid.

was a report that over 10,000 irregular migrant workers had been laid off.[822] Additionally, another report showed that at least 500 irregular migrant workers had been abandoned, forcing them to find their own way home, despite having recently arrived in Thailand.[823] Two weeks after the announcement of the law, a report showed the approximate number of irregular migrant workers who had returned to the three neighbouring countries. According to the vice-governor of the Tak province, there were over 20,000 irregular migrant workers who returned to Myanmar through the Mae Sot immigration checkpoint in the Tak province, which is the main gateway between Myanmar and Thailand. Additionally, the immigration officers at the Aranyaprathet border in the Sakaeo province and at Pongnamron border in the Chanthaburi province reported that there were about 5,000 irregular migrant workers who had returned to Cambodia. Moreover, the immigration officers at the Mittraphap border in the Nongkhai province also reported that there were around 12,000 irregular migrant workers who had returned to Laos.[824] This resulted in a shortage in the labour force in several sectors, specifically in small and medium-sized enterprises.[825] Consequently, there was strong opposition and complaints from both employers and migrant workers.[826]

In response to this, on 4 July 2017, the government implemented Order Number 33/2560, which resulted in the temporary suspension of the penalties from the decree, and which suggested that the Ministry of Labour amend this problematic situation.[827] In addition, this order also recommended that the regulations and policies regarding the registration of irregular migrant workers in Thailand be improved. This suspension of the sanctions provided a period of time for employers to check the legal status of their workers and also gave time for irregular migrants to regularise their status by registering for the NV process to obtain the relevant work permits. This resulted in an increased number of low-skilled workers obtaining work permits from the NV process - from 897,828 workers in December 2016 to 1,248,611 workers in December 2017, as shown in Table 6.

---

[822] Bangkok Post, 'Decree spurs migrant worker exodus' (2 July 2017) <https://www.bangkokpost.com/news/general/1279203/decree-spurs-migrant-worker-exodus> [accessed 3 March 2021].

[823] Ruji Auethavornpipa, 'Thailand's new migrant worker policy is a step onto uncertain ground' (2017) <http://www.eastasiaforum.org/2017/08/10/thailands-new-migrant-worker-policy-is-a-step-onto-uncertain-ground/> East Asia Forum [accessed 3 March 2021].

[824] Nontharat Paichareon, 'Migrant worker exodus after the new decree' (7 July 2017) <https://www.benarnews.org/thai/news/TH-migrants-07032017162454.html> [accessed 3 March 2021].

[825] Bangkok Post (n 805) (2017).

[826] Human Rights Watch, 'Thailand: Migrant Worker Law Triggers Regional Exodus' (7 July 2017) <https://www.hrw.org/news/2017/07/07/thailand-migrant-worker-law-triggers-regional-exodus> [accessed 3 March 2021]

[827] Order of the National Council for Peace and Order Number 33/2560 (2017).

This situation led to the cabinet resolution of January 2018, which resulted in a more systematic regime for the registration of irregular migrant workers. The government announced that 20 June 2018 would be the deadline for the NV process. After the deadline, migrant workers who had not completed the NV process and did not carry a work permit would be considered illegal migrant workers. This cabinet resolution separated migrants into two groups based on their status in the NV process.[828] First, migrants who had completed the NV process and held work permits which expired on 31 March 2018 had to renew their visas and work permits. This group of migrants would get a permit to reside and work in Thailand for another two years until 31 March 2020.[829] Second, migrants who had not completed the NV process had a grace period to work and reside in Thailand up until 30 June 2018. Before that, they had to complete the NV process, and obtain visas and work permits. After completing the process, this group of migrants would also be allowed to reside and work in Thailand for another two years until 31 March 2020.[830] After 31 March 2020, they would be provided with another 15 days to prepare for leaving the country.[831]

In March 2018, an amended version of the Foreigners' Working Management Emergency Decree entered into force. It altered the penalty for both workers and their employers. Migrant workers had the option to voluntarily depart the country instead of serving the sanction under the law. Additionally, the exception for the victims of trafficking in persons remained in the provision. However, the minimum cost of the fine was increased, and the maximum amount of the fine was decreased to a fine of 5,000-50,000 Baht (about 125-1,250 GBP). Moreover, the imprisonment sanction on workers was removed. The new provision also stated that after paying the criminal fine, migrant workers should be expelled as soon as possible.[832] For the employers, the amount of the fine for employers was decreased to 10,000 - 100,000 Baht (about 250 to 2,500 GBP) per migrant worker. Nevertheless, the amendment added a penalty for employers, who were repeat offenders, of one year of imprisonment or a fine of 50,000 to 200,000 Baht (about 1,250 to 5,000 GBP) for each

[828] Cabinet Resolution, Government of Thailand (16 January 2018).
[829] Ministry of Labour, 'Gen. Adul satisfied with the registration of foreigners 96%, with a plan to handle the record of 3.5 hundred thousand people' (1 April 2018) <http://www3.mol.go.th/en/content/68711/1522723239> [accessed 3 March 2021].
[830] Ministry of Labour, 'Gen. Adul is pleased to bring more than 1.18 million foreign workers to the system thanks to all parties involved' (3 July 2018) <https://www.mol.go.th/en/news/gen-adul-is-pleased-to-bring-more-than-1-18-million-foreign-workers-to-the-system-thanks-to-all-parties-involved-2/> [accessed 3 March 2021].
[831] Notification of the Ministry of Interior regarding the Permission to Allow Certain Groups of Foreigners to Enter and Stay in the Kingdom on a Special Case as Cabinet Resolution (6 February 2018).
[832] Foreigners' Working Management Emergency Decree (No. 2) (2018) Section 45.

migrant worker. The repeat offenders were prohibited from employing foreigners for a period of three years.[833] Although an amended decree came into force in March 2018, the law stated that the sanctions on migrant workers and employers would not be enforced until 1 July 2018. According to the meeting report of the National Legislative Assembly, the reason for the delay in the penalty was to maintain consistency between the new law and the cabinet resolution of January 2018 which specified the deadline for the NV process as 31 June 2018.[834]

Then, the NV system was stopped in 2018. On July 2018, Deputy Minister of Labour, Adul Sangsingkeo announced that there would be no extension of the NV period after the deadline of 31 June 2018.[835] Thus, unregistered migrant workers who had not completed the NV process and had not obtained permits by the deadline would be considered to be illegal migrant workers in Thailand. Both the unregistered migrants and their employers were subject to a new set of penalties under the revised Foreigners' Working Management Emergency Decree. These unregistered migrant workers had to return to their home country. If they wished to work in Thailand, they had to re-enter Thailand by means of the legal channel through the MOU recruitment scheme,[836] which is explained in the next section.

One possible reason why the NV process was stopped in 2018 was that the process did not ensure the prevention of illegal border crossings stipulated in Article 1 (4) of the three MOUs signed between Thailand and the three neighbouring countries. Specifically, migrant workers from the three neighbouring countries were allowed to enter into the NV process even though they had illegally crossed the border. As Table 6 shows, the number of low-skilled migrant workers who completed the NV process and held work permits gradually increased from a thousand workers in 2006 to over one million by June 2018. This increasing number of workers who had completed the NV process also reflected the increasing number of migrant workers who had illegally crossed the border into Thailand. It can thus be argued that the Thai government wanted to strengthen its border control by halting the NV process. As a result, low-skilled migrant workers from the neighbouring countries could no longer illegally cross the border (without carrying their identity documents) and enter legal employment though the NV process in Thailand. Here, the Thai government limited the route

[833] ibid.
[834] National Legislative Assembly session 24/2561 (26 April 2018).
[835] Ministry of Labour (n 826) (2018).
[836] ibid.

for low-skilled migrant workers to enter Thailand to one single channel under the recruitment scheme based on the MOUs.

If the Thai government had only relied on the policy in 2018, the nation would likely have experienced further chaos. Over one million low-skilled migrant workers who had obtained work permits through the NV process had to return to their home countries after 31 March 2020. This policy resulted in a sudden shortfall of over one million low-skilled workers in 2020. While employers were allowed to apply for specific quotas to recruit a new set of low-skilled migrant workers through the legal recruitment channel under the MOUs,[837] they might receive fewer workers than requested. This was likely largely due to the fact that many of the workers who had returned to their home country were no longer interested in working in Thailand. However, another reason relates to the fact that the process of legal recruitment under the MOUs can be complicated. Here, it can take some time for migrant workers to understand the rules, to find local recruitment agencies and to complete all the required steps for recruitment in Thailand.[838] In addition, as the employers obtained a new set of migrant workers through the legal recruitment channel, they were forced to spend both time and resources on training new migrant workers.

In August 2019, the government announced the new "name list" scheme to avoid the previously mentioned problems. It allowed migrant workers, who had obtained work permits from the NV process (before 30 June 2018) that expired on 31 March 2020, to be recruited to work in Thailand for another two years without having to leave the country. The employers of these migrant workers who wanted to continue their work contracts were required to submit a list of names of their workers to the OSSCs.[839]

According to the cabinet resolution on August 2019, the employers were allowed to submit this list by 31 March 2020. On 24 March and 15 April 2020, there were two cabinet resolutions extending the deadline for submitting the name lists and the expiry date of the work permits to 30 November 2020. The main reason for the extension was due to the recent COVID-19 pandemic.[840] Specifically, the government agreed with the Ministry of Labour that large numbers of employers and migrant workers should not gather at the OSSCs so as to follow social distancing policies. Once the name list was approved, the employers had to

---

[837] Legal Recruitment Channel is another mechanism under the MOUs between Thailand and its neighbouring countries. Information regarding this mechanism will be provided further in section 3.3.
[838] ibid.
[839] Cabinet Resolution, Government of Thailand (20 August 2019).
[840] Royal Thai Government, 'Summary of the Meeting of the Cabinet' (15 April 2020) <https://www.thaigov.go.th/news/contents/details/29124> [accessed 3 March 2021].

bring their workers to obtain visa stamps for their identity documents and work permits.[841] The work permits granted under the new name list scheme could be renewed annually until 31 March 2022.[842] However, workers who did not submit the name lists by the specified deadline remained on the former NV scheme and consequently had to return to their home countries from 30 November 2020. If they wish to work in Thailand, they will have to be recruited through another legal recruitment channel under the MOUs, which is explained in the next section.[843] According to recent statistics, the majority of low-skilled migrant workers falling under the former NV scheme have been transferred to the new name list scheme. In fact, as of September 2020, 1,266,011 workers have obtained work permits through the new scheme, with only 1,701 workers remaining under the former NV scheme.[844]

The Thai government stopped the NV process – one of the mechanisms that resulted from the MOUs – in June 2018. As such, migrant workers from the three neighbouring countries could no longer illegally cross the border into Thailand and obtain work permits through the NV process. The current policy in Thailand is to retain over one million low-skilled migrant workers who had already completed the NV process and obtained work permits before the end of June 2018 in the Thai labour market. The Thai government believed that these workers were important for the nation's economy since they could address the labour shortage in the labour-intensive sectors. The name list scheme was thus announced in 2019. However, this scheme could be considered to be a short-term measure. Specifically, it allows workers to continue working with the same employers until March 2022. As such, the measure can result in some instability for both employers and migrant workers, especially given that, from March 2022, the policy will depend on the political decisions of the Thai government, which may affect some one million migrant workers.

---

[841] Cabinet Resolution, Government of Thailand 20 August 2019; Department of Employment, 'Management of Migrant workers under the Cabinet Resolution 20 August 2019' (20 September 2019) <https://www.doe.go.th/prd/ar7/news/param/site/143/cat/7/sub/0/pull/detail/view/detail/object_id/28084> [accessed 3 March 2021].

[842] ibid.

[843] ibid.

[844] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (September 2020) <https://www.doe.go.th/prd/assets/upload/files/alien_th/720399013704bebb95073b457d9b4ed5.pdf> [accessed 3 March 2021].

3.3 Legal Recruitment Under the Memorandums of Understanding

Legal recruitment under the MOUs is the method that the Thai government uses to deal with migrant workers from Myanmar, Laos, Cambodia and Vietnam. This method provides a legal channel for these low-skilled migrant workers from the four neighbouring countries to work in Thailand for a limited period of time. This recruitment channel aims to respond to the objective of Article 1 (2) of the MOUs, which states that the parties should apply all necessary measures to ensure effective repatriation of workers, who have completed the terms and conditions of employment or are expelled by relevant authorities of the other party, before completion of the terms and conditions of employment to their permanent address. Specifically, this recruitment method allows migrant workers to take on the low-skilled occupations in Thailand for a limited period of time. After completing the work period, migrant workers have to return to their country of origin. Additionally, this method also serves the purpose of Article 1 (4) of the MOUs which states that the parties should apply all necessary measures to ensure the prevention of illegal border crossings, trafficking of illegal workers and illegal employment of workers.

After signing the MOUs, Thailand and the four countries of origin agreed to cooperate on the recruitment scheme for low-skilled migrant workers. The recruitment scheme began with Laos in January 2006, followed by Cambodia in September 2006, Myanmar in 2010 and more recently Vietnam in 2018.[845] According to the cabinet resolution of 2005, low-skilled migrant workers from the three neighbouring countries were allowed to work as labourers in two subsectors, which were general labour and domestic worker.[846]

The process of recruitment under the MOUs begins with employers requesting the quota from Bangkok or the nearest Provincial Employment Office. Employers who receive the quota have to supply the required documents – the application form, copy of quota confirmation letter, demand letter of migrant workers, power of attorney letter (for the recruiting agent in the country of origin) and a sample of the employment contract. When applications are approved, requests are then passed to the Ministry of Labour, the Thai Embassy and registered recruitment agencies in the countries of origin. The agencies then create a list of names of the workers that are interested in the jobs and send this list to the officials in the labour departments in the countries of origin. These name lists will be passed

[845] ibid.
[846] Cabinet Resolution, Government of Thailand (10 May 2005).

to the Ministry of Labour in the countries of origin and to employers. The employers have to submit the name list, the letter specifying the border checkpoint through which migrant workers plan to enter Thailand, and the application for permission to work on behalf of their workers.

Consequently, the Thai embassy in the countries of origin issues the visa for the workers. Then, the recruitment agencies in the countries of origin have to bring the workers to obtain a visa from the Thai embassy in the countries of origin. When the workers enter Thailand, the employers have to take the workers for a health check-up at the hospital specified by the Ministry of Health within three days. Then, the employers have to take their workers to apply for a work permit from the officer from Bangkok or the provincial employment office.[847] These workers are allowed to work and reside in Thailand for four years. After completing the work contracts, they have to return to their countries of origin. After 30 days, they can then enter the recruitment scheme under the MOUs again.[848]

The following table shows the number of low-skilled migrant workers from Myanmar, Laos, Cambodia and Vietnam who obtained work permits through recruitment channels under the MOUs in Thailand from 2009 to 2020.

Table 7: Number of low-skilled migrant workers who obtained work permit though Recruitment Channel Under the MOUs

Year	Myanmar	Laos	Cambodia	Vietnam	Total
2009[849]	-	10,212	17,235	-	27,447
2010[850]	4,641	7,066	14,818	-	26,525
2011[851]	8,160	14,472	49,724	-	72,356
2012[852]	18,241	11,619	63,405	-	93,265

[847] Foreign Workers Administrative Office (n 792) (2009) 85. Srisuchart and Tangtipongkul (n 757) (2015) 29.
[848] Ibid; Foreign Worker Administration Office, 'Employment Process under MOUs' (2018) <https://www.doe.go.th/prd/assets/upload/files/alien_th/670e57cc84a2daa0aa612df9fe2b0a33.pdf> [accessed 3 March 2021].
[849] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (2009) <https://www.doe.go.th/prd/assets/upload/files/alien_th/0d84c155a7b24af91bd63b4643dbea55.pdf> Table 18, 56 [accessed 3 March 2021].
[850] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (2010) <https://www.doe.go.th/prd/assets/upload/files/alien_th/f51f1de7d1fe32c1086af6c77cdf00e7.pdf> Table 19, 58 [accessed 3 March 2021].
[851] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (2011) <https://www.doe.go.th/prd/assets/upload/files/alien_th/512ca06076423ca92b7128b598a3bfaa.pdf> Table 19, 41 [accessed 3 March 2021].

2013[853]	58,158	26,204	89,680	-	174,042
2014[854]	97,984	20,786	87,398	-	206,168
2015[855]	136,314	28,561	114,436	-	279,311
2016[856]	195,752	44,677	152,320	-	392,749
2017[857]	300,869	78,197	203,660	-	582,726
2018[858]	437,471	162,039	312,714	7	912,231
2019[859]	518,321	183,460	303,971	96	1,005,848
2020[860]	461,825	171,475	255,107	260	888,667

From Table 7, it can be seen that the number of low-skilled migrant workers, who obtained work permits through the recruitment channel under the MOUs, were gradually increased from 24,447 workers in 2009 to 888,667 workers in 2020.

In fact, low-skilled migrant workers were previously prohibited by both immigration law and employment law in Thailand. In terms of immigration law, Article 12 (3) of the 1979 Immigration Act did not allow foreigners to enter the country to perform low-skilled jobs or

---

[852] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (2012) <https://www.doe.go.th/prd/assets/upload/files/alien_th/de207faef896013d98242b3149fa1d80.pdf> Table 19, 41 [accessed 3 March 2021].

[853] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (2013) <https://www.doe.go.th/prd/assets/upload/files/alien_th/06f47d520fee81270a315f7c84d4e7ae.pdf> Table 5, 36 [accessed 3 March 2021].

[854] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (2014) <https://www.doe.go.th/prd/assets/upload/files/alien_th/5f790ebd8469fb89efbe60674b585459.pdf> Table 5, 35 [accessed 3 March 2021].

[855] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (2015) <https://www.doe.go.th/prd/assets/upload/files/alien_th/cea979ea00fbb2f2ad2b6d5e53d5dde8.pdf> Table 5, 34 [accessed 3 March 2021].

[856] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (December 2016) <https://www.doe.go.th/prd/assets/upload/files/alien_th/b579b43c5c135321afec8d83c4ed4aa4.pdf> Table 5, 32 [accessed 3 March 2021].

[857] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (December 2017) <https://www.doe.go.th/prd/assets/upload/files/alien_th/94ec1760f83293298787bf9d0fd3496a.pdf> Table 5, 33 [accessed 3 March 2021].

[858] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (December 2018) <https://www.doe.go.th/prd/assets/upload/files/alien_th/d5b8f909422cc2d4be0a62fdb6df215c.pdf> Table 59, 31 [accessed 3 March 2021].

[859] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (December 2019) <https://www.doe.go.th/prd/assets/upload/files/alien_th/c33cea75dc3c81eb7497c3eb809327e9.pdf> Table 59,36 [accessed 3 March 2021].

[860] Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (September 2020) <https://www.doe.go.th/prd/assets/upload/files/alien_th/720399013704bebb95073b457d9b4ed5.pdf> Table 5, 7 [accessed 3 March 2021].

to perform a job prohibited by employment law.[861] In terms of employment law, the 1979 Supplement Decree prohibited foreigners from performing 39 jobs, including labourers, in Thailand.[862] Similar to the workers under the NV process, low-skilled migrant workers under the legal recruitment scheme were exempted by Article 17 of the 1979 Immigration Act which stated that the Council of Ministers was authorised to permit any foreigners to enter and remain in Thailand under certain conditions.[863] Therefore, there were cabinet resolutions that allowed low-skilled migrant workers, both under the NV scheme and the recruitment scheme, to work as labourers in order to fulfil the demand for low-skilled labour in Thailand.

In 2018, the deputy minister of labour announced that the legal recruitment under the MOUs would be the main channel for low-skilled migrant workers from the neighbouring countries to enter Thailand for employment purposes.[864] In the same year, the recent amendment to immigration law in Thailand was implemented. According to the meeting report of the National Legislative Assembly, Thailand needed migrant workers, especially low-skilled migrant workers to fill the labour shortage in the country.[865] Additionally, the government was concerned that Article 12 (3) of the 1979 Immigration Act was the main barrier. Therefore, the National Legislative Assembly decided to amend this Article by revoking the conditions that specifically mentioned low-skilled migrant workers.[866] Recently, the Ministry of Labour also decided to revise the employment law in Thailand. There was a new official Notification by the Ministry of Labour on 21 April 2020 which replaced the 1979 Supplement Decree. According to this new law, foreigners are allowed to perform low-skilled jobs on condition that the work is carried out under the supervision of the employers and that they have legally entered the country under Thai immigration law and under binding international agreements with Thailand.[867] Therefore, the government no longer needs to issue cabinet resolutions to allow low-skilled migrant workers to work and reside in Thailand under the recruitment scheme of the MOUs.

Migrant workers who wish to work in Thailand under the legal recruitment scheme have to possess appropriate identity documents and work visas before entering Thailand. This

---

[861] Immigration Act, Thailand (1979); (Before the amendment in 2018) Article 12 (3); "an alien, who enters the country to earn a livelihood as a labourer, to perform a low-skilled physical work or to perform a job prohibited under employment law, were subjected to be expelled."
[862] Supplement Decree on Prohibited Occupation for Foreigners (1979).
[863] Immigration Act, Thailand (1979) Article 17.
[864] Ministry of Labour (n 826) (2020).
[865] National Legislative Assembly session 24/2561 (26 April 2018).
[866] Immigration Act, Thailand (Amended in 2018) The revised Article 12 (3) states that "the migrant workers who enter the country to perform a job prohibited by the employment law shall be expelled."
[867] Notification of Ministry of Labour (21 April 2020).

recruitment scheme thus ensures that low-skilled migrant workers from the neighbouring countries cross the border into Thailand legally. This may be why the Thai government decided to stop the NV process in 2018 and announced that the legal recruitment channel would be the only mechanism for recruiting low-skilled migrant workers. In fact, this mechanism would appear to be more stable than the former NV scheme. While the NV process provided clear instructions for workers to prove their nationality and obtain identity documents, the period of time that workers were permitted to work in Thailand varied, depending on the cabinet resolutions issued by the Thai government. Thus, it was relatively difficult for employers to foresee the policy towards their workers in the long term. However, the legal recruitment scheme under the MOUs provides a more stable rule; that is, all migrant workers under this scheme are allowed to work in Thailand for four years. Following this period, they must return to their country of origin for at least 30 days before re-entering the recruitment scheme. Therefore, under this scheme, employers can plan ahead regarding the management of their low-skilled migrant workers.

4. Conclusion

The management of low-skilled migrant workers in Thailand shifted from a unilateral approach to a bilateral approach. In the early stages, there existed unilateral measures for controlling the movement of low-skilled migrant workers from the three AEC member states which included Myanmar, Laos and Cambodia. Here, Thailand constantly adopted exceptional measures to deal with the movement of low-skilled migrant workers without cooperation from the governments of these neighbouring countries. Specifically, the executive branch in Thailand constantly implemented exceptions under domestic law to issue several short-term cabinet resolutions to allow low-skilled migrant workers from the three neighbouring countries to work in the country. However, these measures had negative impacts due to their intrinsic instability.

After the MOUs were signed, the management of low-skilled migrant workers shifted toward a more bilateral approach. The bilateral agreements between Thailand and four AEC countries, namely, Myanmar, Laos, Cambodia, and Vietnam, had the common purpose of dealing with the issue of labour migration. The agreements resulted in the flow of low-skilled migrant workers from the four AEC countries to the labour-intensive sectors in Thailand. While the MOUs did not clearly specify which party was the country of destination and

which was the country of origin, in practice, the bilateral agreements resulted in the movement of low-skilled workers in one direction. The interview with the legal expert on labour migration in Thailand revealed that the concept of reciprocity is not crucial to the implementation of the MOUs between Thailand and the three neighbouring countries. Specifically, Thailand is the main country of destination and the four other AEC countries are the main countries of origin. One of the main objectives of the bilateral agreements was to resolve the shortage of low-skilled labour in Thailand. Therefore, it is less likely that low-skilled migrant workers in Thailand would travel to carry out low-skilled jobs in Myanmar, Laos, Cambodia or Vietnam.[868]

Even though the MOU-based bilateral approach is clearly one-sided, it has resulted in a certain stability for the management of low-skilled migrant workers in Thailand. The NV process and the legal recruitment channel were the two mechanisms that resulted from the MOUs. Here, there were clear steps for proving the nationality of workers and recruiting them from neighbouring countries into Thailand. Moreover, the legal recruitment channel also stipulates a clear period of time in which the workers can work in Thailand. However, in 2018, the Thai government halted the NV process and announced that the legal recruitment channel would be the only route for low-skilled migrant workers to enter Thailand for employment purposes. The main aim here was to address the issue of illegal border crossings, since, as noted above, the NV process allowed migrant workers who had illegally crossed the border to prove their nationality and obtain work permits in Thailand.

While the current legal recruitment channel under the MOUs provides legal pathways for low-skilled migrant workers to enter Thailand, they are not allowed to enter Thailand to seek job opportunities. In fact, workers are only recruited under the condition that they are requested by Thai employers. Moreover, this mechanism is highly bureaucratic, with the governments of the participating states playing an important role in controlling low-skilled migrant workers. Specifically, the scheme is administered by detailed governmental rules, while it is also largely employer-driven. There are several steps that employers can take, including applying for specific quotas to obtain migrant workers, taking their migrant workers to a hospital for a health check-up, and accompanying their workers to official offices in Thailand to apply for work permits. However, in reality, all these stages are somewhat of a burden for employers, and this has resulted in a rather parasitical business involving various intermediaries. These private intermediaries seek to serve their own

[868] Saisoonthorn (n 786) (2020).

interests by assisting employers to complete all the tasks required by the MOU-based mechanism.

Meanwhile, at the AEC level, the regional framework on labour migration can only be said to be reciprocal in nature in the case of high-skilled workers. As discussed in the previous chapter, the MNP and the MRAs allowed all AEC member states to be both the providing and the receiving country of specific high-skilled workers. In terms of low-skilled workers, only the bilateral agreements between the member states come into play. These agreements are comparable to the European guest worker agreement, as they share the common objective of resolving the labour shortage issue in a specific destination country. Since they lack reciprocal characteristics, it is less likely that these current bilateral agreements between Thailand and other AEC countries will develop into a regional framework related to the movement of low-skilled workers at the AEC level.

As this chapter has demonstrated thus far, these one-sided bilateral agreements lead to unnecessary bureaucracy. The government of both the country of destination and the country of origin have to allocate a great deal of time and resources to controlling the recruitment of low-skilled workers from the four AEC countries to Thailand. Moreover, employers in the country of destination also have to pay excessive administrative fees and undertake numerous steps, while some employers even have to pay intermediaries to complete all the required tasks. In addition, under the MOU-based legal recruitment scheme, these authorised migrant workers are allowed to work in Thailand for a continuous period of only four years, after which time they must return to their home countries. Meanwhile, although employers are allowed to request quotas for low-skilled migrant workers, they have to spend a large amount of time and resources on training a new set of workers every four years.

From the experience of European labour migration, the reciprocal bilateral agreement that led to the free movement of workers framework could simplify all the complicated and bureaucratic procedures outlined above. When workers are free to enter specific destination countries for employment purposes or for seeking job opportunities, the government will no longer have to spend extra time and resources on managing the quota of migrant workers. At the same time, employers will no longer have to apply for quotas from the government or resort to intermediaries or pay extra administrative fees to hire low-skilled migrant workers. Additionally, employers in the labour-intensive sectors could also continue to employ their existing migrant workers, rather than having to retrain a new set of low-skilled migrant workers every four years.

It is clear then that the reciprocal approach to the movement of low-skilled migrant workers could be an interesting option for Thailand and the other AEC member states. As the AEC member states have already agreed to adopt reciprocal regional agreements related to the movement of specific high-skilled labour among the member states in the form of the MRAs and the MNP, it would be useful for both employers and migrant workers in the AEC if the regional agreement based on reciprocity was expanded to cover the low-skilled sectors. This form of agreement could resolve both the issue of instability resulting from the unilateral approach of the destination country and the issue of over bureaucracy resulting from the one-sided bilateral agreement between the sending and receiving states.

As was seen from the experience of the EEC outlined in chapter 2 and chapter 3, the host member state of the EEC did not necessarily lose all control regarding migrant workers from other member states under the reciprocal approach. For example, some level of border control may be retained, albeit with simplified documentation requirements (only identity documents such as passports or an identity card issued by the country of origin were required, in the case of the EEC). Moreover, the member states could still preserve preferential access for national workers. As was noted from the first EEC transitional period, Regulation 15/61 stated that EEC workers from other EEC member states were entitled to accept employment offers if no local worker was available within three weeks from the time of notification of the vacancy. The workers from other EEC member states could immediately take up employment only in two cases: the employment offer was addressed to a specific person or there was a labour shortage in a specific region. As such, the migrant workers could fill the demand in the labour market of the host country but without competing for the available jobs with the national workers.

CHAPTER 6. Institutional Framework of the European Economic Community and the ASEAN Economic Community

1. Introduction

As can be seen in the previous chapters, the legal development of the EEC free movement of persons framework as well as the AEC integration of labour migration rely not only on the governments of the member states but also on institutions at the regional level. In general, these regional institutions play an important role in any international organisation operating and performing effectively because they serve as a means through which delegates from each member state can meet, examine problems and make decisions.[869] It can also be said that the effectiveness of the development of any regional cooperation depends largely on the function of the regional institutional framework.[870] Based on their key functioning, regional institutions can generally be divided into two main categories, which are supranational institutions and intergovernmental institutions.[871]

A supranational institution is a composite organisation whose main duty it is to implement the goals and objectives of the organisation, regardless of the personal interests of any particular member state or individual party.[872] In other words, this type of institution acts independently of the member states and should serve to represent the interests of the organisation as a whole. According to Schermers and Blokker, the independence of a supranational organisation can be maintained by comprising an organisation with independent members and adopting a majority vote in the decision-making process;[873] thus, each member state is bound by the decisions that are made.[874] A supranational institution also has the power to make binding decisions and enforce them on the member states and their respective governments, irrespective of any opposition by the sovereign states.[875]

---

[869] Henry G Schermers and Niels M Blokker, *International Institution Law: Unity within Diversity* (5th edn, Martinus Nijhoff Publishers 2011) 155.
[870] ibid.
[871] ibid.
[872] Hugo J Hahn, 'International and Supranational Public Authorities' (1961) 26 (4) Law and Contemporary Problems 640-641; Frederick Lister, *Decision-making strategies for international organisations: the IMF model* (Graduate School of International Studies, University of Denver 1984); Jens-Uwe Wunderlich, 'Comparing regional organisations in global multilateral institutions: ASEAN, the EU and the UN' (2012) 10 (2) Asia Europe Journal 129-130.
[873] Schermers and Blokker (n 869) (2011) 56.
[874] ibid.
[875] ibid; Hahn (n 872) (1961) 640.

Wunderlich notes that this type of institution can enhance internal cohesion and representation in international affairs of the region.[876]

An intergovernmental institution, on the other hand, is an organisation that results from the cooperation of the executive branches of the governments of the member states.[877] In contrast to a supranational organisation, the interests of the member states can influence the decisions of its representatives in an intergovernmental institution.[878] In certain intergovernmental institutions, the arrangements may be premised on consensus decision-making processes that allow for a minority to block any decision made by the majority.[879] The ability of institutions that adopt consensus-based procedures is, therefore, limited and the decisions settled upon tend to be considered as nonbinding.[880] Wunderlich also critiques consensus decision-making as being drawn out, limited and prone to inefficiency.[881] Nevertheless, it is possible for this type of institution to reach binding decisions; however, they do tend to require the unanimous vote of all members, especially in important matters,[882] In addition, Lister has described the requirement of unanimity as being arduous and time consuming.[883]

When compared, it can be seen that the independence, the decision-making process and the binding power of the decisions made are the three main features that distinguish between supranational and intergovernmental institutions. In addition, academics tend to regard supranational institutions more favourably than intergovernmental institutions. However, an international organisation does not necessarily have to be composed of one type of institution over the other;[884] therefore, it is possible for an organisation to consist of both types of regional institutions. Schermers and Blokker also note in their literature that the distinction between supranational and intergovernmental institutions can be unclear, and it is possible that one institution is not fully supranational or intergovernmental.[885] Accordingly, during the analysis conducted in this chapter, there may be some institutions of the regional economic association that cannot be considered as one distinct type of institution. In other

[876] Wunderlich (n 872) (2012) 130.
[877] Lister (n 872) (1984); Schermers and Blokker (n 869) (2011) 55; Wunderlich (n 872) (2012) 130.
[878] ibid.
[879] Volker Rittberger, Bernhard Zangl and Matthias Staisch, *International Organization, Polity, Politics and Policies* (Palgrave Macmillan 2006).
[880] Wunderlich (n 872) (2012) 130.
[881] Lister (n 872) (1984).
[882] Schermers and Blokker (n 869) (2011) 55.
[883] Lister (n 872) (1984).
[884] Wunderlich (n 872) (2012) 130.
[885] Schermers and Blokker (n 869) (2011) 57.

words, these organisations may not exhibit all three features that conform to one type of institution.

Given that the main objective of this research is to examine the feasibility of regional integration of labour migration within the AEC by taking into account the experiences of the EEC, it is essential to examine the institutional framework of both economic associations. This chapter therefore aims to focus on the three key features of the two different institutions, which are independence (by looking at the composition of the institution), the decision-making process, and the binding power of the decisions made (by looking at the execution of powers by the institution). This method will help to examine the institutional frameworks of both the EEC and the AEC as well as illustrate the functions of the EEC institutions that have led to the achievement of the free movement of persons framework, whilst also examining the functions of the comparable AEC institutions.

2. Institutional Framework of the EEC

As mentioned previously, six founding member states signed three main treaties in the 1950s.[886] According to the treaty that established the EEC, the Treaty of Rome, the main objective of the EEC was to establish a common market underpinned by the four freedoms of goods, persons, services and capital.[887] In order to achieve this objective, Article 4 of the Treaty of Rome stated that the duties of the EEC would be carried out by an Assembly, a Commission, a Council and a Court of Justice.[888] It is important to note here that both the Assembly and the Court of Justice were shared by the ECSC, the EAEC and the EEC in order to allow for cohesion among these bodies.[889] However, each institution would have its own separate commission and council in order to differentiate the function and authority of each of the three communities.[890]

As abolishing obstacles to the free movement of persons within the member states was specified by Article 3 of the Treaty of Rome as one of the main objectives of the EEC,[891]

[886] Treaty establishing the ECSC (18 April 1951), Treaty establishing the EAEC (25 March 1957), and Treaty establishing the EEC (25 March 1957).
[887] Treaty of Rome (1957) Article 2.
[888] Treaty of Rome (1957) Article 4.
[889] H R Rooks, 'The Principal Institutions of the European Common Market' (1959) 4 (1) Section of International and Comparative Law Bulletin 9-10.
[890] ibid.
[891] Treaty of Rome (1957) Article 3 (c).

the four institutions each had a responsibility to work toward and actualise this goal. The Assembly, however, had a limited role in advancing the EEC's policies and framework compared with the other three institutions and has been critiqued by a large body of literature.[892] Rooks in particular describes the efforts of the Assembly as merely providing recommendations devoid of any actual legislative force,[893] while Heidelberg asserts that while it holds consultative powers it does not have the power to make decisions.[894] In addition, the suggestions made by the Assembly have no binding power and can be disregarded by the Council.[895] Sewer and Doeker also conclude that the Assembly does not possess any normative functions, but merely consultative and censorial ones.[896] Moreover, Barnard and Peers note that the Assembly has simply the right to be consulted and only where a particular treaty article has mandated such consultation.[897] Accordingly, as this chapter aims to examine the key institutions that played a crucial role in establishing the EEC's free movement of persons framework, it will focus only on the Commission, the Council and the Court of Justice.

2.1 The Commission

According to the Treaty of Rome, the Commission was to be composed of nine members who must be nationals of the member states, with no more than two members from any one state.[898] These members were then appointed by common accord among the governments of each of the member states.[899] In practice, two commissioners were appointed from each of the three major member states (France, Germany and Italy) and one commissioner from each of the remaining member states (Belgium, the Netherlands, and Luxembourg).[900] The terms of the Commission were four years in duration and were

[892] Treaty of Rome (1957) Article 137: The Assembly is to exercise shall exercise the advisory and supervisory powers which are conferred upon it by the Treaty of Rome.
[893] Rooks (n 889) (1959) 10-11.
[894] Franz C Heidelberg, 'Parliamentary Control and Political Groups in the Three European Regional Communities' (1961) 26 (3) Law and Contemporary Problems 434-435.
[895] ibid.
[896] Geoffrey Sewer and Gunther Doeker, 'The European Economic Community as a Constitutional System' (1962) 4 (2) Inter-American Law Review 219.
[897] Barnard and Peers (n 533) (2016) 16.
[898] Treaty of Rome (1957) Article 157 (1).
[899] Treaty of Rome (1957) Article 158.
[900] Ole Lando, 'EEC Council and Commission in their Mutual Relationship: A Survey of Law and Practice' (1963) 12 (2) Journal of Public Law 343-344.

renewable.[901] Moreover, the Commission was to represent the interests of the Community rather than the national interests of the member states, its independence stressed by Article 157 of the Treaty.[902] In detail, the Commission could not seek or take instruction from any government or from any other body.[903] Although the Commission acted as an independent institution, its qualification and actions could be checked by other organs. For example, the Court of Justice, on application by the Council, had the power to compulsorily retire any commissioner who failed to fulfil the conditions required by their duties or who was guilty of serious misconduct.[904] In addition, member states, other EEC institutions and individuals concerned could ask the Court of Justice to make a declaration that the Commission had failed to perform its duty.[905]

While the Treaty of Rome did not stipulate anything as to the organisation within the Commission, in practice, each of the nine commissioners was assigned certain responsibilities. The Commission was divided into nine departments (Directions Générales), which were Foreign Affairs, Economic and Financial Affairs, Internal Market, Competition, Social Affairs, Agriculture, Transport, Overseas Development, and Administration.[906] Subsequently, each commissioner was appointed chairperson of one department and a member of several departments.[907] In addition, each commissioner was assisted by a so-called cabinet, which was composed of two senior officials of the commissioner's own member state, one of whom was responsible for the affairs of the department of which their commissioner was the chair and the other for the affairs of the other departments of which the commissioner was a member.[908]

In terms of the execution of powers, the Commission was to act in all cases by a majority of its membership.[909] As the Commission consisted of nine members, at least five of the commissioners must approve in order to reach a conclusion in any matter. Additionally, according to the Treaty of Rome, the Commission had two main responsibilities: its first duty was to draw up proposals for legal instruments to be used by the Community. According to Article 189 of the Treaty, the Commission shared legislative power with the Council;

---

[901] ibid.
[902] Treaty of Rome (1957) Article 157 (2).
[903] ibid.
[904] Treaty of Rome (1957) Article 160.
[905] Treaty of Rome (1957) Article 175.
[906] Lando (n 900) (1963) 343-344.
[907] Sewer and Doeker (n 896) (1962) 219.
[908] Lando (n 900) (1963) 343-344; Andreas F Lowenfeld, 'How the European Economic Community is Organized' (1963) 19 (1) Business Lawyer (ABA) 127.
[909] Treaty of Rome (1957) Article 163.

specifically speaking, the Commission had an initiative role in proposing drafts of legal instruments to the Council.[910] In terms of the free movement of persons framework, the three articles in the Treaty, namely Article 49, Article 54 and Article 63, similarly stated that the Commission had to propose legislation regarding the free movement of workers, self-employed persons and service providers to the Council for it to decide upon.[911] Thus, the Commission played a crucial role in initiating the proposal for regulations and directives on the free movement of persons framework. In other words, all regulations and directives discussed in chapters 2 and 3, which led to the achievement of the free movement of persons framework of the EEC, were initiated by the Commission.

Before a formal proposal was transmitted to the Council, the Commission began in the informal phase to draft the proposal. During this informal stage, there were meetings between the staff of the Commission and experts from the national governments of the member states in order to ensure the technical and legal quality of the proposal.[912] Afterwards, the Commission would engage in consultation with the Consultative Committee and other interested groups.[913] After doing so, the draft proposal would then be discussed with the Directions Générales concerned and then put into legal form, after which there would be another informal negotiation between the Commission and the relevant experts. According to Dahlberg, who explains the practical role of the Commission during the transitional period in establishing the free movement of workers framework in his study, the Commission wanted to consult not only with the experts from the ministry of labour but also with those from other related ministries, such as population, justice or the interior, that would be impacted by the proposed regulation or directive.[914] The final version of the proposal would then be decided upon by the Directions Générales concerned, before officially being submitted to the Council.

Another duty of the Commission is stated in Article 155 of the Treaty, which endowed the Commission with the executive power to ensure that the provisions within the Treaty would be applied.[915] Specifically, the Commission was charged with the responsibility of ensuring that regulations and directives enacted pursuant to the Treaty regarding the free movement of persons were effectively implemented by other institutions or the member

[910] Treaty of Rome (1957) Article 189.
[911] Treaty of Rome (1957) Article 49, 54, 63.
[912] Dahlberg (n 136) (1967) 313.
[913] ibid.
[914] ibid.
[915] Treaty of Rome (1957) Article 155.

states. If the Commission considered that other institutions had acted in breach of the Treaty or abused their power, it could ask the Court of Justice to make a declaration as to the validity of an act.[916] Moreover, according to Article 169, if the Commission considered that a member state had failed to fulfil an obligation under the Treaty, it must submit reasoned opinion to the member state. If the latter did not comply with the opinion within the period of time stated, the former might bring an action against the member state in the Court of Justice.[917] For instance, in the case of *Commission v Germany*, Germany imposed penalties on workers and service providers from other member states who could not produce their residence permits, to a disproportionate degree compared with German nationals committing a comparable infringement. In this case, the Commission considered that Germany had infringed the Treaty of Rome and thus asked the Court under Article 169 of the Treaty of Rome to make a declaration as to the validity of the act. Subsequently, the Court decided that such practice infringed Article 48, Article 59 of the Treaty of Rome, Article 4 (1) of Directive 68/360 and Article 4 (1) of Directive 73/148.[918] This example illustrates how the Commission played a crucial role in ensuring the proper function of the EEC legal instruments regarding the free movement of workers and service providers, which were, in this case, the Treaty of Rome as well as the two directives on the abolition of restrictions on movement and residence within the community for workers and service providers.

From the above examination of the responsibilities of the Commission, it can, therefore, be said that the Commission had an exclusive power for proposing and drafting EEC legislation. Thus, it owned a legislative role in the initiation and shaping of the regional legal framework. Additionally, the Commission had another crucial responsibility in ensuring the observance of and compliance with EEC legislation by the member states and other institutions of the EEC. As Barnard and Peers highlight in their literature, the Commission was accorded the role of watchdog to ensure that the member states and the regional institutions complied with the Treaty of Rome. In other words, the Commission could be considered as the guardian of the Treaty. Given this exclusive power of the Commission, the provisions in the EEC legal instruments could work more efficiently, and, as a result, the free movement of persons framework of the EEC could be developed more effectively. If the

[916] Treaty of Rome (1957) Article 173-174.
[917] Treaty of Rome (1957) Article 169; Article 170: The member states which considered that another member state failed to fulfil an obligation under the Treaty of Rome may also bring the matter before the Court of Justice.
[918] Case C-24/97 *Commission v Germany* [1998] ECR I 2140-2146 [15].

AEC would like to consider the experiences of the EEC, there is much to learn from these legislative and executive responsibilities of the Commission, which contributed to the advancement of the EEC free movement of persons framework.

2.2 The Council

The Council was composed of one minister from the government of each of the member states,[919] which did not invariably send the same minister to the meetings of the Council. In general, however, the Council had a reasonable continuity of membership, and the practice was that each government would nominate its national minister from the most appropriate department for the matter being discussed by the Council.[920] In contrast to the Commission, there was no article in the Treaty that required the Council to act independently. The reason for this was that the ministers of the Council represented the interests of their member states;[921] therefore, the government of each member state already influenced the decisions of its representatives in the Council. Similar to the Commission, the Council had the same legal responsibility to the Court of Justice in its failure to act effectively, and member states, other EEC institutions and individuals concerned could appeal its acts in the Court of Justice.[922]

In terms of the execution of powers, decisions made by the Council were reached by a simple majority vote when not otherwise stated in the Treaty of Rome.[923] However, a qualified majority vote was required for certain issues[924] and a unanimous vote was required for some very important matters.[925] For a qualified majority vote, the vote was weighted to give the larger member states a greater say than the smaller member states in order to reflect differences in population size.[926] The larger member states, France, Germany and Italy, had four votes each, the medium-sized member states, Belgium and the Netherlands, had two votes each, while Luxembourg as the smallest member state had only one.[927] Therefore, the usual qualified majority vote consisted of twelve votes in total, and, in any qualified majority

[919] Treaty of Rome (1957) Article 146.
[920] Sewer and Doeker (n 896) (1962) 219; Lando (n 900) (1963) 347.
[921] Sewer and Doeker (n 896) (1962) 222; Lowenfeld (n 908) (1963) 128.
[922] Treaty of Rome (1957) Article 175.
[923] Treaty of Rome (1957) Article 148 (1).
[924] Treaty of Rome (1957) Article 148 (2).
[925] Treaty of Rome (1957) Article 148-149.
[926] Rooks (n 889) (1959) 13.
[927] ibid.

vote, two large and two medium states together could outvote a large member state and Luxembourg.[928] However, two large member states, one medium member state and Luxembourg together could never outvote one large and one medium state opposing or not voting for a proposal.

According to the Treaty of Rome, the Council would execute legislative power, and the primary function of the Council was to pass on proposals made by the Commission.[929] In terms of the free movement of workers, Article 49 of the Treaty did not mandate any special voting method;[930] thus, the Council had to adopt a simple majority vote to pass the Commission's proposal to issue regulations and directives setting out the measures required to bring about the freedom of movement for workers. In terms of the free movement of self-employed persons and service providers, Articles 54 and 63 of the Treaty required a unanimous vote by the Council during the first stage and a qualified majority vote at a later stage to pass the Commission's proposals to issue directives.[931] It can therefore be seen that the required voting method on the issues pertaining to workers was different to those of self-employed persons and service providers. This was especially the case during the first stage, where only a simple majority vote was required for the former, while a unanimous vote was required for the latter. Consequently, all the ministers from every member state sitting on the Council had to unanimously agree in order to issue any directive during the first stage on free movement of self-employed persons and service providers. As for the later stage, while a simple majority was required for the matters regarding workers, a complex qualified majority vote was required for that regarding self-employed persons and service providers. It is therefore apparent that the Council took more time to reach an agreement on issues regarding self-employed persons and service providers than that of workers.

These differing requirements regarding the Council's vote could explain why negotiating legislation for workers was faster than that for self-employed persons and service providers during the EEC transitional period. According to Article 8 of the Treaty of Rome, "a transitional period should not be any longer than 12 years and it is to be divided into three stages of four years each."[932] As the Treaty of Rome came into force on 1 January 1958, the deadline for the transitional period was 31 December 1969. As mentioned in chapter 2, the

[928] Sewer and Doeker (n 896) (1962) 219.
[929] Treaty of Rome (1957) Article 145.
[930] Treaty of Rome (1957) Article 49.
[931] Treaty of Rome (1957) Article 54 (2), 63 (2).
[932] Treaty of Rome (1957) Article 8.

negotiations regarding the free movement of workers largely followed the time frame of the Treaty. First, there was Regulation 15/61 and the Directive of August 1961, then the second round of negotiations resulted in Regulation 38/64 and Directive 64/240. Finally, the negotiation process regarding the free movement of workers in the EEC period was completed with the adoption of Regulation 1612/68 and Directive 68/360 in 1968. This means that the negotiation process did not experience any delay beyond the transition deadline. However, as mentioned in chapter 3, the negotiations regarding the free movement of self-employed persons and service providers were delayed and continued beyond the end of the transitional period. In terms of the general movement and residence of self-employed persons and service providers and their family members, the first relevant directive was Directive 64/220 in 1964. It then took almost ten years for the EEC to publish the next piece of legislation on this issue, which was Directive 73/148 of 1973.

Although the Council had to act upon proposals submitted by the Commission, the Council had certain powers to amend or call for proposals of EEC legislation in specific situations, having the ability to amend a proposal by a unanimous vote.[933] The Council could also request the Commission to undertake any studies that the Council deemed desirable for the attainment of the common objectives and to submit to it any appropriate proposals.[934]

Overall, it can be seen that the Treaty left only a limited initiative role for the Council to bring about any EEC legislation. The Council still had to rely on the Commission in all cases. To be specific, the Council only had the power to make changes to the proposals that the Commission had already drafted. In addition, the Council could only request the Commission draft a proposal on the desired matter; thus, the Council was not empowered to draft its own proposals under any circumstances. Therefore, the primary role of the Council was to pass EEC legislation proposed by the Commission. From the examination of the EEC transitional period, it is apparent that the requirement for a unanimous vote by the Council caused a delay in passing EEC legislation on the free movement of self-employed persons and service providers. On the other hand, EEC legislation on the free movement of workers required a simple majority vote of the Council and did not face any delay. This could be a useful lesson for the AEC – that is, a voting procedure in an institution which requires agreement from all member states could lead to a delay in the process of negotiation.

[933] Treaty of Rome (1957) Article 149.
[934] Treaty of Rome (1957) Article 152.

2.3 The European Court of Justice

The Treaty of Rome stated that the Court of Justice was to be composed of seven judges.[935] In general, it had to sit as a plenary session; however, it was also allowed to divide into chambers of three or five judges in order to undertake certain inquiries or hear certain categories of cases.[936] The judges would then elect the President of the Court of Justice from among their numbers for a term of three years, after which they could be re-elected.[937] The Court of Justice was assisted by two Advocates General,[938] and the judges and Advocates General were appointed for six-year terms by common accord of the governments of the member states.[939] This means of appointment was to ensure that the seats in the Court were fairly distributed.[940] In addition, the drafters of the Treaty deviated from the conventional appointment of the judiciary for life-long terms because of the uncertainty regarding the evolution of their tasks.[941] In terms of qualifications, the judges and Advocates General needed to be qualified for the highest judicial offices in their respective countries or who were jurisconsults of recognised competence.[942] Moreover, Article 167 of the Treaty of Rome stressed that their independence must be beyond doubt.[943] According to Donner, who served as President of the Court of Justice during the first EEC transitional period from 1958 to 1964, seven judges of the Court during that time consisted of a few judges from the national supreme jurisdiction, some university professors, a legal advisor to the Ministry of Foreign Affairs, and a luminary of a national bar.[944] Also, one of the Advocates General was the former Conseiller d'Etat and the other was a legal adviser to a German bank.[945]

In terms of the sources of law, none of the articles in the Treaty of Rome or the Protocol on the Statute of the European Court of Justice specified the scope of legal instruments which the Court must apply. This was different from the Statute of the International Court of Justice (ICJ) which stated that the ICJ shall apply international

---

[935] Treaty of Rome (1957) Article 165 (1).
[936] Treaty of Rome (1957) Article 165 (2).
[937] Treaty of Rome (1957) Article 167.
[938] Treaty of Rome (1957) Article 166 (1).
[939] Treaty of Rome (1957) Article 167 (1).
[940] Rooks (n 889) (1959) 14.
[941] ibid.
[942] ibid.
[943] ibid.
[944] Andreas Matthias Donner, 'The Court of Justice of the European Communities' (1961) 1 International and Comparative Law Quarterly Supplementary Publication 66.
[945] ibid.

convention, international custom, or general principles of law recognised by civilized nations.[946] Nevertheless, the practice of the European Court of Justice demonstrated its clear sources of law.[947] Specifically, the Treaty of Rome could be considered as a primary source of EEC legislation.[948] The secondary EEC legislation resulted from cooperation between the Commission and the Council, as discussed in the two previous sections. As seen from chapters 2 and 3, the two main secondary laws were the regulation and the directive. The regulation was directly applicable in all member states without any requirement of transposition into domestic laws.[949] However, the directive only set out objectives and it was up to member states to devise domestic laws to reach the objectives.[950] Lastly, it was common that the Court of Justice referred to its previous decisions. Therefore, the Court of Justice tended to rely on the EEC legal instruments. Contrary to the practice of the ICJ, the Court of Justice was not generally concerned with international law.[951]

In terms of the execution of powers, the Protocol on the Statute of the European Court of Justice stated that judgments must be signed by the President, and they must be read in open court.[952] However, the rule was that the Court's deliberations must be and must remain secret,[953] which followed continental legal tradition,[954] and were dissenting opinions to occur, they could not be made public. According to Donner, this rule forced the Court of Justice to come to an agreement that might not have been approved by all but had to be considered as clear by all judges of the Court of Justice.[955] This required a prolonged discussion in-camera with a careful wording of the decision,[956] which assured that the judgments were understandable throughout the EEC and helped to establish common legal principles.[957]

According to the Treaty of Rome, the main function of the Court of Justice was to ensure that in the interpretation and application of the Treaty of Rome and other secondary EEC legislation these laws would be observed.[958] The jurisdiction of the Court of Justice,

---

[946] The Statute of the International Court of Justice Article 38.
[947] J F McMahon, 'The Court of the European Communities Judicial Interpretation and International Organization' (1961) 37 British Year Book of International Law 325-326.
[948] ibid.
[949] Treaty of Rome (1957) Article 189 (2).
[950] Treaty of Rome (1957) Article 189 (3).
[951] McMahon (n 947) (1961) 326-327.
[952] Protocol on the Statute of the Court of Justice (1957) Article 34.
[953] Protocol on the Statute of the Court of Justice (1957) Article 32.
[954] Lowenfeld (n 908) (1963) 129.
[955] Donner (n 944) (1961) 67-68.
[956] ibid.
[957] ibid.
[958] Treaty of Rome (1957) Article 164

therefore, had an exceptional purpose and its three main jurisdictions were as discussed below.

First of all, the Court of Justice had jurisdiction over the cases against the member states when the Commission considered that a member state had failed to fulfil its obligations under the Treaty of Rome.[959] If the Court found such failure, the state must take the measures required to implement the judgment.[960] In terms of the free movement of persons, it can be seen in the case of *Commission v Germany* that the Court of Justice declared the act by Germany in imposing disproportionate penalties for EEC workers and service providers was an infringement of the Treaty of Rome and secondary EEC legislation.[961] Germany was still allowed to impose penalties on EEC workers and service providers who could not produce their residence permits, but the penalties had to be comparable to those imposed on German nationals who failed to carry their identity cards.[962] This example illustrates how the decision of the Court of Justice directly bound the member states concerned to their obligations under EEC legislation. Additionally, this case law shows that the Court of Justice was willing to discipline Germany which was considered to be a powerful and important original member state of the EEC.

Second, the Court of Justice also had jurisdiction over cases against other EEC regional institutions, including the Commission and the Council. The Treaty of Rome stated that a member state, the Council, the Commission or any individual natural or legal person directly affected by a matter might ask the Court of Justice to make a declaration as to the legality of an act by the Council or the Commission.[963] An act could then be challenged on four grounds, which included the following: a lack of competence, infringement of an essential procedural requirement, infringement of the Treaty of Rome or any rule of law relating to its application, and the misuse of powers.[964] If the action was well-founded, the Court of Justice had the power to declare the act concerned to be void[965] and the related institution was required to take the necessary measures to comply with the judgment of the Court of Justice.[966]This demonstrates that there was a check and balance of powers among the EEC institutions. Specifically, the Court of Justice played a crucial role in ensuring the

[959] Treaty of Rome (1957) Article 169, 170.
[960] Treaty of Rome (1957) Article 171.
[961] Case C-24/97 *Commission v Germany* [1998] ECR I 2140-2146 [15].
[962] ibid.
[963] Treaty of Rome (1957) Article 173 (1).
[964] ibid.
[965] Treaty of Rome (1957) Article 174.
[966] Treaty of Rome (1957) Article 176.

execution of powers of the Commission and the Council in following their obligations in the Treaty of Rome.

Finally, the Court of Justice also had jurisdiction over the interpretation of regional law. According to Article 177 of the Treaty of Rome, the national courts could refer questions regarding the interpretation of Community law to the Court of Justice for a preliminary decision.[967] Subsequently, the national court had to observe this decision in ruling on the case before it.[968] As seen in chapters 2 and 3, the majority of the cases discussed were referred to the Court of Justice in this respect. As the Treaty of Rome did not define the terms workers, self-employed persons and service providers, the Court of Justice developed the common definitions of these crucial terms through case law.[969] For example, the term "workers" was developed by the Court of Justice after the end of the EEC transitional period. Surprisingly, it was not until 1986 that the definition of a worker was finally settled. According to the *Lawrie-Blum* case, a worker refers to a person who performs services for and under the direction of another person in return for remuneration.[970] About ten years later the Court had to provide further clarification, in the case of *Asscher*, where it explained that such an employment relationship is required to have subordination characteristics.[971]

The Court of Justice also interpreted the provisions in the secondary laws. For instance, the Court in the *Sotgiu* case was tasked with interpreting Article 7 of Regulation 1612/68, which entailed the same treatment for EEC workers regarding remuneration. The Court of Justice held that an allowance, which was paid in addition to wages for the inconvenience caused to workers who were separated from home, could also be considered remuneration.[972] Additionally, the Court of Justice in the case of *Donato Casagrande* interpreted Article 12 of Regulation 1612/68, which provided the right to general education for the children of EEC workers. The Court of Justice held that this right to general education

---

[967] Treaty of Rome (1957) Article 177 and Protocol on the Statute of the Court of Justice of the European Economic Community (1957) Article 20.
[968] ibid.
[969] Definition of Workers; Case 66/85 *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2139-2148 and Case C-107/94 *Asscher v Staatssecretaris van Financiën* [1996] ECR I-3113-3132 [26]; Definition of Self-employed Persons; *Case 2-74 Jean Reyners v Belgian State* [1974] ECR 632-657 [21]; Case C-107/94 *Asscher v Staatssecretaris van Financiën* [1996] ECR I-3113-3132 [26]; Definition of Service Providers; Case 352/85 *Bond van Adverteerders and others v The Netherlands State* [1988] ECR 2124-2137 [12]; Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I4186-4201 [27]; Case 33-74 *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverhei* [1974] ECR 1300-1313 [13].
[970] Case 66/85 *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2139-2148.
[971] Case C-107/94 *Asscher v Staatssecretaris van Financiën* [1996] ECR I-3113-3132 [26].
[972] Case 152-73 *Giovanni Maria Sotgiu v Deutsche Bundespost* [1974] ECR 154-167 [8].

not only pertained to the domestic rules regarding the admission but also to other general measures aimed at facilitating educational attendance, such as an educational grant.[973] These examples illustrate that the preliminary ruling of the Court could prevent different domestic interpretations by the national courts, which could hinder the achievement of a uniform interpretation of EEC law and frustrate the common objectives of the EEC.[974]

Another by-product of the preliminary rulings were legal principles developed by the Court of Justice. The first important principle developed was the principle of direct effect. According to the *Van Gend and Loos* case in 1963, EEC legislation is a new legal order of international law because its subjects include not only member states but also individuals.[975] Therefore, EEC legislation confers rights on individuals, which could be directly invoked at the national level.[976] This offered national courts a way to bypass national constitutional law in light of international treaties which stipulated that international law can provide influence domestically only after the transposition.[977] The direct effect seems to be reasonable in the case of regulations which are directly applicable in member states without the transposition.[978] However, at the end of the EEC transitional period, the Court of Justice was challenged with the problem of deciding whether a direct effect could be attributed to the directive, which binds member states only with the aims of the regional law, allowing national legislators to decide on the method of implementation.[979] According to the *Van Duyn* case in 1974, the Court of Justice relied mostly on the effectiveness argument, declaring that it would be incompatible with the direct effect for the directive not to have a direct effect.[980] About ten years afterwards, the Court of Justice clarified in the *Marshall* case that the directive only has vertical direct effect. Thus, individuals could directly invoke the directive

---

[973] Case 9/74 *Donato Casagrande v Landeshauptstadt München* [1974] ECR 774-780 [9].
[974] Donner (n 944) (1961) 69; McMahon (n 947) (1961) 325-326; Arthur Lenhoff, 'Jurisdictional Relationship between the Court of the European Communities and the Courts of the Member States' (1963) 12 (2) Buffalo Law Review 324-325; Werner Feld, 'The Significance of the Court of Justice of the European Communities' (1963) 39 (1) North Dakota Law Review 41; Werner Feld and Elliot Slotnick, 'Marshalling the European Community Court: A Comparative Study in Judicial Intergration' (1976) 25 (2) Emory Law Journal 323-324.
[975] Case 6/62 *Van Gend and Loos v Netherlands Inland Revenue Administration* [1963] ECR 4-16.
[976] ibid.
[977] Joseph Minattur, 'The Court of Justice of the European Communities' (1964) 3 (3) Philippine International Law Journal 39-40; Jerry L Mashaw, 'Federal Issues In and About the Jurisdiction of the Court of Justice of the European Communities' (1965-1966) 40 (1) Tulane Law Review 38; Maurice Lagrange, 'The Court of Justice as a Factor in European Integration' (1967) 15 (4) American Journal of Comparative Law 723-724.
[978] Treaty of Rome (1957) Article 189 (2)
[979] Treaty of Rome (1957) Article 189 (3).
[980] Case 41/74 *Yvonne van Duyn v Home Office* [1974] ECR 1338-1352.

against member states.[981] Although there was no direct effect in the case between private parties, the Court in the *von Colson* case declared that the national courts still have to interpret and apply the domestic laws to achieve the objectives specified in the directives.[982]

The Court of Justice also developed the principle of supremacy of Community law. The issue was raised in the case of *Costa v. E.N.E.L* in 1964, where there was a conflict between certain provisions of the Treaty of Rome and the domestic law in a member state. Specifically, this case reiterated the key principle from the *Van Gend and Loos* case that the Community law norm is a new form of legal order and cannot be classified as an ordinary international law. Thus, the Community law norm must be enforced by the national court.[983] The Court of Justice in the *Costa v. E.N.E.L* case also added that the Treaty of Rome was superior to conflicting laws passed by the national legislatures.[984] In other words, a conflict between an EEC law norm and a domestic one should be resolved by giving effect to the EEC legislation. It is clear that the Court of Justice had another crucial role in ensuring that EEC legislation was enforceable, in practice.

As discussed in chapters 2 and 3, the main factor that led to the achievement of the free movement of persons framework in the EEC was the legislation that abolished the obstacles to labour migration, and guaranteed the rights of workers, self-employed persons and service providers within the region. From the above examination of the main responsibilities of the Court of Justice, it can be concluded that it was a powerful institution and played an important role in ensuring that the interpretation and application of EEC law was observed. The Court of Justice had a broad jurisdiction, ranging from cases against the member states or institutions to cases regarding the interpretation of Community law. The most unique and crucial role of the Court of Justice is the final jurisdiction, which was the preliminary ruling under Article 177 of the Treaty of Rome. It allowed the Court of Justice to be a supreme interpreter of EEC legislation which joined the domestic court into a common system with a view to a common design. As mentioned by Lenhoff and Lowenfeld, the preliminary ruling of the Court of Justice helped to ensure uniformity in the interpretation of Community law among the member states.[985] Additionally, the Court of Justice also created important legal principles through its preliminary rulings, especially the principle of direct

---

[981] Case 152/84 *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 737-751.
[982] Case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] 1892-1911.
[983] Case 6/64 *Flaminio Costa v E.N.E.L* [1964] ECR 588-600.
[984] ibid.
[985] Lenhoff (n 974) (1963) 320-321; Lowenfeld (n 908) (1963) 130.

effect and supremacy of Community law. These principles illustrate that the Court of Justice made Community law enforceable to bring about regional integration and fulfil the objectives of the EEC. It is apparent that the Court of Justice is not only the supreme interpreter of Community law but also a powerful integrator of the EEC. As free movement of persons was one of the main objectives of the EEC, these exceptional features of the Court of Justice contributed to further integration, which ensured that the free movement measures were actually applied by the EEC member states. If the AEC would like to take into account the experiences of the EEC in this respect, this role of the Court of Justice is an interesting model from which the AEC could learn.

3. Institutional Framework of the AEC

As mentioned in chapter 4, the ASEAN was founded by the ASEAN Declaration in 1967.[986] After 40 years of operating as a loose association,[987] the member states signed the ASEAN Charter in 2007, which committed to intensifying community building through enhanced regional cooperation and integration, in particular by establishing an ASEAN Community comprising the ASEAN Security Community (ASC), the ASEAN Socio-Cultural Community (ASCC) and the ASEAN Economic Community (AEC).[988] This ASEAN Charter could be considered as a foundational basis for the ASEAN endeavours because it set the objectives as well as institutional framework of the three ASEAN communities.[989] Apart from the Charter, there have been the blueprints that set forth the specific goals and actions to be achieved for each community. The blueprint, endorsed by the leaders of the member states, is a political instrument, and has no legally binding effect.[990] However, completing further ASEAN legal instruments could be one of the goals set in the blueprint.

Regarding the AEC, its main objective, as stated in Article 5 of the ASEAN Charter, is to create a single market in which there is a flow of goods, services, skilled labour and capital.[991] There are two AEC blueprints which are the AEC Blueprint 2015 published in

[986] ASEAN Declaration (1967) [2].
[987] Michael Ewing-Chow and Leonardo Bernard, 'The ASEAN Charter: The Legalization of ASEAN?' in S Cassese and others (eds), *Global Administrative Law: The Casebook* (Institute for International Law and Justice 2012) 117; ISEAS-Yusof Ishak Institute, 'ASEAN and the EU in Perspective' (2016) ASEAN Focus 5.
[988] ASEAN Charter (2007) Preamble.
[989] Tan (n 535) (2008) 181.
[990] Inama and Sim (n 505) (2015) 48.
[991] ASEAN Charter (2007) Article 5.

2008 and the AEC Blueprint 2025 published in 2015. According to the first AEC Blueprint 2015, the member states agreed to hasten the establishment of the AEC and to transform into a region with a flow of goods, services, skilled labour, and capital.[992]It also set a strategic approach in terms of the free flow of skilled labour that the AEC member states planned to negotiate and complete MRAs for major professional services.[993] According to the more recent AEC Blueprint 2025, the current objective of the AEC is to facilitate the seamless movement of goods, services, skilled labour and capital within the AEC in order to enhance regional trade and production networks, as well as to establish a more unified market for its firms and consumers.[994] In respect of the movement of labour, it states that the AEC member states would consider further improvements to existing MRAs and consider the feasibility of additional new MRAs to facilitate the mobility of professionals and skilled labour in the region. It also aims to complete the MNP that would allow for the temporary cross-border movement of business visitors, intra-corporate transferees, and contractual service suppliers.[995] Therefore, the current regional plan of the AEC regarding the movement of labour is to develop the movement of skilled labour. Nevertheless, it is silent on the movement of low-skilled labour within the regional context.

The ASEAN Charter also covers the issues regarding the regional institutions. It aspires to situate an institutional framework to facilitate regional activities and fulfil regional objectives.[996]This section of the chapter aims to examine the framework of these institutions, in particular their roles in developing the plan of the AEC to facilitate the movement of labour. This section will also aim to compare and contrast these institutions with those of the EEC that share similar responsibilities. The first AEC institution to be examined is the Secretariat, which has similar executive powers to the Commission of the EEC in monitoring the implementation of regional agreements.[997] The second institution is the Summit, which is known to be the main decision-making body, similar to the EEC Council.[998] Unlike the EEC, however, the AEC does not have any regional court, and the only legal measures available to it are dispute settlement mechanisms.[999] Therefore, this part of the chapter will also examine

[992] AEC Blueprint 2015 (January 2008) [4].
[993] AEC Blueprint 2015 (January 2008) [A5].
[994] AEC Blueprint 2025 (November 2015) [7].
[995] AEC Blueprint 2025 (November 2015) [19 A5].
[996] Tan (n 535) (2008) 181.
[997] ASEAN Charter (2007) Article 11.
[998] ASEAN Charter (2007) Article 7.
[999] ASEAN Charter (2007) Article 25-26.

these mechanisms in order to understand how the AEC plans to deal with disputes in the absence of any court at the regional level.

3.1 The Secretariat

Nine years after the region was established, the founding member states signed the Agreement on the Establishment of the ASEAN Secretariat.[1000] The main responsibilities of the Secretariat were to initiate policies for regional cooperation and to monitor progress in the implementation of regional activities.[1001] The head of the Secretariat was the Secretary General, appointed by the foreign ministers of the member states, and the term in office was two years.[1002] However, this two-year term could be considered as a short working period leading to a discontinuity in the regional policies.[1003]Additionally, there was no mechanism for the Secretariat to monitor the activities of the member states.[1004] Therefore, this institution was reformed when the member states decided to strengthen the regional institutional framework by signing the ASEAN Charter in 2007.[1005]

According to the ASEAN Charter, the Secretariat is comprised of the Secretary General serving as president, who is assisted by four Deputy Secretaries General.[1006] The Secretary General is selected by the ASEAN Summit by the ASEAN nationals with due consideration being given to integrity, capability, professional experience and gender equality.[1007] The nationality of the Secretary General rotates based on the alphabetical order of the member states' names in English, and the term of office is five years, non-renewable.[1008] Two of the Deputy Secretaries General are appointed by a similar process for a non-renewable term of three years, while the other two are hired based on merit for a renewable term of three years.[1009] The four Deputy Secretaries General are required to be from different nationalities to the Secretary General and from four different member

[1000] Agreement on the Establishment of the ASEAN Secretariat (1976) <http://agreement.asean.org/media/download/20140117151823.pdf> [accessed 3 March 2021].
[1001] Agreement on the Establishment of the ASEAN Secretariat (1976) Article 3.
[1002] Agreement on the Establishment of the ASEAN Secretariat (1976) Article 3.
[1003] Pitsuwan (n 499) (2013) 42.
[1004] Weatherbee (n 500) (2013) 170.
[1005] ibid.
[1006] ASEAN Charter (2007) Article 11 (7), (4).
[1007] ASEAN Charter (2007) Article 11 (1).
[1008] ibid.
[1009] ASEAN Charter (2007) Article 11 (6).

states.[1010] It can, therefore, be seen that there are five representatives from five (out of ten) member states in the ASEAN Secretariat. Consequently, the Secretariat does not consist of representatives from all member states at any given time; however, the five seats in the Secretariat are rotated among all the member states. This composition of the Secretariat differs from the Commission of the EEC, which consists of representatives from all member states at all times.[1011]

Although the word "independence" is not stated in the ASEAN Charter, Article 11 (8) states that the Secretary General and the Secretariat staff shall not seek or receive instruction from any government or external party outside of the ASEAN.[1012] Article 11 (9) also states that each member state commits to exclusively respect the responsibilities of the Secretary General and their staff outlined in the ASEAN Charter, and to not seek to influence them in the discharge of their responsibilities.[1013] Accordingly, it can be seen that the requirement of independence of the ASEAN Secretariat is similar to that of the Commission of the EEC. To be specific, the members of these two institutions must not seek instructions from external parties and the governments of the member states must not seek to intervene in their operations.

In terms of execution of power, the Secretariat does not use a voting system to reach an agreement. Rather, according to the ASEAN Charter, the basic principle of decision-making in the region shall be based on consultation and consensus.[1014] This is different from the way in which the Commission of the EEC makes a decision, which, according to the Treaty of Rome, acts in all cases by a simple majority of its membership.[1015]

Unlike the Commission of the EEC, the Secretariat also does not have any direct legislative power, nor does it have any official responsibility to independently initiate any legislation. There is nothing in the ASEAN Charter or its blueprints that specifies such a role for the Secretariat, and, in current practice, the Secretariat makes proposals only by request of

[1010] ASEAN Charter (2007) Article 11 (5).
[1011] Treaty of Rome (1957) Article 157 (1) The Commission was composed of nine members who must be the nationals of the Member States but no more than two members from any single states; Lando (n 900) (1963) In practice, two Commissioners were from each of the three big countries (France, Germany and Italy) and one from each of the others.
[1012] ASEAN Charter (2007) Article 11 (8 B).
[1013] ASEAN Charter (2007) Article 11 (9).
[1014] ASEAN Charter (2007) Article 20.
[1015] Treaty of Rome (1957) Article 163.

the member states or the donor countries that provide aid to the ASEAN projects.[1016] Consequently, the Secretariat does not have the independent power to propose initiatives.

According to the ASEAN Charter and the AEC blueprints, the Secretariat does, however, have the executive power to facilitate and monitor progress in the implementation of AEC agreements and decisions.[1017] In the matter of the movement of skilled labour, the most recent and relevant AEC instrument is the AEC Blueprint 2025. This blueprint states that the objective of facilitating the movement of skilled labour began with the MRAs that would allow for the movement of practitioners in selected professions and the MNP that would allow for the temporary cross-border movement of business visitors, intra-corporate transferees and contractual service suppliers.[1018] The AEC Blueprint 2025 also states that the monitoring or tracking of the implementation of and compliance with strategic measures or action lines agreed upon in the AEC blueprint will be conducted by the Secretariat.[1019]

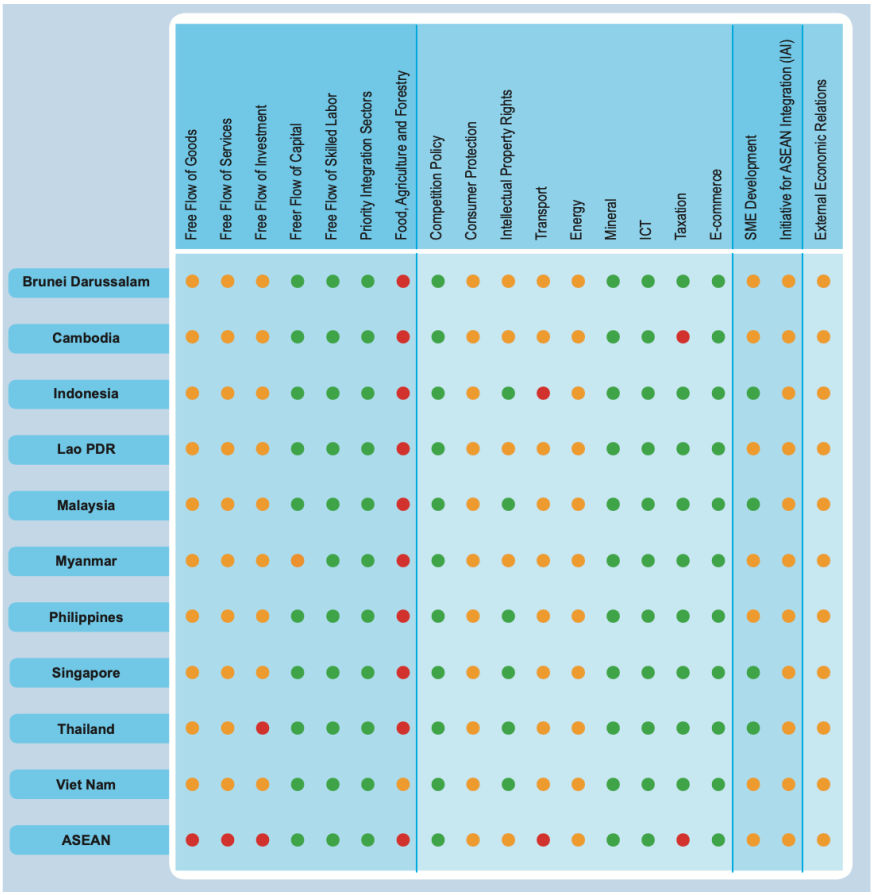
The main role of the Secretariat is, therefore, to provide progress reports regarding the AEC to the ASEAN Summit,[1020] the Secretariat's methods for monitoring the development of the AEC being stated in the two blueprints. Under the previous AEC Blueprint 2015 published in 2008, the Secretariat had to produce scorecards to monitor and assess the progress of measures affecting the AEC.[1021] The member states had committed politically to self-report to the Secretariat, but the failure by some of them to respond could have affected the overall score.[1022] This method illustrates the approach of the AEC to monitor the progress of AEC measures through "negative publicity and peer pressure."[1023]

Two official AEC scorecards have since been published by the Secretariat. The first scorecard, published in 2010, reported an implementation rate of 73.6 per cent of a total of 110 AEC measures.[1024] In terms of the measures regarding the movement of labour, the scorecard only listed the professions of the MRAs that had been signed by all member states[1025] and was very brief and did not provide any country-specific information or

[1016] Inama and Sim (n 505) (2015) 180.
[1017] ASEAN Charter (2007) Article 11 (2).
[1018] AEC Blueprint 2025 (November 2015) [19].
[1019] AEC Blueprint 2025 (November 2015) [82 Vi].
[1020] ASEAN Charter Article 11; AEC Blueprint 2025 (November 2015) [71].
[1021] AEC Blueprint 2015 (January 2008) [73].
[1022] Inama and Sim (n 505) (2015) 179.
[1023] ibid 49.
[1024] ASEAN Secretariat, Scorecard (2010) 13. <https://www.asean.org/wp-content/uploads/images/archive/publications/AEC%20Scorecard.pdf> [accessed 3 March 2021].
[1025] ibid 5.

assessment. Inama and Sim comment in their literature that the sanction of negative publicity was nullified in this case because the Secretariat did not want to highlight individual failures in implementing the AEC measures within each member state.[1026] The second scorecard published in 2012 reported a lower implementation rate of 67.5 per cent of a total of 277 AEC measures.[1027] This scorecard employed a colour-coded grading system where green indicated that the measures targeted in this area had been implemented, yellow indicated that more than half of the measures had been implemented, while red indicated that less than half of the measures had been implemented. Unlike the previous scorecard, this scorecard reflected the individual progress of each of the member states, as can be seen in the figure below.

The ASEAN Secretariat's Scorecard (March 2012)



[1026] Inama and Sim (n 505) (2015) 52.
[1027] ASEAN Secretariat, Scorecard (2012) 17 <https://www.asean.org/wp-content/uploads/images/documents/scorecard_final.pdf> [accessed 3 March 2021].

Looking at the above scorecard, it can be seen that all member states received a green rating for the matter relating to the free flow of skilled labour. According to this second scorecard in 2012, the MRAs for engineers and architects had started to be implemented, while work was underway to effectively operationalise the other professional MRAs. In addition, the MNP had been drafted and was expected to be finalised by 2012.[1028] Although this second scorecard provided details of the individual member states, the data provided in it was quite limited and was purely quantitative. It did not report how each of the member states had adopted the AEC measures, nor did it provide any detailed explanation of issues of non-compliance among the member states. As Inama and Sim noted in their study, more detail regarding the progress and lack of progress needs to be provided on an individual AEC member state basis.[1029]

In the recent AEC Blueprint 2025 published in 2015, the Secretariat's method of monitoring the development of the AEC had been changed. Instead of the previous scorecard system, the AEC Blueprint 2025 states that the monitoring or tracking of the implementation of and compliance with strategic measures or courses of action agreed upon in the blueprint will be conducted by the ASEAN Secretariat through "an enhanced monitoring framework using appropriate approaches and robust methodology."[1030] In August 2016, the AEC then devised a new Integration Monitoring Office, which was responsible for preparing a monitoring and evaluation framework as a new means of gauging the progress of the AEC measures.[1031] This framework proposed that the Secretariat would work with different sectoral bodies to develop detailed key performance indicators (KPIs) that align with the objectives and measures in the AEC Blueprint 2025.[1032]

Currently, the Secretariat is developing a new monitoring framework and is not publishing detailed evaluations of integrating outcomes or compliance.[1033] In the meantime, it recently published a report on the overall progress of the AEC in October 2019. In terms of the movement of labour, this report only provided a brief summary of the progress regarding the MRAs in eight professional services and an update that a review of the schedules for

---

[1028] ASEAN Secretariat, AEC Scorecard (2012) 5. <https://www.asean.org/wp-content/uploads/images/documents/scorecard_final.pdf> [accessed 3 March 2021].
[1029] Inama and Sim (n 505) (2015) 52.
[1030] AEC Blueprint 2025 (November 2015) [82 Vi].
[1031] ASEAN, 'AEC Monitoring' (2016) <https://asean.org/asean-economic-community/aec-monitoring/> [accessed 3 March 2021].
[1032] ibid.
[1033] Jayant Menon, Laurence Todd, Azam Wan Hashim and Aiman Wan Alias, 'ASEAN Integration Report' (2019) 3 ASEAN Prosperity Initiative Report 6.

commitments under the MNP is still underway with consideration of a common format for scheduling commitments under the agreement.[1034] However, this report did not contain any country-specific data and was still silent on the issue of non-compliance by each of the member states.

In comparison, it can be seen that the executive role of the Secretariat in monitoring the application of the provisions of the AEC instruments, including the MRAs and the MNP, is a lot weaker than that of the Commission of the EEC. The ASEAN Secretariat only has the power to submit questionnaires to the member states regarding the implementation and administration of the AEC measures. In addition, the previous AEC scorecard system was based on self-assessment by the member states and, therefore, subject to concerns about the independence and objectivity of this process.[1035] As the Secretariat is currently working on a new regime to monitor the AEC measures, it is useful to look at the Commission of the EEC, which has far more means of ensuring the application of the provisions of the EEC instruments. For example, when the Commission considers that a member state has failed to fulfil one of its obligations under the Treaty, it must submit a reasoned opinion to the state. Then, if the latter does not comply with the opinion within the period of time stated, the former may bring an action against the state in the Court of Justice whose decision would then bind the member state. Although the AEC does not have the equivalent of the Court in its framework, it may be beneficial to begin by facilitating a more active role for the Secretariat. Instead of the policy of self-reporting to which each member state has only made a political commitment to respond, the Secretariat should also be endowed with a new power to submit a reasoned opinion to a member state when it believes that a state is not fulfilling its obligations under the AEC instruments. If the member state concerned does not comply with the opinion, the Secretariat should then be able to enforce a certain kind of sanction. Moreover, if the AEC continues to rely on sanctioning in the form of "negative publicity and peer pressure," then this sanction should actually be enforced. In other words, the Secretariat should no longer stay silent on the non-compliance of member states when they publish reports in the future.

[1034] ASEAN Secretariat, 'ASEAN Integration Report' (October 2019) <https://asean.org/storage/2019/11/ASEAN-integration-report-2019.pdf> 35-36 [accessed 3 March 2021].
[1035] Menon and others (n 1033) (2019) 6.

3.2 The Summit

It took nine years for the region to have the first ASEAN summit, which was the official meeting between the heads of the member states, in 1976. This first Summit resulted in the Declaration of the ASEAN Concord which aspired the improvement of the ASEAN structure and institutional framework.[1036] There was also the initiation of the ASEAN Secretariat, discussed in the previous section.[1037] Nevertheless, the Concord did not specify the host and the frequency of the ASEAN Summit. It only stated that the meeting of the heads of member states would be held as and when necessary.[1038] This might be the reason why there were only two ASEAN Summits in the ten years after the Concord.[1039]In the fourth ASEAN Summit in 1992, there was the Singapore Declaration in which the heads of member states agreed to have an ASEAN Summit every three years with informal meetings in between.[1040] In 2007, the ASEAN Summit announced the ASEAN Charter which reformed its regional institutions, including the Summit.

According to the ASEAN Charter, the Summit is now composed of the heads of state or government of the ten member states.[1041] In contrast to the Secretariat, there is no article in the ASEAN Charter that requires the Summit to act independently. Therefore, these heads of state or government can make decisions based on the interests of their own member states and the government of each member state can also influence its representatives who have a seat at the Summit. Additionally, according to the ASEAN Charter, the chairmanship shall rotate annually, based on the alphabetical order of the English names of the member states.[1042] A member state that holds the chairmanship shall then chair and host the Summit, which is expected to be held twice a year.[1043] The ASEAN Summit is assisted by the ASEAN Coordinating Council, which comprises the foreign ministers from the member states.[1044] This council is responsible for preparing the meetings of the ASEAN Summit and

---

[1036] Declaration of the ASEAN Concord (1976) Section F (1)-(3) <https://asean.org/?static_post=declaration-of-asean-concord-indonesia-24-february-1976> [accessed 3 March 2021].
[1037] Declaration of the ASEAN Concord (1976) Section F (1).
[1038] Declaration of the ASEAN Concord (1976) Section A (1).
[1039] The second ASEAN Summit was in Malaysia in 1977 and the third ASEAN Summit was in Philippines in 1978; Phophueksanand (547) (2013) 47; Pitsuwan (n 499) (2013) 9.
[1040] Singapore Declaration 1992 Section 8 <https://asean.org/?static_post=singapore-declaration-of-1992-singapore-28-january-1992> [accessed 3 March 2021].
[1041] ASEAN Charter (2007) Article 7 (1).
[1042] ASEAN Charter (2007) Article 31.
[1043] ASEAN Charter (2007) Article 7 (3).
[1044] ASEAN Charter (2007) Article 8 (1).

undertaking other tasks as stipulated in the Charter or other such functions as may be assigned by the ASEAN Summit.[1045] Similarities can therefore be seen between the composition of the ASEAN Summit and the EEC Council from two key aspects: first, both consist of one representative from each of the member states. Second, the representatives can be influenced by their governments and make decisions in the interests of their own member states. However, the composition of these two institutions differs with regard to the qualification of the representatives. While the heads of government have a seat at the ASEAN Summit, the relevant ministers are nominated by each government to sit on the EEC Council.

In terms of their responsibilities, the ASEAN Summit is the main decision-making body of the Community.[1046] According to the ASEAN Charter, the ASEAN Summit shall deliberate, provide policy guidance and make decisions on "key issues pertaining to the realisation of the objectives of the region, important matters of interest to member states and all issues referred to it."[1047] Given that the freer flow of skilled labour is one of the main objectives of the AEC, the instruments regarding this issue have to be approved by the ASEAN Summit. Therefore, the two AEC blueprints and other instruments that have helped to establish the framework and measures to facilitate the flow of skilled labour within the AEC were adopted by the ASEAN Summit. The first AEC Blueprint 2015 was adopted by the 13th ASEAN Summit held in 2007 in Singapore[1048] and the second AEC Blueprint 2025 was adopted by the 25th ASEAN Summit held in 2014 in Myanmar.[1049] The MNP was subsequently adopted by the 21st ASEAN Summit in 2012 in Cambodia.[1050] The ASEAN Summit, therefore, shares a similar responsibility to the EEC Council in approving regional instruments to facilitate the movement of labour. However, there is a difference between the proposals that the ASEAN Summit and the EEC Council have to decide upon. While the EEC Council votes on the proposals independently submitted by the Commission, the ASEAN Summit makes decisions on the proposals made by the Secretariat merely upon request by the member states.

In terms of the execution of power, the decision-making process within the ASEAN Summit also differs to that of the EEC Council. As discussed in section 2.2 of this chapter, the EEC Council is able to reach a conclusion on a matter via a simple majority vote, a

[1045] ASEAN Charter (2007) Article 8 (2).
[1046] ASEAN Charter (2007) Article 7 (2a).
[1047] ASEAN Charter (2007) Article 7 (2b).
[1048] AEC Blueprint 2015 (January 2008) Preamble.
[1049] AEC Blueprint 2025 (November 2015) Preamble.
[1050] Agreement on Movement of Natural Persons (2012).

qualified majority vote or a unanimous vote. The EEC member states may then be bound by a decision made against their will in the case of a simple majority vote or a qualified majority vote. For instance, when the Council issued EEC legislation on the free movement of workers, there were some cases for which the EEC required a unanimous vote, such as the directives on the free movement of self-employed persons and service providers in the preliminary stage. However, this unanimous vote did cause significant delay; specifically, the negotiation of legislation regarding workers reached a faster conclusion than that for self-employed persons and service providers during the EEC transitional period.

As for the AEC, the voting process is not the standard means for the ASEAN Summit to make decisions. According to the ASEAN Charter, the basic principle of decision-making in the ASEAN shall be based on consultation and consensus.[1051] This is the tradition and normal practice of collective decision making in the region.[1052] This principle was influenced by the non-interference principle which developed from political interests, not from a legal basis.[1053] Contrary to the voting system, consensual decision-making sometimes lacks the decisive edge. Specifically, unanimity is not a necessary requirement in order to reach every final conclusion.[1054] Nevertheless, it only means that none of the member states objects to the decision so strongly that it feels compelled to register its dissent.[1055]In other words, the desired result for the consensual negotiation is that no member state loses face as a consequence of being in the minority.[1056] This decision-making method illustrates the aim to maintain a political balance among the member states.[1057] It is appropriate for the region because the member states have different political systems, culture, and economic status. This ASEAN Way allows every member state to feel at ease to cooperate under a regional framework.[1058] It also allows every issue to be gradually considered and scrutinized until every member state is satisfied with the final result.[1059] According to the interview with the Thai official who participated in the 28th-29th ASEAN Summit, the region does not adopt the voting systems where the minority has to be bound by the decision of the majority. However,

[1051] ASEAN Charter (2007) Article 20.
[1052] Sathirathai (n 540) (2014) 107, 114.
[1053] Nattpat Limsiritong, 'How to Apply Protocol to the ASEAN Charter on Dispute Settlement Mechanisms 2010' (2017) 1 (1) Asian Political Science Review 8-13.
[1054] Tan (n 535) (2008) 189; Inama and Sim (n 505) (2015) 43-44.
[1055] Tan (n 535) (2008) 189.
[1056]Ibid.
[1057] Nattpat Limsiritong, 'The Deadlock of ASEAN Dispute Settlement Mechanisms and Why ASEAN Cannot Unlock It' (2016) 3 (1) Asian Political Science Review 18-25.
[1058] Sathirathai (n 540) (2014) 5.
[1059] Sathirathai (n 540) (2014) 68.

the ASEAN Way of consultation and consensus allows the ASEAN member states to negotiate until they reach or mostly reach the point where every member state is "equally happy" or "equally unhappy."[1060]

The decisions made at the ASEAN Summit, therefore, represent the consensus among all member states, which tends to take a long period of time to reach a conclusion. This can be seen in the negotiation of the MNP among the AEC member states. The first AEC blueprint adopted at the 13th ASEAN Summit in 2007 inspired the AEC to facilitate the movement of skilled labour, including natural persons engaged in trade, services, and investments.[1061] It then took about five years for the AEC member states to sign onto the MNP that would allow the temporary cross-border movement of business visitors, intra-corporate transferees and contractual service suppliers among the AEC member states at the 21st ASEAN Summit in 2012. However, the MNP did not come into force immediately; rather, it entered into force in June 2016 following the completion of its ratification by all member states. This example illustrates how the process of achieving a consensus among all member states within the AEC can be considered a time-consuming process.

Based on the experience of the EEC, the equivalent decision-making procedure of the Council is the requirement in the Treaty of Rome regarding a unanimous vote that requires all member states to agree on a certain matter. Therefore, the AEC should learn from the experience of the EEC in that a decision-making process that requires agreement among all member states can often lead to delays in negotiation. As the current policy of the ASEAN is to reach a consensus in all matters, this could certainly cause delays in the overall progress of the AEC legal framework. Accordingly, the ACE should consider the possibility of reaching a faster agreement by adopting a simple majority vote on certain matters.

3.3 The Dispute Settlement Mechanisms

The ASEAN dispute settlement mechanism (DSM) was initiated by the Framework Agreement on Enhancing ASEAN Economic Cooperation in 1992[1062] and it was amended in

[1060] Interview with Noppadol Theppitak, Justice of the Constitutional Court of Thailand (Former Deputy Permanent Secretary of Foreign Affairs) (Bangkok, Thailand, 18 June 2020).
[1061] AEC Blueprint 2015 (January 2008) [33].
[1062] Framework Agreement on Enhancing ASEAN Economic Cooperation (28 January 1992).

1995.[1063] This framework was replaced by the Protocol on Dispute Settlement Mechanism in 1996.[1064] Then, it was superseded by the Protocol on Enhanced Dispute Settlement Mechanism in 2004 (EDSM Protocol).[1065] Although the 2007 ASEAN Charter provided the institutional framework for the region, it did not set up any institution for dispute settlement.[1066] In 2010, an up-to-date Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (DSM Protocol) was adopted by the 16th ASEAN Summit in Vietnam to replace the previous EDSM Protocol.[1067] This DSM Protocol entered into force in July 2017, following the completion of its ratification by the ten member states.[1068] It can be seen that the regional dispute settlement framework has still not been fully developed as an institution, remaining instead in the form of a mechanism. This development of DSMs in the AEC is different from the EEC which had the Court of Justice as a judicial institution at the regional level.

Table 8: Current ASEAN Dispute Settlement Mechanisms

Mechanisms	Third Party Involved	Power of the Third Party	Binding Result
1. Consultation	-	-	N/A (DSM Protocol is silent on binding result)
2. Good Offices	Good Offices Provider(s)	- Assist disputing parties to resolve the disputes, taking into account of the wishes of the parties	Settlement agreement
3. Mediation	A Mediator	- Make the decision on the manner in which the mediation shall be conducted	Settlement agreement
4. Conciliation	Conciliator(s)	- Make the decision on the manner in which the conciliation shall be conducted - Request a written statement of facts and grounds, supplemented by any evidence	Settlement agreement
5. Arbitration	3 Arbitrators (be chosen from ASEAN's list)	- May adopt additional procedures which do not conflict with DSM Protocol or Rule of Arbitration	Arbitral Tribunal and Award

[1063] Protocol to Amend the Framework Agreement on Enhancing ASEAN Economic Cooperation (15 December 1995).
[1064] Protocol on Dispute Settlement Mechanism (20 November 1996).
[1065] Protocol on Enhanced Dispute Settlement Mechanism (29 November 2004).
[1066] ASEAN Charter (2007) Article 22: ASEAN shall maintain and establish dispute settlement mechanisms in all fields of cooperation.
[1067] Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (DSM Protocol) 2010.
[1068] ASEAN, ASEAN Legal Instruments <http://agreement.asean.org/> [accessed 3 March 2021].

According to the current DSM Protocol, there are five DSMs. The first mechanism, consultation, is described in Article 5 of the Protocol, which states that a complaining party may request consultation with a responding party with respect to any dispute concerning the interpretation or application of the ASEAN Charter or other regional instruments.[1069] In addition, the Protocol sets a time frame of thirty days for the responding party to reply and sixty days to enter into consultation,[1070] which must be conducted within ninety days.[1071] The consultation process can, therefore, be viewed as a direct bilateral negotiation in which no third party is allowed to be involved. However, when consultation fails to settle the dispute, the complainant can request the dispute to be submitted to arbitration.[1072]

The second mechanism is good offices. The first Annex of the DSM Protocol states that a provider of good offices must be a suitable person and that it is possible to have more than one provider.[1073] A person providing good offices must assist the parties to resolve the dispute by means of direct communication[1074] and may proceed in any manner considered appropriate, taking into account the circumstances of the case and the wishes of the parties.[1075] When both parties to the dispute reach a settlement, the Protocol then requires them to sign a written settlement agreement.[1076] Even though this mechanism allows a third party to be involved in the negotiation process, the rules for the proceedings using good offices tend to be flexible and rely extensively on the will of both parties.

The third mechanism is mediation. The second Annex to the DSM Protocol states that the parties involved must agree on a mediator who may be chosen from a list of arbitrators maintained by the ASEAN Secretary General.[1077] A mediator may communicate with them in person or in writing, either together or with each of them separately.[1078] If both parties cannot agree on the manner in which the mediation shall be conducted, the mediator can make the decision.[1079] Similar to the good offices mechanism, the parties have to sign a written settlement agreement when they agree to settle a dispute.[1080] Although mediation allows for

[1069] DSM Protocol (2010) Article 5 (1).
[1070] DSM Protocol (2010) Article 5 (3).
[1071] ibid.
[1072] DSM Protocol (2010) Article 8 (1).
[1073] DSM Protocol (2010) Annex 1, Rule 1 (1).
[1074] DSM Protocol (2010) Annex 1, Rule 1 (2).
[1075] DSM Protocol (2010) Annex 1, Rule 3.
[1076] DSM Protocol (2010) Article 7 (3).
[1077] DSM Protocol (2010) Annex 2, Rule 1.
[1078] DSM Protocol (2010) Annex 2, Rule 4.
[1079] DSM Protocol (2010) Annex 2, Rule 5.
[1080] DSM Protocol (2010) Article 7 (3).

third-party involvement much like the previous mechanism, a mediator has more power in managing the negotiation process than a provider of good offices.

The fourth mechanism is conciliation. According to the third Annex of the DSM Protocol, the appointment of a conciliator is similar to that of a mediator;[1081] however, the parties involved can agree to have more than one conciliator.[1082] The conciliation process is then to be conducted in a manner that the conciliator deems appropriate.[1083] The conciliator may request a written statement of facts and grounds, supplemented by any evidence.[1084] Moreover, the conciliator may make proposals for the settlement of a dispute at any stage.[1085] Similar to the previous mechanism, a written settlement agreement must be signed by both parties at the end of negotiations.[1086] In comparison, the role of the conciliator can be considered as more active than that of the mediator.

The fifth and final mechanism is arbitration. An arbitral tribunal must consist of three arbitrators[1087] who are chosen from a list maintained by the ASEAN Secretary General.[1088] Each party to the dispute has to choose one arbitrator,[1089] while the third is appointed by mutual agreement.[1090] All arbitrators are required to have expertise in law, other matters covered by the relevant regional instruments, or the resolution of disputes arising under international agreements.[1091] In addition, the chair of the tribunal must not be of the same nationality as any of the parties involved.[1092] The decision must be a majority vote in which the chair can have a casting vote[1093] and must also be in written form with dissenting opinions attached. The Protocol is silent as to whether the decision can be made public; however, confidentiality is not an uncommon practice in arbitration.[1094] It can be seen that arbitration is the most formal in nature among the five available ASEAN DSMs.

[1081] DSM Protocol (2010) Annex 3, Rule 1.
[1082] ibid.
[1083] DSM Protocol (2010) Annex 3, Rule 6.
[1084] DSM Protocol (2010) Annex 3, Rule 2.
[1085] DSM Protocol (2010) Annex 3, Rule 4.
[1086] DSM Protocol (2010) Article 7 (3).
[1087] DSM Protocol (2010) Annex 4, Rule 1.
[1088] DSM Protocol (2010) Annex 4, Rule 5; each member state can make 10 nominations to the Arbitrators' list of Secretary General.
[1089] ibid.
[1090] ibid.
[1091] DSM Protocol (2010) Article 11.
[1092] ibid.
[1093] DSM Protocol (2010) Annex 4, Rule 14.
[1094] Gino J Naldi, 'The ASEAN Protocol on Dispute Settlement Mechanisms: An Appraisal' (2014) 5 Journal of International Dispute Settlement 136; Robert Beckman and others, 'Dispute settlement mechanisms in ASEAN' in Beckman R and others (eds), *Promoting Compliance: the Role of Dispute Settlement and Monitoring Mechanisms in ASEAN Instruments* (Cambridge University Press 2016) 91.

In terms of the sources of law, the DSM Protocol lists the applicable law for the ASEAN DSMs which are the ASEAN Charter, the regional instruments and applicable rules of public international law.[1095] Additionally, the DSM Protocol also states that the arbitral tribunal shall apply other rules of law applicable to the substantive questions of the dispute or to decide a case *ex aequo et bono*, if so agreed by the parties to the dispute.[1096] This is different from the EEC in that none of the articles in the Treaty of Rome or the Protocol on the Statute of the Court of Justice specified the scope of legal instruments which the Court of Justice must apply. From the practice of the Court of Justice, EEC legislation could be considered as the main source of law. However, as mentioned in section 2.3 of this chapter, the Court of Justice was not generally concerned with international law or other rules of law.

In terms of the results of a DSM, the DSM Protocol is silent on the degree to which the results of consultation are binding. The possible reason for this is that consultation may not be considered as a final means to end a dispute. This can be seen in Article 8 of the Protocol, which allows the complainant to request arbitration when both parties cannot reach a conclusion through consultation. In the cases of good offices, mediation and conciliation, the DSM Protocol states that the parties put an end to a dispute and are bound by the agreement by signing the settlement agreement.[1097] In the case of arbitration, the award issued by the arbitral tribunal shall be final and binding on the parties to the dispute.[1098] Additionally, all parties must comply with a settlement agreement and arbitral award.[1099] The DSM Protocol does not require the publication of the final agreement or award. However, confidentiality is a common practice for signing agreements and arbitration.[1100] This is another different aspect compared with the practice of the Court of Justice of the EEC. The judgments of the Court of Justice were published in the official languages of all member states.[1101]

In terms of the scope of application, these five DSMs apply to disputes concerning the interpretation or application of the ASEAN Charter as well as other AEC instruments, unless specific means of settling disputes have already been provided.[1102] As the AEC instruments on free movement of skilled labour, including the MNP and the MRAs on selected

[1095] ASEAN Charter (2007) Article 14.
[1096] ibid.
[1097] DSM Protocol (2010) Article 7 (3).
[1098] DSM Protocol (2010) Article 15.
[1099] DSM Protocol (2010) Article 16.
[1100] Naldi (n 1094) (2014) 136.
[1101] Donner (n 944) (1961) 67.
[1102] DSM Protocol (2010) Article 2.

professions, do not contain any special methods for settling disputes, the DSM Protocol is also applicable to the interpretation of these instruments. However, only member states are allowed to have recourse to the Protocol.[1103] Individuals and other AEC institutions cannot bring a case against the member states under this Protocol. This scope is more limited than that of the Court of Justice of the EEC. The parties to the disputes in the EEC could be the regional institutions, the member states and private parties. The Court of Justice had a wide jurisdiction, ranging from cases against the member states[1104] or the regional institutions[1105] to the interpretation of regional law.[1106] Specifically, the domestic courts of the EEC member states could refer questions regarding interpretation of EEC legislation to the Court of Justice for preliminary rulings. As discussed in section 2.3 of this chapter, this preliminary ruling played an important role in the development of the EEC free movement of persons framework. It allowed the Court to ensure the uniform interpretation of Community law such as the clarification of the term "workers" and "self-employed persons." Additionally, the Court created important legal principles such as direct effect and the supremacy of EEC law to ensure that Community law was enforceable.

It can be seen that the scope of the ASEAN DSM is limited only to an inter-state dispute at the regional level concerning the interpretation and application of AEC instruments. Unlike the EEC, the AEC lacks a procedure that allows the domestic courts of the member states to refer the question regarding the interpretation and application of regional instruments to a regional institution. Therefore, the AEC does not have a regional court or a comparable institution that could ensure uniform interpretation or create legal principles, unlike the EEC.

In terms of the uniform interpretation of regional law, the researcher interviewed the Justice of the Constitutional Court of Thailand[1107] and the Secretary General of Judicial Training Institute of Thailand,[1108] on this issue. They agreed that it would be useful to have a regional institution to interpret the AEC legal instruments. Specifically, the current practice of the AEC that allows the interpretation to depend only on the discretion of the domestic courts could lead to uncertainty and lack of unanimity among member states, which will

[1103] DSM Protocol (2010) Article 1.
[1104] Treaty of Rome (1957) Article 169, 170.
[1105] Treaty of Rome (1957) Article 173 (1).
[1106] Treaty of Rome (1957) Article 177.
[1107] Interview with Adjunct Professor Dr Chiranit Havanond, Justice of the Constitutional Court of Thailand (Former Justice of Supreme Court of Thailand) (Bangkok, Thailand 13 June 2020); Theppitak (n 1060) (2020).
[1108] Interview with Pongdej Wanichkittikul, Secretary General of Judicial Training Institute and Justice of Appeal Court of Thailand, (Bangkok, Thailand 15 June 2020).

defeat the common good interests of the AEC. Thus, the regional institution would create common understanding and practice among the ten AEC member states on debatable or controversial issues regarding the interpretation or application of regional law. However, they were also concerned that the interpretation of the AEC instruments should be done by an appropriate institution officially set up at the regional level consisting of legal experts in order to create credibility of interpretation. Nevertheless, the current AEC institutions such as the ASEAN Secretariat and the ASEAN Summit, which could be considered to be political institutions, might not be appropriate institutions for this role. Additionally, the Justice of the Constitutional Court of Thailand also said that the non-legally binding effect of the interpretation by an AEC institution is appropriate for the current situation in the AEC. Currently, the constitutional principle or practice of many AEC member states, including Thailand, still reserves the authority of their domestic courts to make a final decision on the issue of interpretation. This illustrates that the judiciary in Thailand acknowledges the benefits of the regional institution that interprets regional law, but they have concerns regarding the credibility of the current AEC institutions and the binding effect of the interpretations set out by such a regional institution.

In terms of the legal principles ensuring that regional law is enforceable, the AEC does not have any institution that has the authority to create these legal principles, contrary to the EEC. As discussed in section 2.3 of this chapter, the Court of Justice confirmed the principle of direct effect and the supremacy of Community law. The Court considered EEC legislation to be a new legal order of international law,[1109] so EEC legislation could be directly invoked at the domestic level without transposition into domestic laws.[1110] Additionally, the Court also confirmed that EEC legislation was superior to conflicting domestic laws.[1111] On the other hand, the ASEAN Charter stated that member states shall

[1109] Case 6/62 *Van Gend and Loos v Netherlands Inland Revenue Administration* [1963] ECR 4-16.
[1110] Minattur (n 977) (1964) 39-40; Mashaw (n 977) (1965-1966) 38; Lagrange (n 977) (1967) 723-724.
[1111] Case 6/64 *Flaminio Costa v E.N.E.L* [1964] ECR 588-600. Nevertheless, on 5 May 2020, the German Constitutional Court gave a judgment on European Central Bank's Public Sector Purchase Program nullifying a prior judgment of the European Court of Justice. It declared that the judgment of the Court of Justice was ultra vires [166] and had no binding force in Germany [163]. Several academics disagreed with Germany and claimed that this would undermine the supremacy of Community law and damage the whole integration process. Some academics also urged that the Commission should start infringement proceedings against Germany. This illustrates that even though the Court of Justice has developed the principle of supremacy of Community Law since the EEC period in the 1960s, there is the derogation of the domestic court in the member states such as the German Constitutional Court in this recent case in 2020s; Miguel Poiares Maduro, 'Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court' Verfassungsblog (6 May 2020) <https://bit.ly/2ZuDNPy> [accessed 2 March 2021]; Federico Fabbrini, 'Suing the BVerfG' Verfassungsblog (13 May 2020) <https://bit.ly/3dOKvoA> [accessed 2 March 2021]; Oliver Garner, 'Squaring the PSPP Circle'

take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter and to comply with all obligations of membership.[1112]

Contrary to the EEC, the binding effect of AEC legal instruments depends on the constitutional mechanisms within each member state. The research on the constitutions of the ten AEC member states shows that the majority of constitutions require the national legislation to give effect to the AEC legal instruments.[1113]According to the constitutional practice of Thailand, the transposition could be in the form of enacting a new domestic law or amending the existing domestic law.[1114] For instance, the AEC member states including Thailand signed the MRAs on engineering services in 2005,[1115] architectural services in 2007,[1116] and accountancy services in 2014.[1117] The domestic law in Thailand which was the 1979 Royal Decree prohibited foreigners from performing civil engineering, architectural and accountancy services.[1118] However, there was no exception for the AEC engineers, architects and accountants under the MRAs. The negotiations for the amendment of this domestic law took a long period of time between the Ministry of Labour, the Council of Engineers, the Architect Council, and the Federation of Accounting Professions. The Thai parliament has just passed a new domestic law to exempt the AEC engineers, architects, and accountants under the MRAs from the prohibition in April 2020.[1119]

From the interview with the Justice of the Constitutional Court of Thailand, it can be seen that regional law and international law, which have not been transposed into the domestic laws, could be considered as a matter of fact that the disputing party has the responsibility to prove.[1120] If these regional or international laws have been transposed into domestic laws, the domestic courts in Thailand tend to make reference only to the domestic

---

Verfassungsblog (22 May 2020) <https://bit.ly/2BXxOdQ> [accessed 2 March 2021]; András Jakab and Pál Sonnevend, 'The Bundesbank is under a legal obligation to ignore the PSPP Judgment of the Bundes-verfassungs-gericht' Verfassungsblog (25 May 2020) <https://bit.ly/2Bq68i1> [accessed 2 March 2021].

[1112] ASEAN Charter Article 5 (2).

[1113] Desierto (n 559) (2011) 299-303: Among the ten ASEAN member states, only Cambodia's 1999 Constitution, the domestic courts could directly refer to international treaties and laws in the field of human rights.

[1114] Jaturon Tirawat, *International Law* (2015 Winyuchip Publishing, 3rd edn) 72-75.

[1115] ASEAN Mutual Recognition Arrangement on Engineering Services (2005).

[1116] ASEAN Mutual Recognition Arrangement on Architectural Services (2007).

[1117] ASEAN Mutual Recognition Arrangement on Architectural Services (2007).

[1118] Royal Decree on Prohibited Occupation for foreign workers (1979).

[1119] Notification of Ministry of Labour on the prohibited occupation for foreigners in Thailand (21 April 2020).

[1120] Havanond (n 1107) (2020).

laws.[1121] This can imply that the AEC legal instruments have no direct effect or supremacy over domestic laws. In other words, the status of AEC law is no different to international law.

Although the ASEAN DSMs were initiated in 1992, none of these mechanisms has yet been invoked.[1122] Contrary to the EEC, there were not many inter-state disputes among the member states and all of these disputes were settled by an international third party. Most of the previous disputes were submitted to the ICJ,[1123] whereas some of them were submitted to the Dispute Settlement Body of the WTO[1124] and the Permanent Court of Arbitration.[1125] Moreover, most of the inter-state disputes among the AEC member states were related to state sovereignty, while some of the cases were related to trade; however, none of the cases was related to labour migration or the free flow of labour.

The first reason behind this is that the member states tend to persist in managing their disputes through the well-known "ASEAN Way" of diplomacy, which is based on non-confrontation and non-interference principles in the internal affairs of each other's countries.[1126] This illustrates a loose cooperation without direct power over internal policies or action by the member states.[1127] Narine states that these characteristics of informality and closed-door policy could be considered the signature behaviour of the AEC.[1128] In that case, disputes within the AEC tend to be discussed during informal summits,[1129] which Ewing-Chow and Yusran believe keeps the disputes from public attention.[1130] Even in the most formal mechanism in the DSM Protocol, arbitration, the Protocol is still silent on whether the decision can be made public. The "ASEAN Way," therefore, differs significantly from the EEC as thousands of cases were settled in the Court of Justice and the judgments were made public in all four official languages.[1131]

[1121] ibid.
[1122] Peeradech Kongdecha, *ASEAN Dispute Settlement Mechanisms* (Legislative Paper, ASEAN Community Center of the Secretariat of the House of 2020) 6.
[1123] *Cambodia v Thailand* 'Sovereignty over Preah Vihear Temple' (1962) ICJ Reports 24; *Indonesia v Malaysia* 'Sovereignty over Pulau Ligitan and Pulau Sipadan' (2002) ICJ Reports 625; *Malaysia v Singapore* 'Sovereignty over Pulau Batuputeh Middle Rocks and South Ledge' (2008) ICJ Reports 12. *Cambodia v Thailand* 'Request for Interpretation of the. Judgement of 1962' (2013) ICJ Reports 151.
[1124] *Malaysia v Singapore* 'Request for Consultation: Polyethylene and Polypropylene' (1955) WTO DSB; Thailand v Philippines 'Cigarettes' (2011) WTO DSB.
[1125] *Malaysia v Singapore* 'Railway Land Arbitration' (2014) PCA no. 2012–01.
[1126] ASEAN Charter Articles 2 (2) (e) and 20.
[1127] Weatherbee (n 500) (2013) 153.
[1128] Shaun Narine, *Explaining ASEAN: Regionalism in Southeast Asia* (Lynne Rienner Publishers 2002) 31.
[1129] ibid.
[1130] Michael Ewing-Chow and Ranyta Yusran, 'The ASEAN Trade Dispute Settlement Mechanism' in Robert Howse, Hélène Ruiz-Fabri, Geir Ulfstein and Michelle Q Zang (eds), *The Legitimacy of International Trade Courts and Tribunals* (Cambridge University Press 2018) 384-387.
[1131] Donner (n 944) (1961) 67.

The second reason why the DSMs are yet to be adopted is because the AEC member states have never been forced or required to settle a dispute through the regional institutions or procedures.[1132] The submission to the dispute of any of the ASEAN DSMs depends on the double consent of both parties.[1133] The exception to this double consent only appears in the most recent DSM Protocol in the case of arbitration which entered into force in 2017.[1134] Specifically, when the responding party does not agree to the request for the establishment of an arbitral tribunal, the complainant may refer to the ASEAN Coordinating Council, which has the power to direct the parties to the dispute to resolve their dispute through good offices, mediation, conciliation or arbitration.[1135] This illustrates that the rules of procedure of the DSMs of the region tend to be flexible and depend largely on the disputing parties. This approach is also different from disputes in the EEC, where there is only one option – for a dispute to be settled in the Court of Justice.

Another possible reason for this reticence to adopt the regional DSMs is that the parties to the dispute within the AEC want to seek more assurances regarding the proceedings and the decision-making process. In other words, the mechanisms provided by the DSM Protocol may be viewed as being a weaker method to end a dispute compared with the ICJ or the Dispute Settlement Body of the WTO. Specifically speaking, the procedures in the ICJ have a proven track record in settling disputes, which may give the parties involved a higher level of assurance.[1136] For instance, the Philippines brought a case regarding customs measures on cigarettes against Thailand to the dispute settlement body of the WTO in 2008,[1137] even though there was an ASEAN dispute settlement mechanism under the previous 2004 EDSM Protocol, during that period of time. Additionally, there was the ASEAN Free Trade Agreement, which was a regional instrument that could have been applied to this case.[1138] According to the research by Sim in 2014, the persons involved in all parts of the dispute on the Philippines side indicated that they were reluctant to use the EDSM of the region because they did not trust the untested ASEAN EDSM arbitration provisions. Moreover, they were concerned that "the basic issues of panel organisation, procedures,

[1132] Ewing-Chow and Yusran (n 1130) (2018) 395.
[1133] DSM Protocol (2010) Article 3 (1), Article 6 (1).
[1134] DSM Protocol (2010) Article 8 (4), 9 (1).
[1135] DSM Protocol (2010) Article 9 (1).
[1136] Ewing-Chow and Yusran (n 1130) (2018) 395.
[1137] *Thailand v Philippines* 'Cigarettes' (2011) WTO DSB.
[1138] Edmund W Sim, 'The Outsourcing of Legal Norms and Institutions by the ASEAN Economic Community' (2014) 1 (1) Indonesian Journal of International & Comparative Law 324-325.

capabilities, and especially the enforcement of the panel decisions were uncertain."[1139] They also indicated that "the ASEAN mechanism was in contrast with the years of experience accumulated in WTO Panels since 1995." This was the possible explanation of why the Philippines decided to bring the case to the dispute settlement body of the WTO which used the legal instrument provided by the WTO Customs Valuation Agreement.

Even though the AEC leaders "desire transforming the region into a rules-based organisation with practical, efficient and credible mechanisms in place to resolve disputes in an effective and timely manner,"[1140] the regional mechanisms for settling the dispute have not been used. When the inter-state disputes among the member states ended up with international third parties, the disputes were solved by international law, instead of regional law. However, in order to transform the region into "the rules-based organisation" as mentioned in the ASEAN Charter, these regional mechanisms and laws should have been used as a tool to deal with the dispute at the regional level.

Confidence in and acceptance of regional-based legal norms and institutions should be increased among the AEC member states. As the AEC member states tend to reserve their sovereignty and independence of the domestic courts, it is quite hard for the AEC to ensure the uniform interpretation of regional law among the AEC member states, contrary to the Court of Justice of the EEC. Although it is too early for the current AEC member states to accept legally binding results of an interpretation by a regional institution, it is advantageous for the region to rethink softer and non-legally binding measures focusing on the implementation of regional legal instruments.[1141] For instance, it is useful for the AEC to set up an institution with the legal expertise in providing recommendations for the member states implementing regional law.

4. Conclusion

In examining the institutional framework of the EEC, it can be seen that the Commission, the Council and the Court of Justice worked together to facilitate and develop the free movement of persons framework of the EEC.

[1139] ibid.
[1140] ibid.
[1141] Diego Acosta, 'Global Migration Law and Regional Free Movement: Compliance and Adjudication – The Case of South America' (2017) 111 American Journal of International Law Unbound 163-164.

The Commission was an institution that was required to be completely independent and to work in the interests of the Community. Additionally, it was a collegial authority whose conclusions were reached by a majority vote and which had both legislative and executive power. To be specific, the Commission could independently initiate a proposal for EEC legislation, as well as have the power to refer cases to the Court of Justice regarding a breach of the Treaty by the member states or abuse of power by the other EEC institutions. In summary, the Commission could be seen as an effective measure to control the implementation of EEC legislation by the member states; therefore, it could be considered to be a supranational institution.

The Council was another institution of the EEC in which the representatives were ministers who worked for the interests of their respective member states. This characteristic represents a clear intergovernmental dimension to the Council. The decisions made by the Council were particularly influential, given that its primary role was to pass proposals for EEC legislation. The Council then reached an agreement to issue EEC legislation via a simple majority vote if the Treaty did not specify otherwise, such as when the Council issued regulations and directives on the free movement of workers. In these circumstances, the decision-making process of the Council was similar to that of a supranational institution. However, a qualified majority vote or a unanimous vote was still required for certain issues, such as issuing the directives on the free movement of self-employed persons and service providers. As mentioned in the introduction, it was possible for an intergovernmental institution to make binding decisions, but its decisions tended to require the unanimous vote of all members, especially for important matters. Therefore, the primary function of the Council was as an intergovernmental organisation.

The Court of Justice was another influential institution whose judges and Advocates General were also required to be strictly independent. In terms of its decision-making process, judgments were concluded by a majority of the judges, which were then able to be enforced against the member states and other EEC institutions. Moreover, the Court had the power to validate an act by any of the member states regarding their obligations under EEC legislation and to make a declaration as to the legality of an act by the Council or the Commission. In addition, the Court had a distinctive role in providing a preliminary ruling on the interpretation of EEC legislation in order to ensure uniformity in the application of Community law. Additionally, the Court also developed legal principles ensuring that Community law was enforceable, such as the principle of direct effect and the supremacy of

EEC law. Given the above, the Court of Justice could be considered as a powerful supranational institution.

Overall, it can be seen that the institutional framework of the EEC consisted of both supranational and intergovernmental institutions; however, there were more supranational than intergovernmental dimensions to the EEC institutional framework. In turn, these institutions worked collaboratively in order to ensure the effectiveness of EEC legislation. In particular, the responsibilities and characteristics of the three main institutions, which were the Commission, the Council and the Court of Justice, share important roles in progressing and actualising the objective of the free movement of persons, as stated in the Treaty of Rome.

Based on an examination of the AEC institutional framework, the Secretariat, the Summit and the DSMs are seen to share responsibility in the AEC's plan to facilitate and develop the movement of skilled labour within the region.

To summarise, the Secretariat is an institution that has the main executive responsibility of monitoring the implementation of regional policies and instruments, including legislation on the free flow of skilled workers, similar to the Commission of the EEC. It is required by the ASEAN Charter to be independent, thus exhibiting a supranational dimension. However, the Secretariat does not normally use a voting procedure; instead, it makes decisions based on consultation and consensus. In addition, a decision made by the Secretariat does not have any direct binding force over the member states; it only has the power to make a report on the overall progress in implementing AEC legislation and does not have the power to take legal action against member states that do not adhere to this legislation. These two characteristics of the Secretariat regarding its decision-making process and the binding force of its decisions illustrate that it is an institution that has a larger intergovernmental dimension.

The Summit, on the other hand, is the main decision-making institution regarding regional legislation, including legislation on the movement of skilled workers within the AEC, which is similar to the responsibility of the Council of the EEC. Unlike the Secretariat, it is not required by the ASEAN Charter or the AEC blueprints to be independent; therefore, the governments of the member states are able to influence the decisions of their representatives sitting at the Summit. Likewise, the representatives at the Summit can work in the interests of their own member states. Even though the decisions of the Summit can directly bind the member states, the Summit reaches a conclusion or final decision on any legislation at the regional level through consultation and consensus. Unlike the decision-

making process of the Council of the EEC, there is no voting procedure; thus, all member states have to agree in order to pass any legislation or policy in the Summit. These characteristics of the Summit clearly reflect that it is an intergovernmental institution.

In contrast to the EEC, the AEC framework has no regional court, relying instead on the DSMs as the only method that has been designed to deal with disputes at the regional level. The rules regarding the DSMs are flexible and rely mostly on the disputing parties. The DSM protocol does require, however, third parties involved in the DSMs, such as the providers of good offices, mediators, conciliators and arbitrators, to act independently. In addition, the disputing parties can choose a person to act as a third party among themselves. In addition, the results of the DSMs, except consultation, bind the disputing parties; however, the decision-making process undertaken by the third party in the DSMs differs depending on the mechanism. In specific detail, only the arbitration mechanism has adopted a majority vote to reach a decision, while the other mechanisms lack a voting procedure since there can only be one third party involved in either the provision of good offices, mediation or conciliation. The characteristics of the DSMs show that these methods exhibit more intergovernmental tendencies.

Overall, it can be seen that the institutional framework of the AEC consists of institutions with a greater intergovernmental dimension. The intergovernmental characteristic of the AEC framework could, therefore, explain the flexibility and informality of the procedures adopted by the AEC. This feature of the AEC institutional framework differs significantly from the EEC institutional framework, which comprised more supranational institutions. It may also be the reason behind the inability of the AEC to monitor and dispute settlement schemes; therefore, the AEC should learn from the experiences of the EEC from a number of aspects.

First, the ASEAN Secretariat, as the primary institution in monitoring the implementation of regional legislation, should play a more active role and its decisions should be enforced more effectively. For example, if a member state were to not comply with the opinion of the Secretariat, the Secretariat should be able to enforce some kind of sanction. As mentioned previously, if the AEC wishes to rely on a sanction in the form of “negative publicity and peer pressure,” the Secretariat should no longer stay silent on the non-compliance of each member state.

Second, the ASEAN Summit should reconsider its decision-making process, which relies primarily on consultation and consensus in all cases. From the experience of the EEC, it can be seen that reaching a decision through a unanimous vote, which also requires the

mutual agreement of all of the member states similar to a consensus, can often lead to delays in dealing with the issues of EEC directives on the free movement of self-employed persons and service providers during transitional periods. On the other hand, the regulations and directives on the free movement of workers that require a simple majority vote could follow the time frame set by the Treaty of Rome. Therefore, the AEC should consider adopting a simple majority vote in certain cases to avoid these delays.

Finally, the DSMs may be considered a weak mechanism for dealing with disputes at a regional level and none of these mechanisms has yet to be invoked. In addition, based on the experience of the AEC, most of the dispute cases between the member states were submitted to the ICJ or WTO. It could, therefore, be said that the member states prefer to rely on an institution with more proven assurances than the current DSMs. In order to transform the region into a rules-based organisation as the leaders of the member states desired, the AEC member states should rely on its own legal norms as well as dispute settlement mechanisms.

As the current member states tend to reserve the independence of their domestic courts, it is quite hard to picture the AEC being like the EEC. Specifically, the regional court might not be suitable for the current situation of the AEC. The way that could be acceptable to the current AEC member states is to gradually increase confidence in and acceptance of regional-based legal norms and institutions among the AEC member states. The possible suggestion is to set up an institution with legal expertise providing recommendations for the member states regarding the interpretation of regional law. This institution would have more credibility than the current regional institutions which tend to be political institutions. Although the recommendation might not be a strong tool for shaping the uniformity of regional law, it is a beginning point for communication between the member states and the regional institutions regarding the interpretation of regional law. This communication could increase confidence in the regional-legal norms and institutions. In the long run, the member states of the AEC might agree to be bound by the interpretation of regional law by such a regional institution.

CHAPTER 7. Conclusion and Recommendations

1. Introduction

As mentioned in the introduction, this research adopts doctrinal methodology to answer the main research question: "How can participating states develop and accept a legal framework on labour migration within regional economic associations?"

The development of the EEC framework proves the hypothesis of the new regionalism theory that effective regional cooperation emerges from below and within the region. In order to abolish obstacles to labour migration, a regional association needs a strong legal framework that requires deep cooperation among the member states. It can be seen that the EEC legal framework offered a more effective way of regional integration on labour mobility than international law. From the experiences of the EEC, such an effective regional framework on labour mobility was initiated by new rules agreed by the member states and also developed from reciprocal bilateral labour agreements between the founding member states. Additionally, a strong institutional framework of the EEC played an important role in the advancement of the free movement of persons framework.

This research believes that the development of the EEC free movement of persons framework would provide useful lessons for the emerging AEC labour migration framework. From this research, it can be seen that the AEC has made a good effort to facilitate the movement of skilled labour. However, several obstacles to labour migration still remain. In order to facilitate the regional framework on labour mobility of the AEC, it is useful to learn from the experiences of the EEC. This research acknowledges the differences between the main features of the two regional frameworks. It also understands that certain approaches of the EEC may not be proper solutions for the current AEC. Therefore, this research will provide feasible and pragmatic recommendations for the AEC labour migration framework.

This final chapter presents the main findings of the research. It begins with a summary of the regional framework on labour migration of the EEC and that of the AEC dealing with the main obstacles to labour migration. Consequently, this chapter continues to illustrate the main features of those frameworks. Finally, it provides recommendations for the current AEC framework on labour migration, considering the experiences of the EEC free movement of persons framework.

2. The Obstacles to Labour Migration

This section aims to summarise the differences and the similarities between the legal framework on labour migration of the EEC and that of the AEC. The discussion in this section relies on the six important obstacles hindering labour migration set out above. As discussed in the first chapter, academics writing on migration theory during the establishment of the EEC free movement of persons framework (from the 1950s to the 1960s) and more recent academics (since the 1990s) have agreed on these obstacles. As explained in chapter 4, persons under the current AEC labour migration framework are comparable to workers and service providers under the EEC free movement of persons framework. Even though the AEC labour migration framework has a narrower scope than that of the EEC, it also involves migration, with the purpose of pursuing economic activities. Therefore, the six obstacles to labour migration also apply to the movement of labour within the AEC.

2.1 Access to the Labour Market

Access to the labour market relates to issues of frontier formalities and national prioritisation. In terms of frontier formalities, host states could create an obstacle to labour migration by requiring travel documents, such as entry or working visas, from foreigners. The process of obtaining these required documents could be expensive and complicated. As mentioned in chapters 2 and 3, the EEC legal framework had abolished this obstacle by cancelling the visa requirement for persons moving to other member states for economic purposes. The only documents required were valid identity documents issued by the home member state. It can be seen that the EEC legal framework had simplified administrative procedures and reduced the costs of travel documents. This issue is in contrast to the case of the current AEC. As discussed in chapter 4, the AEC legal framework only calls for the home state to organise pre-departure assistance to enable compliance with the formalities of the host state. In addition, AEC legislation only states that any administrative fees imposed by the immigration formalities should be reasonable. It is apparent that identity documents are inadequate for AEC nationals passing through the border controls. The host member states could still require extra travel documents, including entry and working visas. Therefore, persons who move to undertake economic activities under the current AEC framework are

more likely to face varying visa standards, depending on the domestic laws of each host member state.

In terms of national prioritisation, the domestic laws of the host state might provide preferential access to domestic workers ahead of migrant workers for available jobs. Chapter 2 shows that the EEC legal framework had gradually reduced this obstacle for EEC workers. In the first transitional period, national prioritisation was still allowed in the host country. EEC legislation stated that the nationals of the host member states had a three-week priority period in which to accept employment offers. Specifically, workers from other EEC member states were entitled to accept employment offers only if no local worker was available within three weeks of the time of notification of the vacancy. In the second transitional period, the priority phase was reduced to two weeks, and this priority could be invoked only in the case of jobs with a high unemployment rate. Then, in the third transitional period, EEC workers were allowed to accept employment offers without any priority period being given to nationals in all cases. The situation is different in the case of the AEC. As mentioned in chapter 4, none of the provisions in the AEC legal framework relate to the issue of national prioritisation. It can be implied that member states can still establish their own domestic rules that give special access to available jobs for their national workers. Therefore, the obstacle concerning access to the labour market remains in the AEC legal framework.

2.2 Permission to Perform Economic Activities

Host states can have a national protectionist attitude by creating restrictive domestic rules for foreigners, such as the requirement of additional examinations or training. Moreover, there are issues regarding professional qualifications. This is relevant to varying levels of education, training, and other experience required for certain professions among the different states. From this research, it can be concluded to some extent that the approach of the current AEC legal migration framework, especially the MRAs, is comparable to the early EEC legal framework relating to the free movement of self-employed persons and service providers.

As seen in chapter 3, the early EEC had dealt with the movement of self-employed persons and service providers, sector by sector, from 1963 to 1985. The early EEC legislation categorised economic activities into four groups. The first group adopted a “transitional measure” that required the state of destination to accept vocational experience of reasonable

duration as equivalent to the professional knowledge required for nationals performing the same economic activities.[1142] The second group adopted "mutual recognition of qualification" and "coordination" methods. For the qualification method, it listed the formal qualifications evidence that would be mutually recognised by all member states. Then, the host state had to recognise such evidence issued by the home state, as equivalent to domestic standards. For the coordination method, it specified acceptable standards of training and set the minimum length of training courses for each service sector.[1143] The third group only adopted the "mutual recognition of qualification" method. This approach was contrasted with that in the second group because there were widely divergent rules among the member states for training of the professions concerned in the third group.[1144] The fourth group adopted a special measure solely for lawyers. It allowed lawyers who were entitled to practise the legal profession in their home state to provide services in other member states. However, they were required to respect the rules governing their professions in the host state. This distinguishing feature arose because of the different legal systems among member states.[1145]

The current AEC framework on the MRAs has also adopted the sectoral approach. Chapter 4 shows that economic activities under the MRAs can be separated into four groups. The first group adopts a "three-step process." Persons within this group must first be recognised by the professional authority in the home state. Then, they are required to meet the AEC qualifications and register with the regional authority. After that, they must register with the professional authority in the host state.[1146] Persons within this group may face further restrictions in the host states. For instance, they may not be allowed to work independently and only be allowed to work in collaboration with local practitioners. The second group adopts a "two-step process." Persons within this group must be recognised by the professional authority in their home state. Then, they have to register with the professional authority in the host state. The AEC sets the minimum qualifications of each profession for the authority in the host state to consider. However, persons within this group may face further restrictions in the host states, such as extra examinations, assessments, or

[1142] See Chapter 3 - Section 3.2: There were 13 service sectors in the first group: (1) agriculture, (2) trade and commerce, (3) manufacturing, (4) eating and lodging places, (5) fishing, (6) transport, (7) communication, (8) personal, (9) community, (10) recreation, (11) insurance, (12) travel agency, and (13) hairdressing. The required years of vocational experiences were varied according to the service sectors.
[1143] See Chapter 3 - Section 3.2: There were 6 service sectors in the second group: (1) doctors, (2) nurses, (3) dentists, (4) veterinary surgeons, (5) midwives, and (6) pharmacists.
[1144] See Chapter 3 - Section 3.2: There was only one service sector in the third group: (1) architects.
[1145] See Chapter 3 - Section 3.2: There was only one service sector in the fourth group: (1) lawyers.
[1146] See Chapter 4 - Section 3.2: There are 3 service sectors in the first group: (1) engineers, (2) architects, (3) accountants.

other requirements.[1147] The third group adopts a special measure solely for surveying professionals. Persons within this group must be recognised by the professional authority in the home state. Then, they have to register with the professional authority in the host state. Unlike the other groups, there are no detailed regional standards or qualifications. Although the AEC sets the minimum length of vocational experience, it still allows the host member states to impose extra examinations, assessments, or other requirements on these surveying professionals.[1148] The fourth group adopts a special measure only for tourism professionals.[1149] The AEC sets the regional standards for training each type of tourism professional. Persons within this group must pass the training programme and obtain a certificate from the authority in the country of origin. Then, they can apply for their tourism jobs in other member states through an online regional platform that links them with potential employers.

It can be seen that both the early EEC framework (from 1963 to 1985) and the current AEC framework (MRAs) adopt a sectoral approach. In other words, these two frameworks liberalise permission to perform economic activities, sector by sector. Additionally, the liberalised sectors can be categorised into different groups, depending on the levels of liberalisation agreed upon by the member states. Nevertheless, there are differences between EEC and AEC legislation. When the conditions in EEC legislation were met (i.e., length of experience, evidence of qualifications, or length of training), host states could not impose extra requirements on persons within the first three groups. Only persons within the fourth group (lawyers) could face further limitations. Specifically, host states might require lawyers from other states to be introduced to the presiding judge or the president of the relevant Bar and to work alongside local lawyers. However, in the case of the AEC, when the conditions of AEC legislation are met, the persons within the first three groups may face further restrictions in the host member states. As mentioned above, further restrictions, including extra examinations, assessments, or other requirements, can be imposed by the professional authority in the host member state. In the case of the AEC, only persons within the fourth group (tourism professionals) can directly apply for their jobs with potential employers in the host states after meeting the regional standards. Therefore, persons who moved under the

[1147] See Chapter 4 - Section 3.2: There are 3 service sectors in the second group: (1) nurses, (2) dentists, (3) doctors.
[1148] See Chapter 4 - Section 3.2: There is only one service sector in the third group: (1) surveying professionals.
[1149] See Chapter 4 - Section 3.2: There is only one service sector in the fourth group: (1) tourism professionals.

early EEC framework faced fewer obstacles regarding permission to perform economic activities than those under the current AEC framework.

2.3 Permission to Reside

Permission to reside relates to administrative procedures and conditions for the residence permit. In terms of administrative procedures, the host states can create an obstacle to labour migration through the requirement of excessive supporting documentation and high administrative fees for foreigners. As seen in chapters 2 and 3, the EEC legal framework dealt with this obstacle by reducing the documentation requirements. Since then, the only required documents were the valid identity document that was issued by the home member states, and proof of the economic activities of the applicants in the host member state. Additionally, it specified that residence permits must be issued and renewed free of charge, or for a cost not exceeding that of the fees charged for the issuance of identity documents for nationals. It can be seen that the EEC legal framework simplified administrative procedures and reduced costs related to residence permits. This situation is different from that of the AEC. As discussed in chapter 4, AEC legislation only requires adequate or reasonable accommodation. It does not prohibit member states from requiring excessive documents or collecting high administrative fees for the issuance or renewal of residence permits. Thus, persons who move for economic purposes under the AEC framework are more likely to face varying administrative procedures for residence permits, depending on the domestic laws of each host member state.

In terms of conditions to reside, the host states can create an obstacle to labour migration by limiting the length of stay or geographical areas for foreigners residing in their territories. A short length of stay could put a burden on foreigners, as they would have to go through domestic administrative procedures several times to renew their residence permits. Additionally, the restrictive geographical areas might limit the right to movement for foreigners performing economic activities within the host states. As seen in chapters 2 and 3, the EEC legal framework tackled these obstacles by setting the minimum length of residence permit for the host member states to consider. For workers and self-employed persons, the permits were to be valid for no less than five years and were automatically renewed. For service providers, the permit was to have at least an equal duration to the period during which the services were to be provided. Moreover, the permits in all cases were valid for the whole

territory of the member states concerned. Thus, persons who moved under the EEC framework could change their residential areas and freely move within the host state. This differed from the AEC. As discussed in chapter 4, the AEC legal framework only asks for adequate or reasonable accommodation for persons who move for economic purposes. There was no provision regarding the minimum length of stay or geographical residence area. The host member states could provide a short-term residence permit or limit the residency area for persons from other member states. Therefore, the obstacle regarding permission to reside remains in the AEC legal framework.

2.4 Family Reunification

Family reunification relates to issues of the scope of family members allowed to accompany persons who moved under the EEC framework and other rights of these authorised family members in the host states. In terms of the scope of family members, the host states could create an obstacle to labour migration through narrowing such scope. As seen in chapter 2, EEC legislation had gradually diminished this obstacle for EEC workers. In the first transitional period, only spouses and children under the age of 21 years old who were nationals of the member states were allowed to accompany EEC workers to host member states. Then, in the second transitional period, the scope of family members regarding category and nationality was extended to cover all the ascendants and descendants of the worker and their spouse who were dependent on the worker, regardless of nationality. As seen in chapter 3, this scope of family members also applied to self-employed persons and service providers. It can be seen that the scope of family members was clearly specified by EEC legislation. This situation is different from the current AEC framework. As discussed in chapter 4, AEC legislation does not confirm the right to be accompanied by family members for the persons who move to undertake economic activities under the current AEC framework. Specifically, it only guarantees the right to be visited by their family members. Moreover, none of the provisions in the AEC legal framework relate to the scope of family members. Therefore, such scope depends on the domestic laws and policies of each host member state.

In terms of other rights of family members, host states could create an obstacle to labour migration through the requirement of entry, residence, employment, and education of family members. In the case of the EEC, these authorised family members were entitled to

the same conditions regarding permission to enter and reside as the person on whom they were dependent. Family members who were third-country nationals might be required to have entry visas, but member states had a responsibility to provide every assistance in obtaining the necessary visas. Additionally, this visa would be free of charge. As discussed in chapter 2, all authorised family members of EEC workers were provided with access to employment under the same conditions as the workers on whom they were dependent. In addition, the children of EEC workers were entitled to access vocational training courses and general education under the same conditions as nationals in host states. However, EEC legislation on the free movement of self-employed persons and service providers did not mention employment and education of family members. Therefore, the spouses and the children of these persons might be treated differently from the nationals in the host member states in these areas. In the case of the AEC, the rights of family members are subject to further conditions under the domestic laws of each host member state. In other words, the AEC legal framework does not specify clear regional standards regarding the entry, residence, employment, or education of family members. It can be implied that the member states can still establish their own domestic rules that control family members. Therefore, the obstacle regarding family reunification remains in the current AEC framework.

2.5 Working Conditions

The issue of working conditions relates to the protection of remuneration, dismissal, and other benefits. The host member states could create an obstacle to labour migration by limiting such protection for foreigners. As seen in chapters 2 and 3, EEC legislation also dealt with this obstacle. For workers, it confirmed equal treatment in remuneration and dismissal for EEC workers as for national workers in the host member states. In addition, EEC workers were entitled to the same social benefits and tax advantages as national workers. For self-employed persons and service providers, the sectoral directives from 1963 to 1985 confirmed the same rights on their economic activities as nationals in the host member states who performed the same activities. It can be implied that the host member states could keep their domestic rules regarding working conditions for their nationals. Nevertheless, the host member states could no longer treat differently other EEC nationals with respect to working conditions. It can be seen that persons who moved for economic purposes under the EEC free movement of persons framework were no longer at a disadvantage when performing

economic activities compared to the nationals of the host member states. Therefore, the obstacle regarding working conditions was diminished by EEC legislation.

As discussed in chapter 4, the current AEC framework confirmed the right to fair and appropriate remuneration and other benefits in the host member states. AEC legislation specifies that, in accordance with its applicable national laws, the host member states shall provide fair treatment in terms of remuneration, occupation safety, health protection, protection from violence, gender and nationality in the workplace. This means that the host member states could keep their domestic rules regarding working conditions for their nationals. Nevertheless, the host member states can no longer treat unfairly other AEC nationals with regard to working conditions. There is a slight difference between AEC and EEC legislation in terms of dismissal. To be specific, AEC legislation does not confirm the same protection and treatment as national workers in the host member states with respect to dismissal. Instead, it states that the host member states should make every effort to issue an authorisation for workers from other member states to stay in employment for at least the same length of time for which they are authorised to engage in the remunerated activity. Where there is a termination of employment or a breach of an employment contract, AEC legislation confirms the right to file a complaint or make a representation under the law on a labour dispute in the receiving state. It can be seen that the current AEC legislation framework shares certain similarities with the EEC framework with respect to working conditions. Thereby, the obstacle regarding working conditions has also been reduced by the AEC labour migration framework.

2.6 Protection from Expulsion

The issue of protection from expulsion relates to the treatment and protection of foreigners regarding expulsion orders. The host states could create an obstacle to labour migration by providing inadequate reasons or justification for expulsion orders. As seen in chapters 2 and 3, EEC legislation set the three grounds for expulsion, which were public policy, public security, and public health. It also specified that the use of these grounds was restrictive because they could not be invoked to service economic ends. Additionally, an expulsion order must be based exclusively on the personal conduct of the individual concerned. Therefore, the member states could only use the three grounds to obstruct the movement of persons from other member states on a case-by-case basis. These three grounds

were applied to workers, self-employed persons and service providers under the EEC free movement of persons framework. It can be seen that legal certainty, in terms of justification for expulsion, was provided for persons under the EEC framework. This situation is different from the case of the current AEC. Specifically, there is no common justification for expulsion orders in the AEC. As discussed in chapter 4, grounds for expulsion or repatriation of foreigners may be varied among the AEC member states. Thereby, persons who move for economic purposes under the current AEC legal framework may face different standards regarding the justification for expulsion orders in the host state.

This obstacle also relates to the administrative procedures and remedies for persons from other states who are subject to an expulsion order. In the case of the EEC, the legislation clearly specified that the host member states must officially notify persons of the period of time allowed for leaving the territory. The minimum for such a time period, in general, was not less than one month. In terms of remedies, those persons who received an expulsion order had the same legal remedies as were available to nationals of the host state regarding acts of the administration. Where there was no right to appeal to a court in the host member state regarding expulsion or the appeal could not have a suspensory effect, EEC legislation confirmed the right to refer the case to a competent authority in the host state, who should not be the same as whoever was empowered to make the decision of ordering an expulsion. In terms of administrative procedures, it is slightly different in the case of the AEC. The legislation only requires the authority in the member states to follow the repatriation process of each receiving state, but it does not specify a common repatriation process among the member states. In terms of remedies, AEC legislation also confirmed the right to the right to file their grievances with the relevant authorities of the receiving states and seek assistance from their respective embassies, consulates, or missions located in the receiving states. It can be seen that AEC legislation is similar to EEC legislation in terms of the remedies for persons receiving expulsion orders. Specifically, both laws also require the host state to allow persons from other member states to challenge their expulsion order to the competent authority. However, the AEC legal framework does not specify clear justification as well as administrative procedures for the host state to issue expulsion orders.

3. The Main Features of the two Regional Frameworks

This section examines the main features of the EEC and AEC legal frameworks on labour migration within the regional context. These main features are extracted from the historical development to achieve regionalism with respect to labour migration within the two regional economic associations from chapters 2, 3 and 4. Additionally, these main features are also summarised from the institutional frameworks, especially the functions and roles of the regional institutions of the EEC and AEC, from chapter 6. The four main features discussed in this section are the core principles of cooperation, relationship between the regional framework and international law, binding effects of regional legal instruments, and the roles of regional institutions.

3.1 Core Principle of Cooperation

The EEC legal framework was built upon the principle of non-discrimination based on grounds of nationality. As discussed previously, this principle did not require the member states to treat all EEC nationals from other member states as their own nationals, in every aspect. Nevertheless, this principle was implemented only to a certain extent with the objective of facilitating the movement of persons performing economic activities within the regional context. In other words, this principle guaranteed proper well-being and a fair working environment for EEC workers, self-employed persons and service providers in the host member states. As seen in chapters 2 and 3, the EEC legal instruments that relied on this principle had reduced excessive administrative procedures and set common grounds for all member states in order to facilitate labour migration. Therefore, EEC nationals who moved to perform economic activities in other member states would face the same standards and similar treatment regarding frontier formalities, residence permits, family reunification and expulsion orders. In terms of permission to perform economic activities, the EEC instruments also set the common regional standards for the liberalised service sectors. When those conditions were met, host states could not impose any further requirements.[1150] In terms of working conditions, EEC legislation also confirmed equal treatment regarding remuneration, dismissal, social benefits, and tax advantages as national workers in the host states. For self-

[1150] See Chapter 3 – Section 3.2: Except for the case of lawyers.

employed persons and service providers in the liberalised service sectors, early EEC legislation also confirmed the equal rights and obligations regarding related economic activities as nationals in the host states. It can also be seen that this principle was a significant foundation for the EEC to overcome the main obstacles to labour migration.

However, the AEC legal framework has mainly relied on the principle of non-interference. As discussed in chapter 4, AEC legislation tends to respect sovereignty and highly avoids intrusion into the internal affairs of the member states. Specifically, it leaves many issues to the discretion of the host member states. Unlike EEC legislation on the free movement of persons, the AEC instruments on labour migration do not clarify the required travel documents, the minimum length of residence permits, the scope of family members or the justification for expulsion orders. Therefore, persons who move for economic purposes under the current AEC legal framework may encounter varying standards of treatment and administrative procedures concerning visas, residence permits, family reunification and expulsion orders, depending on the domestic laws and policies of the host member states. Additionally, where the conditions in AEC legislation are met, the host member states are still allowed to impose further limitations or restrictions on persons from other member states, such as setting extra examinations or requiring them to work in collaboration with designated local workers. Although AEC legislation attempts to deal with the main obstacles to labour migration, it calls only for a minimum level of cooperation among the member states. For instance, the AEC only guarantees “the right to be visited” by family members, not “the right to be accompanied” by family members to the host member states. It can be concluded that the core principle of the AEC legal framework, which is the principle of non-interference, could be a possible reason why several obstacles to labour migration remain in the current AEC framework.

3.2 Relationship with International Laws

The EEC legal framework did not develop mainly from international law because there were not many international laws on labour migration during the EEC transitional periods (from the 1950s to the 1960s). As discussed in chapters 2 and 3, there were only the 1949 ILO Convention on Migration for Employment (Convention No. 97) and the 1950 United Nations Convention for the Suppression of the Traffic in Women and Children. These international laws did not deal with all obstacles to labour migration within the regional

context. For instance, Convention No. 97 only called for non-discrimination based on nationality on specific issues such as remuneration. It can be seen that international law can be an inadequate tool for facilitating the movement of workers, self-employed persons, and service providers within the EEC. Therefore, EEC legislation covered a wider issue, including frontier formalities, permission to perform economic activities, permission to reside, working conditions, and expulsion orders. In addition, the EEC had also designed its own service sectors, which would be liberalised under the regional framework on the free movement of self-employed persons and service providers. As the main goal of the EEC was to abolish all the main obstacles to labour migration, it was necessary to go beyond the standards stated in international law and demand a stronger programmatic approach among member states to achieve the free movement of persons for economic purposes. This situation proves a hypothesis of the new regionalism theory that following only the standards in international law may not be a suitable technique for the regional economic association to achieve regionalism. Therefore, an economic association had to implement its own legislation to deal with specific issues, such as labour migration within the regional context.

The situation is different in the case of the AEC, as some of its legal instruments have been inspired by and developed from existing international law. A good example is the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers, which covers the issues on the rights of persons who move for economic purposes under the AEC legal framework, including access to the labour market, permission to reside, family reunification and working conditions. The preamble of this Consensus explicitly refers to several international laws, including the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child. Additionally, the MNP agreement, which is another AEC instrument on the movement of skilled labour also relies on the GATS of the WTO. Specifically, the service sectors, which are liberalised by the MNP agreement, are similar to those of the GATS. Nevertheless, some of the AEC legal instruments go beyond international law. For instance, the MRAs on the movement of selected high-skilled professions within the AEC set certain regional standards and qualifications. Moreover, the MRAs also require stronger cooperation among member states than international law. This development of the AEC also proves the hypothesis of the new regionalism theory that international law may not be a proper instrument for the regional organisation to achieve regionalism. Even in the case of the AEC, where international law has played an important role in the development of

several regional legal instruments, it should devise its own rules to deal with certain issues, such as labour migration.

3.3 Binding Effects of Regional Instruments

As discussed in chapter 6, the EEC legal instruments had a special characteristic. According to the preliminary rulings developed by the Court of Justice, EEC legislation could be considered to be a new legal order of international law because its subjects included not only member states but also individuals. Specifically, EEC legislation conferred rights on individuals that could be directly invoked at the national level. As seen in chapters 2 and 3, the two main forms of legislation on the EEC free movement of persons framework were the regulations and directives. On the one hand, the regulations tended to cover the core rights of workers, such as working conditions, categories of family members, and access to education by family members. The regulations were directly applicable in all member states without any requirement of transposition into domestic laws. Therefore, the reasoning of the Court of Justice tended to be reasonable in the case of regulations that were directly applicable in the member states. On the other hand, the directives tended to cover the detailed administrative procedures such as frontier formalities, residence permits, and expulsion orders. The member states had to adjust their existing procedures or impose a new procedure in order to meet the standards in the directives. Thereby, the Court of Justice ruled that the directives only had a vertical direct effect. This means that the individuals could directly invoke the directive only against the member states, not other private parties. The Court also developed the principle of supremacy of Community law. In other words, a conflict between an EEC law norm and a domestic one should be resolved by giving effect to EEC legislation. The main reason why the Court of Justice developed these important legal principles, which included the principle of direct effect and the principle of the supremacy of EEC law, was to ensure the enforcement of and compliance with regional law by the member states.

In the case of the AEC, the regional instruments are classified by member states as ordinary international law. In other words, the status of the AEC legal instruments is not different from other international law. Thereby, the binding effect of these legal instruments depends on the constitutional mechanisms within each member state. As discussed in chapter 6, the majority of constitutions of the AEC member states require the national legislation to give effect to the regional legal instruments. From the perspective of the judiciaries of the

domestic courts in the AEC, regional law that has not yet been transposed into domestic laws could be considered as a matter of fact that the disputing party has the responsibility to prove. This can imply that the legal instruments of the AEC have no direct effect. In contrast to EEC legislation, AEC legislation lacks any regional legal principle ensuring the enforcement of its regional law. Therefore, it takes longer for the legislation of the AEC to be transposed and enforced at the domestic level than that of the EEC.

3.4 Roles of Regional Institutions

There were three main institutions within the EEC legal framework. The first institution was the Commission, which had the legislative power to propose regional legislation and the executive power to examine the implementation of EEC legislation. Specifically, it could be considered as the guardian of the Treaty, which was empowered to refer the case to the Court of Justice regarding an infringement of the regional law by the member states or abuses of power by the other EEC institutions. This institution was independent and reached its decision by majority vote, so it was a supranational institution. The second institution is the Council, which had the main role of passing EEC legislation. For the legislation on the free movement of workers, the Council reached an agreement via a simple majority vote. For the legislation on the free movement of self-employed persons and service providers, it reached an agreement through a qualified majority vote or a unanimous vote. The representatives in the Council decided on the interests of each member state. Thereby, the Council was an intergovernmental institution. The third institution was the Court of Justice, which had the power to implement EEC legislation to validate the action of member states and other regional institutions. Additionally, it had a crucial role in providing a preliminary ruling on the interpretation of legislation, which could ensure uniformity in the application of regional law. Moreover, it developed crucial legal principles such as the principle of direct effect and supremacy of Community law. Additionally, the Court of Justice was independent and reached its decision by majority vote. Therefore, it could be considered to be a supranational institution.

It can be seen that the institutional framework of the EEC consisted of both supranational and intergovernmental institutions. Nevertheless, there were more supranational dimensions in the EEC institutional framework. Such a framework could be

considered as a useful mechanism for the EEC, which ensured that the member states complied with the regional standards specified in regional law.

Based on an examination of the AEC institutional framework, there are two institutions that could be comparable to the EEC institutions. The first institution is the Secretariat, which has the role of monitoring the implementation of regional instruments. It is required to be independent, but it only has the power to make a report on the overall progress in implementing legislation. Unlike the Commission of the EEC, it does not have the power to take any legal action against the member states or other AEC institutions. In addition, it only decides based on consultation and consensus. Thus, the Secretariat is an institution with a larger intergovernmental dimension. The second institution is the Summit, which has the role of passing the regional legal instruments. Similar to the Council of the EEC, the representatives in the Summit can work for the interests of their own member states. Nonetheless, the Summit does not adopt a voting procedure. Specifically, all member states have to agree in order to pass any legislation. This situation clearly shows that it is an intergovernmental institution. Contrary to the EEC, the AEC framework does not have any regional court. The only available judicial measures are dispute settlement mechanisms (DSMs). The results of the DSMs, except consultation, bind the disputing parties. However, the decision-making process in the DSMs differs depending on the mechanism. Only the arbitration mechanism, which is one of the DSMs, has adopted a majority vote, while the other mechanisms lack a voting procedure. The characteristics of the DSMs show that these methods exhibit more intergovernmental tendencies.

Overall, it can be seen that the AEC consists of institutions with a greater intergovernmental dimension. Unlike the EEC, the institutional framework of the AEC tends to lack a sufficient monitoring system that ensures the enforcement of and compliance with regional law.

4. Recommendations for the AEC

This final section of the chapter aims to provide recommendations for the current AEC labour migration framework. These recommendations result from the consideration of the EEC regional framework on the free movement of persons, especially during the EEC transitional period. This research acknowledges the differences between the main features of the two regional frameworks. It also understands that certain approaches of the EEC free

movement of persons framework may not be proper solutions for the current AEC labour migration framework. Therefore, this section summarises suitable recommendations for the AEC in order to facilitate labour migration within the regional context, taking into account the experiences of the EEC.

4.1 Attitude of Cooperation

Discrimination based on nationality is a fundamental cause of the obstacles to labour migration. Specifically, the national protectionist attitudes of the host member states tend to end up creating restrictive domestic laws and policies to exclude or control foreign labour. Such restrictive laws and policies could create a burden on foreigners through excessive documentation requirements, complicated administrative procedures, exorbitant fees, and further limitations on performing economic activities in the host member states. In order to facilitate labour migration within a regional context, member states of an economic association should rethink and adjust their attitude of cooperation, from national prioritisation to non-discrimination based on nationality.

From the experiences of the EEC, the principle of non-discrimination based on nationality did not require all member states to treat labourers from other member states as their own nationals in all respects. In other words, this principle had a specific scope of implementation upon which the member states could decide. In the case of the EEC, the member states had agreed to provide equal treatment for persons who had moved for economic purposes only in certain areas in order to ensure proper well-being and a fair working environment in the host member states. As seen in chapters 2 and 3, the principle of non-discrimination based on nationality had played an important role in the development of the EEC legal instruments which could effectively reduce several obstacles to labour migration. Specifically, the obstacles regarding access to the labour market, permission to perform economic activities, permission to reside, and working conditions could be diminished by the cooperation among the member states based on this principle. If the AEC wants to strengthen cooperation among member states regarding labour migration, it would be beneficial to consider the principle of non-discrimination based on nationality. This principle could provide the AEC with a stronger foundation on which to negotiate and shape its regional legislation on labour migration in the future.

Although the current AEC framework mainly relies on the principle of non-interference, the regional legislation, influenced by the principle of non-discrimination based on nationality, does not conflict with this core principle of the AEC. As seen from the experiences of the EEC, it may be necessary for the regional legislation to set common standards for certain administrative procedures, to provide equal treatment and to facilitate the movement of labour. These legal instruments of the EEC did not intrude on the sovereignty of member states because such legislation was usually published in the form of a "directive" that was not immediately applicable at the domestic level. Instead, each member state was allowed to decide on the means by which to meet the standards of the directives. In other words, a directive only bound member states with the aims of the legislation. Nevertheless, the member states could decide on the method of implementation in order to reach the objectives in the directives. Therefore, the AEC could still rely on its original core principle of cooperation, with the adoption of the principle of non-discrimination based on nationality.

4.2 Approach of Labour Liberalisation

The approach of labour liberalisation in the economic association could be varied depending on the level of cooperation among the member states. As discussed in chapter 5, the usual management of labour migration before the introduction of regional systems was in the form of bilateral agreements. The first type of bilateral agreement is a one-sided bilateral agreement. One country would be considered the host state, while the other would be considered the home state. This situation could only be seen as a temporary solution for the labour shortage in the host state. Therefore, it could not be a potential model for the regional framework on migration. The second type of bilateral agreement is a reciprocal bilateral agreement. Both parties would be considered a host state and a home state. Reciprocal bilateral agreements intend to encourage labour migration between the two countries. Such agreements could be a potential model for regional legislation on labour migration. When member states of an economic association can agree on regional legislation on labour migration, there are different approaches of liberalisation. The possible approaches of liberalisation are the sectoral approach and the mutual recognition approach.

From interviews with legal experts on labour migration within the EEC, their view is that the regional framework on the free movement of persons could be influenced by

reciprocal bilateral agreements. For the approach of liberalisation, the EEC decided to adopt a sectoral approach at the early stage. From 1963 to 1985, the EEC liberalised the movement of persons under the regional framework, sector by sector. From the experience of the EEC between 1963 and 1985, it is necessary to be aware that the sectoral approach was time-intensiveness. As seen in chapter 3, it took more than 15 years to adopt many sectoral directives within the EEC. Therefore, the EEC shifted to the mutual recognition approach in 1989; specifically, the 1989 directive applied to all regulated professions not covered by sectoral directives. Established on the principle of mutual trust, it stipulated that the competent authorities could not refuse to recognise persons who had pursued the equivalent of a three-year higher education course and completed necessary professional training as being qualified to take up the regulated profession in question.

The current approach of labour liberalisation within the AEC is the sectoral approach. It only allows the regional movement of selected high-skilled professions. In terms of low-skilled labour, there were only one-sided bilateral agreements between the sending and receiving states. As explained in chapter 5, there have been bilateral agreements on low-skilled workers between Thailand and the four AEC countries, Myanmar, Laos, Cambodia and Vietnam. These bilateral agreements are one-sided. In other words, Thailand is the main country of destination and the four AEC countries are the main countries of origin. These one-sided bilateral agreements lead to unnecessary bureaucracy. The government must allocate a great deal of time and resources to controlling the recruitment of low-skilled workers from the four neighbouring countries. Additionally, this recruitment is also largely driven by the employers. The employers must apply for quotas to obtain migrant workers, taking their migrant workers to a hospital for a health check-up, and accompanying their workers to official offices in Thailand to apply for work permits. These employers also have to pay excessive fees and undertake numerous steps, while some even have to pay intermediaries to complete all the required tasks.

The way forward that could be acceptable to the current AEC member states is to negotiate reciprocal bilateral agreements on the movement of low-skilled labour. From the experience of the EEC, the reciprocal bilateral agreement that led to the free movement of workers could simplify all the complicated and bureaucratic procedures outlined above. When workers are free to enter specific destination countries for employment or for seeking job opportunities, the government will no longer have to spend extra time and resources on managing them. Simultaneously, the employers will no longer have to apply for quotas from the government or resort to intermediaries or pay extra administrative fees to hire low-skilled

migrant workers. As seen from the experiences of the EEC, this reciprocal agreement could be a potential model for the regional legislation on labour migration. As the AEC has adopted regional agreements related to the movement of specific high-skilled migrant workers (the MRAs and the MNP), it will be advantageous for both employers and workers in the AEC if the regional agreement based on reciprocity is expanded to cover the low-skilled sectors. This form of agreement could resolve both the issue of instability resulting from the unilateral approach of the destination country and the issue of bureaucracy resulting from the one-sided bilateral agreement between the sending and receiving states.

4.3 Use of International Laws

From the approach of the EEC, the framework on the free movement of persons did not merely develop from the existing international law. During the EEC transitional period, there was Convention No. 97 of the ILO in 1949, which called for non-discrimination based on nationality on the issue of remuneration in the participating states. Nevertheless, EEC legislation on the free movement of workers constituted a higher standard of working conditions by confirming equal treatment on wider issues, which were remuneration, dismissal, social benefits, and tax advantages. Regardless of any international law during that time, the EEC also devised its own rules to deal with other obstacles to labour migration. Specifically, it set regional standards on broader issues, including frontier formalities, national prioritisation, professional qualifications, residence permits, family members, and expulsion orders. It can be seen that international law could positively inspire or influence cooperation among the member states. However, only relying on international law may not lead an economic association to achieve strong regional integration with respect to labour migration. In other words, EEC law offered a more effective way of regional integration on labour migration than international law. In order to abolish obstacles to labour migration, a regional association needs a stronger legal framework that requires stronger cooperation among the member states.

For the AEC labour migration framework, some of its legal instruments on labour migration within the regional context have been developed from existing international law. Specifically, the Consensus that provided regional standards on labour rights was developed from various international laws such as UDHR, CEDAW, and CRC. Additionally, the MNP agreements that allowed the movement of businesspersons within the AEC mainly relied on

the GATS of the WTO. Relying on international law could be another reason why these AEC instruments only call for minimum cooperation and leave many issues to the discretion of the member states. For instance, the Consensus and the MNP only guarantee reasonable fees on the immigration procedure for persons moving for economic purposes. There is no common standard on documents required at border controls, so frontier formalities could be varied depending on the domestic laws of the host member states.

Nevertheless, the MRAs on the movement of selected professions within the AEC require stronger cooperation among the member states than international law requires. Specifically, it sets the regional standards on professional qualifications for the person moving under the MRA framework. It can be seen that international law could be a good influence on the development of regional law, but it seems to be an inadequate tool for regional cooperation. For negotiating future legislation on labour migration within the regional context, the AEC should be aware that regional cooperation needs more than international law to facilitate the movement of labour.

4.4 Monitoring Role of Regional Institution

In the case of the EEC, the Commission had an executive power to monitor the application of regional legal instruments. Specifically, it could independently refer the case of an infringement of EEC legislation to the Court of Justice. This monitoring role of the Commission was significant because it ensured that the member states and other regional institutions followed EEC legislation. As a result, the provisions in the EEC legal instruments, which included the provisions regarding the free movement of persons, would be implemented accurately by the member states. Then, the rights of EEC workers, self-employed persons, and service providers, which were confirmed by EEC legislation, would be safeguarded and protected. Consequently, the movement of persons under the EEC framework would be facilitated.

In the case of the AEC, the Secretariat is a comparable institution because it also has an executive power to monitor the implementation of regional instruments. However, its decision does not have any direct binding force over the member states or other regional institutions. Previously, the Secretariat adopted the AEC scorecard system, which monitored implementation of the AEC legal instruments through “negative publicity and peer pressure.” It was mainly based on self-assessment by the member states, and therefore subject to

concerns about the independence and objectivity of this measure. Currently, the Secretariat only publishes a report on the overall progress in implementing the AEC legislation and stays silent on the non-compliance of each member state. It can be seen that the Secretariat has a weaker monitoring power than that of the Commission of the EEC.

As the Secretariat is currently working on a new regime to monitor the AEC regional instruments, it is useful to look at the Commission of the EEC, which has far more effective measures to ensure the implementation of regional instruments. Even though the AEC does not currently have any equivalent of the Court of Justice in its framework, it is beneficial to begin with facilitating a more active role for the Secretariat. Instead of a self-reporting regime to which each member state has only made a political commitment to respond, the Secretariat should also be endowed with a new power to submit a reasoned opinion to a member state when it believes that a member state is not fulfilling its obligations under the AEC legal instruments. If the member state concerned does not follow the opinion, the Secretariat should then be able to enforce a certain kind of sanction. If the AEC continues to rely on a sanction in the form of "negative publicity and peer pressure," this kind of sanction should be enforced. In other words, the Secretariat should no longer stay silent on the non-compliance of each member state when it publishes reports in the future.

4.5 Decision-Making Process of Regional Institution

As seen from the situation in the EEC, the Council was the main institution with the responsibility to pass the regional legislation. It could agree to issue the EEC legal instruments through a voting system, which was specified in the Treaty of Rome. According to the Treaty, a qualified majority vote or a unanimous vote was required for EEC legislation on the free movement of self-employed persons and service providers. However, legislation on the free movement of workers only required a simple majority vote.

From the examination of the EEC transitional period, EEC legislation on the free movement of workers that required a simple majority vote by the Council did not face any delay. Specifically, the negotiation process on legislation regarding workers did not experience any delay beyond the transition deadline of 31 December 1969. However, the requirement for a unanimous vote of the Council caused a delay in passing EEC legislation on the free movement of self-employed persons and service providers. It can be seen that the negotiations on legislation regarding workers reached a faster conclusion than that for self-

employed persons and service providers during the EEC transitional period. This situation could be a beneficial lesson for the AEC – that is, a voting procedure that requires agreement from all member states could lead to a significant delay in the process of negotiation.

In the case of the AEC, the Summit is a comparable institution because it also has the main decision-making power to issue regional legislation. The major difference between the Council of the EEC and the Summit of the AEC is that the Summit does not adopt any voting system. Instead, it currently relies primarily on "consensus" in all cases. This measure allows every issue to be gradually considered and scrutinized until every member state is satisfied with the final result. It can be seen that this consensual decision-making process by the AEC also requires the mutual agreement of all of the member states, similar to the requirement of a unanimous vote by the EEC. As the current policy of the AEC is to reach a consensus in all cases, it could certainly cause a crucial delay in the overall progress of the AEC legal framework. For instance, the negotiation of the MNP agreement among the AEC member states began in 2007. Nevertheless, it took nine years for this agreement to enter into force in 2016. Accordingly, the Summit should learn from the experience of the Council of the EEC and should consider the possibility of reaching a faster agreement by adopting a simple majority vote on certain matters to avoid these delays.

4.6 Role of Regional Judicial Institution

From the experience of the EEC, the regional judicial institution played an important role in the development of the regional legal framework. The Court of Justice had a broad jurisdiction. It had the power to validate an action by member states or other regional institutions on the implementation of EEC legislation. Its decision directly bound member states and other regional institutions. As seen in chapters 2 and 3, the Court of Justice disciplined member states on several issues regarding the application of EEC legislation on the free movement of persons framework. Another role of the Court of Justice was jurisdiction over the interpretation of EEC legislation through the preliminary ruling. This measure could ensure uniformity in the application of regional law. Additionally, it could also be considered as the unique and crucial role that allowed the Court to be a supreme interpreter of the regional law that joined the domestic court into a common system with a view to a common design. Additionally, preliminary rulings also allowed the Court of Justice

to develop regional legal principles that ensured that the EEC legal instruments were enforceable, especially the principle of direct effect and the supremacy of Community law.

Nevertheless, the AEC does not have a comparable regional judicial institution. Dispute settlement mechanisms (DSMs) could be considered a weak mechanism for dealing with disputes at a regional level. Moreover, none of these mechanisms have yet been invoked. In addition, based on the experience of the AEC, most of the dispute cases between the member states were submitted to the ICJ or the dispute settlement body of the WTO. It could, therefore, be said that the AEC member states prefer to rely on an institution with more demonstrated assurances than the current DSMs. In order to transform the AEC into a rules-based organisation as the leaders of the member states desired, the member states should rely on their own legal norms and DSMs.

As the AEC member states tend to reserve the independence of their domestic courts, it is difficult to picture the AEC as being like the EEC. Specifically, the regional court may not be suitable for the current AEC. The way that could be acceptable to the current AEC member states is to gradually increase confidence and acceptance of the ASEAN-based legal norms and institutions among the AEC member states. One possible suggestion is to set up an institution with legal expertise providing the recommendations for member states on the interpretation of regional law. This institution would have more credibility than the current AEC institutions, which tend to be political institutions. Although the recommendations may not be strong tools for shaping the uniformity of regional law, they would be a beginning point for communication between member states and regional institutions regarding the interpretation of regional law. This communication could increase confidence in the AEC legal norms and institutions. Eventually, the member states may agree to be bound by the interpretation of regional law by such an institution.

CONCLUSION

The EEC and the AEC share certain similarities in international relations on cooperation regarding labour migration within the regional context. Both economic communities develop their regional legislation and institutional framework to facilitate the movement of labour among the member states. Specifically, regional legal instruments reflect how each economic association dealt with obstacles to labour migration. Additionally, regional institutions ensure that regional legal standards specified in regional law are properly enforced and implemented at the domestic level of the member states.

The analysis of this research illustrates that the EEC developed efficient regional law and powerful regional institutions on the free movement of persons framework, which facilitated the movement of workers, self-employed persons, and service providers among EEC member states. The programmatic approach of EEC legislation allowed the member states to gradually reduce obstacles that hindered labour migration within the regional context. It can be seen that the EEC legal instruments went beyond international law in order to tackle all the main obstacles to labour migration. Moreover, the EEC regional institutions, which comprised more supranational institutions, worked collaboratively to progress and actualise the objective of the free movement of persons framework. In particular, the Commission ensured the implementation of EEC legislation by taking infringement proceedings against the member states that failed to comply with EEC law. The Council adopted a voting system to review and pass regional law. The Court of Justice had the judicial power to validate an action by the member states and to interpret EEC legal instruments through the preliminary rulings that ensured uniformity in the application of regional law.

In terms of the AEC, several obstacles to labour migration remain in the current regional framework. Moreover, the current AEC institutional framework lacks effective measures that ensure the implementation of and compliance with regional legal instruments. This research suggests that there are great opportunities for the AEC member states to deepen their cooperation and strengthen their regional legal instruments on labour migration, considering the experiences of the EEC. It is also beneficial for the AEC member states to adjust both their attitude of cooperation as well as their approach to labour liberalisation. They should also be aware of the weakness of international law. As the new regionalism theory has proposed, regional cooperation needs more than international law to facilitate the

movement of labour within the regional context. In the case of labour migration, it is useful for an economic association to devise its own rules to diminish obstacles to labour migration. From the experiences of the EEC, bilateral agreements could be a foundation for regional cooperation on labour migration such as the free movement of persons framework. However, it should be noted that a reciprocal bilateral agreement has more potential to become a foundation for further cooperation at a regional level, rather than a one-sided bilateral agreement. Additionally, this research recommends that the AEC scrutinise its institutional framework. It is also advantageous for the AEC to facilitate a more active monitoring role by the Secretariat, to consider the possibility of the Summit reaching a faster agreement by adopting a simple majority vote and to gradually increase the confidence of regional-based legal norms among the AEC member states.

Finally, it is also worth noting that reaching regional cooperation on labour migration did not always result in the loss of control by the state over its sovereignty or the mass influx of labour from other member states. The regional framework on the free movement of persons in the EEC, which abolished all major obstacles to labour migration and facilitated the movement of workers, self-employed persons, and service providers within the region, has been embedded in the current EU framework. Even though it has been over fifty years since the free movement of persons framework was initiated during the EEC transitional period, only 3.3 per cent of EU nationals migrate to other member states with the purpose of pursuing economic activities, according to a recent statistic by Eurostat.[1151] Nevertheless, the abolition of obstacles to labour migration by regional legislation can favourably result in the diminution of cost to the member states in terms of immigration controls and the qualification of diplomas. Therefore, it is advantageous for the AEC member states to enhance and reinforce their cooperation on labour migration in the regional context.

[1151] Eurostat (n 40) (2019).

References

1. Legislation and policy documents

1.1 International Conventions and Treaties

International Labour Organisation, Migration for Employment Convention (No. 97) (1949)

International Labour Organisation, Migration for Employment Recommendation (No. 86) (Revised) (1949).

Treaty establishing the European Atomic Energy Community (25 March 1957).

Treaty establishing the European Coal and Steel Community (18 April 1951).

The United Nations Convention for the Suppression of the Traffic in Women and Children (1950).

1.2 Bilateral Agreements

Agreement between Belgium and France designed to Facilitate the Movement of Persons (April 1949).

Agreement between Belgium and France for the Issue Free of Charge of a Temporary Residence Visa to Wage-Earners (October and November 1952).

Agreement between the Government of the Federal Republic of Germany and the Government

of the Italian Republic on the Recruitment and Placement of Italian Workers in the Federal Republic of Germany (December 1955).

Memorandum of Understanding between the Royal Thai Government and the Government of Lao PDR on employment cooperation (October 2002).

Memorandum of Understanding between Cambodia and Thailand on cooperation in the employment of workers (May 2003).

Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the Union of Myanmar on cooperation in the employment of workers (June 2003).

Memorandum of Understanding between the Government of the Socialist Republic of Viet Nam and the Government of the Kingdom of Thailand on Labour Cooperation (July 2015).

1.3 EEC

1.3.1 Primary Legislation

Treaty establishing the European Economic Community (Treaty of Rome) (25 March 1957).

1.3.2 Regulations

Regulations 15/61 on free movement for workers within the Community (26 August 1961).
Regulation 38/64 on free movement for workers within the Community (25 March 1964).
Regulation 1612/68 on free movement for workers within the Community (15 October 1968).

1.3.3 Directives

Directive of 16 August 1961 (this directive does not have a number) on the abolition of restrictions on movement and residence within the community for workers of member states and their families (16 August 1961).

Directive 63/261 laying down detailed provisions for the attainment of freedom of establishment in agriculture in the territory of a Member State in respect of nationals of other countries of the Community who have been employed as paid agricultural workers in that Member State for a continuous period of two years (2 April 1963).

Directive 63/262 laying down detailed provisions for the attainment of freedom of establishment on agricultural holdings abandoned or left uncultivated for more than two years (2 April 1963).

Directive 64/220 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (25 February 1964).

Directive 64/221 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (25 February 1964).

Directive 64/222 laying down detailed provisions concerning transitional measures in respect of activities in wholesale trade and activities of intermediaries in commerce, industry and small craft industries (25 February 1964).

Directive 64/223 concerning the attainment of freedom of establishment and freedom to provide services in respect of activities in wholesale trade (25 February 1964).

Directive 64/224 concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of intermediaries in commerce, industry and small craft industries (25 February 1964).

Directive 64/240 on the abolition of restrictions on movement and residence within the community for workers of member states and their families (25 March 1964).

Directive 64/427 laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in manufacturing and processing industries (7 July 1964).

Directive 64/429 concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self- employed persons in manufacturing and processing industries (7 July 1964).

Directive 68/360 on the abolition of restrictions on movement and residence within the community for workers of member states and their families (15 October 1968).

Directive 68/364 laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in retail trade (15 October 1968).

Directive 68/365 concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in the food manufacturing and beverage industries (15 October 1968).

Directive 68/366 laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in the food manufacturing and beverage industries (15 October 1968).

Directive 68/367 concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in the personal services sector (15 October 1968).

Directive 68/368 laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in the personal services sectors (15 October 1968).

Directive 70/522 concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in the wholesale coal trade and activities of intermediaries in the coal trade (30 November 1970).

Directive 70/523 laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in the wholesale coal trade and in respect of activities of intermediaries in the coal trade (30 November 1970).

Directive 73/148 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (21 May 1973).

Directive 74/556 laying down detailed provisions concerning transitional measures relating to activities, trade in and distribution of toxic products and activities entailing the professional use of such products including activities of intermediaries (4 June 1974).

Directive 75/368 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of various activities and, in particular, transitional measures in respect of those activities (16 June 1975).

Directive 75/369 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of itinerant activities and, in particular, transitional measures in respect of those activities (16 June 1975).

Directive 75/362 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services (16 June 1975).

Directive 76/92 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of the activities of insurance agents and brokers and, in particular, transitional measures in respect of those activities (13 December 1976).

Directive 77/249 to facilitate the effective exercise by lawyers of freedom to provide services (22 March 1977).

Directive 77/452 concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of nurses responsible for general care, including

measures to facilitate the effective exercise of this right of establishment and freedom to provide services (27 June 1977).

Directive 78/686 concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of practitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services (25 July 1978).

Directive 78/1026 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in veterinary medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services (18 December 1978).

Directive 80/154 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in midwifery and including measures to facilitate the effective exercise of the right of establishment and freedom to provide services (21 January 1980).

Directive 82/470 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in certain services incidental to transport and travel agencies (29 June 1982).

Directive 82/489 laying down measures to facilitate the effective exercise of the right of establishment and freedom to provide services in hairdressing (19 July 1982).

Directive 85/384 on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in architecture, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services (10 June 1985).

Directive 90/364 on the right of residence (28 June 1990).

Directive 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activity (28 June 1990).

Directive 90/366 on the right of residence for students (28 June 1990).

Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states (29 April 2004).

1.3.4 Other EEC Documents

COM/69/334 Commission's Proposal for a Directive on the coordination of certain laws, regulations and administrative provisions concerning the training of engineers (May 1969).

Council of Europe, Consultative Assembly, 5th session, 3rd part, Document No. 201 (15-26 September 1953).

Council of Europe, Consultative Assembly, 8h Session, 2nd part, Document No. 458 (15-26 October 1956).

Executive Secretariat of the Commission of the EEC, Revised proposal for a regulation and a directive relating to free movement of workers within the Community (17 May 1963).

General programme for the abolition of restrictions on freedom of services (1961).

General programme for the abolition of restrictions on freedom of establishment (1961).

Protocol on the Statute of the Court of Justice (1957).

1.4 AEC

1.4.1 Primary Legislation

Association of Southeast Asian Nations Declaration (ASEAN Declaration) (8 August 1967).

Charter of Association of Southeast Asian Nations (ASEAN Charter) (20 November 2007).

Declaration of the Association of Southeast Asian Nations Concord (24 February 1976).

1.4.2 Secondary Legislation

Agreement on the Establishment of the ASEAN Secretariat (1976).

ASEAN Agreement on the Movement of Natural Persons (2012).

ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (2017).

ASEAN Declaration on the Protection and Promotion of the Rights of the Migrant Workers (2007)

ASEAN Framework Agreement on Visa Exemption (2006).

ASEAN Mutual Recognition Arrangement on Engineering Services (2005).

ASEAN Mutual Recognition Arrangement on Nursing Services (2006).

ASEAN Mutual Recognition Arrangement on Architectural Services (2007).

ASEAN Framework Arrangement for the Mutual Recognition of Surveying Qualifications (2007).

ASEAN Mutual Recognition Arrangement on Dental Practitioners (2009).

ASEAN Mutual Recognition Arrangement on Medical Practitioners (2009).
ASEAN Mutual Recognition Arrangement on Accountancy Services (2012).
ASEAN Mutual Recognition Arrangement on Tourism Professional (2012).

1.4.3 Other AEC Documents

ASEAN Economic Community Blueprint 2015 (January 2008).
ASEAN Economic Community Blueprint 2025 (November 2015).
Framework Agreement on Enhancing ASEAN Economic Cooperation (28 January 1992).
Protocol to Amend the Framework Agreement on Enhancing ASEAN Economic Cooperation (15 December 1995).
Protocol on Dispute Settlement Mechanism (20 November 1996).
Protocol on Enhanced Dispute Settlement Mechanism (29 November 2004).
Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (DSM Protocol) (2010).

1.5 Thailand

1.5.1 Acts, Decrees, and Declarations

Declaration of the Revolutionary Party No. 322 (1972).
Decree on Prohibited Occupations for Foreigners (1973).
Foreigners' Working Management Emergency Decree (2017).
Foreigners' Working Management Emergency Decree (No. 2) (2018).
Immigration Act (1950).
Immigration Act (1979).
Immigration Act (2018).
Order of the National Council for Peace and Order Number 33/2560 (2017).
Supplement Decree on Prohibited Occupation for Foreigners (1979).
Working of Alien Act (1978).

1.5.2 Administrative Laws

Announcement of the National Council for Peace and Order No. 117/2557 (2014).

Announcement of the National Council for Peace and Order No. 100/2558 (2015).

Announcement of the National Council for Peace and Order No. 101/2558 (2015).

Notification of the Ministry of Interior Regarding the Minimum Wage Rate (14 February 1972).

Notification of the Ministry of Interior Regarding the Minimum Wage Rate (30 August 1978).

Notification of the Ministry of Interior Regarding the Permission to Allow Certain Groups of Foreigners to Enter and Stay in the Kingdom on Special Cases (6 February 2018).

Notification of the Ministry of Labour and National Service on Regarding the Occupations Allowed to the Migrant Workers (29 August 1996).

Notification of the Ministry of Labour Regarding the Occupations Allowed to the Migrant Workers (2 September 2003).

Notification of Ministry of Labour on the Prohibited Occupation for Foreigners in Thailand (21 April 2020).

1.5.3 Policy Documents

Cabinet Resolution, Government of Thailand (March 1992).

Cabinet Resolution, Government of Thailand (June 1996).

Cabinet Resolution, Government of Thailand (April 1998).

Cabinet Resolution, Government of Thailand (March 1999).

Cabinet Resolution, Government of Thailand (March 2000).

Cabinet Resolution, Government of Thailand (April 2001).

Cabinet Resolution, Government of Thailand (May 2005).

Cabinet Resolution, Government of Thailand (July 2005)

Cabinet Resolution, Government of Thailand (December 2006).

Cabinet Resolution, Government of Thailand (December 2008).

Cabinet Resolution, Government of Thailand (January 2010).

Cabinet Resolution, Government of Thailand (January 2013).

Cabinet Resolution, Government of Thailand (February 2016).

Cabinet Resolution, Government of Thailand (January 2018).

Cabinet Resolution, Government of Thailand (August 2019).

Foreign Workers Administrative Office, 'Official Manual for Employers and Business Enterprises; Process of Nationality Verification for Foreign Workers from Myanmar, Laos and Cambodia' (2009) Department of Employment Thailand.

National Legislative Assembly session 42/2560 (6 July 2007).

National Legislative Assembly session 24/2561 (26 April 2018).

2. Books

Axelord R, *The Evolution of Cooperation* (Basic Books 1984) 136-140.

Barnard C, *The Substantive Law of the EU: The Four Freedom* (5th edn, Oxford University Press 2016) 203-205, 324-378.

— — and Peers S, *European Union Law* (2nd edn, Oxford University Press 2016) 379.

Berneri C, *The movement and residence rights of third country national family members of EU citizens: a historical and jurisprudential approach* (City University of London 2014) 35.

Borjas G J, *Heaven's Door: Immigration Policy and the American Economy* (Princeton University Press 1999) 189-190.

Chuathai S, *Introduction to Law and Legal Systems*, (24th edn, Winyuchon 2018).

Craig P and De Búrca G, *EU Law: Text, Cases and Meterials* (6th edn, Oxford University Press 2015) 4-8, 744-745, 843.

Goedings S, *Labour Migration in an Integrating Europe: National Migration Policies and the Free Movement of Workers 1950-1968* (SDU Uitgevers 2005) 153-157.

Guild E, Peers S and Tomkin J, *The EU Citizenship Directive: A Commentary* (Oxford University Press 2014).

Green N, Hartley T C and Usher J A, *The Legal Foundations of the Single European Market* (Oxford University Press 1991) 153.

Haas H, Castles S and Miller M J, *The Age of Migration: International Population Movements in the Modern World* (6th edn, Palgrave MacMillan 2020) 30-35, 42-73, 124, 194–195, 360.

Havanond C, *Administrative Law: General Principles* (8th edn, Thai Bar Association Press 2016) 99-100.

Inama S and Sim E W, *The foundation of the ASEAN Economic Community: an institutional and legal profile* (Cambridge University Press 2015) 48.

Jennings R and Watts A, *Oppenheim's International Law* (9th edn Longman 1992) 1202.

Kartajaya H and Huan H D, *Think ASEAN* (Polsaram P and Bunyakiati P, McGraw Hill Publishing 2013) 60.

Klučka J and Elbert L, *Regionalism and its Contribution to General International Law* (Pavol Jozef Šafárik University, Institute of European Law and Department of International Law 2015) 26, 30-31, 190.

Kulkonkarn K, *Management of Foreign Workers in Thailand and other Countries* (Thailand Research Fund 2014) 14.

Lister F, *Decision-making strategies for international organisations: the IMF model* (Graduate School of International Studies, University of Denver 1984).

Mei A P, *Free Movement of Persons within the European Community* (Hart Publishing 2003) 41-42.

Molle W, *The Economics of European Integration: Theory, Practice, Policy* (Dartmouth Publishing Company Limited 1991) 12-14, 21-23.

Narine S, *Explaining ASEAN: Regionalism in Southeast Asia* (Lynne Rienner Publishers 2002) 31.

Phophueksanand N, *ASEAN Studies* (McGraw Hill Publishing 2013) 33.

Pitsuwan S, *ASEAN: A better understanding of ASEAN from the experiences of Secretary-General of ASEAN* (Amarin Publisher 2013) 4-8, 121-122.

Rittberger V, Zangl B and Staisch M*, International Organization, Polity, Politics and Policies* (Palgrave Macmillan 2006).

Saint-Paul G, *Dual Labor Markets: A Macroeconomic Perspective* (Massachusetts Institute of Technology Press 1997) 45-54.

Sassen S, *The Mobility of Labour and Capital: A Study in International Investment and Labour Flow* (Cambridge University Press 1998) 4-6.

Sathirathai S, *ASEAN Community* (Chulalongkorn University Press 2014) 5, 67-68.

Schermers H G and Blokker N M, *International Institution Law: Unity within Diversity* (5th edn, Martinus Nijhoff Publishers 2011) 155.

Srisuchart S and Tangtipongkul K, *Management of Foreign Workers in Thailand*, (Ministry of Labour 2015) 15.

Sukonthapan P and Busapathamrong P, *The Study of Related Laws on Employment of Foreign Workers* (Thailand Research Fund 1997) 97-98.

Sundberg-Weitman B, *Discrimination on Grounds of Nationality: Free Movement of Workers and Freedom of Establishment under the EEC Treaty* (North-Holland 1977) 183-184.

Tirawat J, *Internatinal Law* (2015 Winyuchip Publsihing, 3rd edn) 72-75.

Torpey J C, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge University Press 2014) 17-24.

Weatherbee D E, *International Relations in Southeast Asia: The Struggle for Autonomy* (Kiatichai Pongpanich, Seangdao Publisher 2013) 153, 261.

3. Chapters in Books

Acosta D, 'The Expansion of Regional Free Movement Regimes. Towards a Borderless World?' in Minderhoud P, Mantu S and Zwaan K (eds), *Caught In Between Borders: Citizens, Migrants and Humans* (2019 Wolf Legal Publishers) 9-15.

Beckman R and others, 'Dispute settlement mechanisms in ASEAN' in Beckman R and others (eds), *Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in ASEAN Instruments* (Cambridge University Press 2016) 91.

Brumat L and Acosta D, 'Three generations of free movement of regional migrants in Mercosur: any influence from the EU?' in Geddes A, Espinoza M V, Abdou L H, and Brumat L (eds), *The Dynamics of Regional Migration Governance* (Edward Elgar Publishing 2019) 67-68.

Chiswick B R, 'Are Immigrants Favourably Self-Selected? An Economic Analysis' in Brettell C and Hollifield J (eds), *Migration Theory: Talking Across Disciplines* (Routledge 2000) 61-76.

Ewing-Chow M and Bernard L, 'The ASEAN Charter: The Legalization of ASEAN?' in Cassese S and others (eds), *Global Administrative Law: The Casebook* (Institute for International Law and Justice 2012) 117.

— — and Yusran R, 'The ASEAN Trade Dispute Settlement Mechanism' in Howse R, Ruiz-Fabri H, Ulfstein G and Zang M (eds), *The Legitimacy of International Trade Courts and Tribunals* (Cambridge University Press 2018) 384-387.

Fawcett L, 'Regionalism from An Historical Perspective' in Farrell M, Hettne B and Langenhove L V (eds), *Global Politics of Regionalism: Theory and Practice* (Pluto Press 2005) 21-38.

Gentile E, ‘Skilled migration in the literature: what we know, what we think we know, and why it matters to know the difference’, in Gentile E (ed): *Skilled Labor Mobility and Migration: Challenges and Opportunities for the ASEAN Economic Community* (Edward Elgar Publishing 2019) 47.

Griecon J M, ‘Systemic source of Variation in Regional Institution in Western Europe, East Asia, and the Americas’ in Mansfield E and Milner H V(eds), *The Political Economy of Regionalism* (Columbia University Press) 164-187.

Hollifield J F, ‘The Politics of International Migration: How Can We Bring the State Back In?’ in Brettell C and Hollifield F (eds), *Migration Theory: Talking Across Disciplines* (Routledge 2000) 137-185.

Ibbetson D, ‘Historical Research in Law’ in Cane P and Tushnet M (eds), *The Oxford Handbook of Legal Studies* (2005) 863-864

Mau S, Brabandt H, Laube L and Roos C, ‘Globalization and the Challenge of Mobility’ in Mau S and others (eds), *Liberal States and the Freedom of Movement: Selective Borders, Unequal Mobility* (Palgrave Macmillan 2015) 25-26.

Molle W, ‘Regional Policy’ in Coffey P (ed), *Main Economic Policy Areas of the EEC Towards 1992* (2nd edn, Kluwer Academic Publishers 1988) 68-69.

Reimann H and Reimann H, ‘Labour-Importing Countries: Germany’ in Krane R H (ed), *International Labour Migration in Europe* (Prager Publishers 1979) 64-65.

Romero F, ‘Migration as an Issue in the European Interdependence and Integration: the Case of Italy in Milward A S (ed), *The Frontier of National Sovereignty History and Theory 1945-1992* (Routledge 1994).

Ruhs M, ‘Immigration and Labour Market Protectionism: Protecting Local Workers’ Preferential Access to the National Labour Market’ in Costello C and Freedland M (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford University Press 2014) 68-77.

Yue C S, ‘Free Flow of Skilled Labor in the AEC’, in Urta S and Okabe M (eds): *Toward a Competitive ASEAN Single Market: Sectoral Analysis* (ERIA Research Project Report 2011) 208, 245, 250, 258-259.

4. Articles in Journals

Antkiewicz A and Whalley J, ‘China's New Regional Trade Agreements’ (2005) 28 The World Economy 1539.

Bigo D, ‘Immigration controls and free movement in Europe’ (2010) 91 (875) Cambridge University Press 579-591.

Bloomquist K, ‘Sex worker affirmative therapy: conceptualization and case study’ (2019) 34 (3) Sexual and relationship therapy 329-408.

Bronkhorst H, ‘Freedom of Establishment and Freedom to Provide Services under the EEC-Treaty’ (1975) 12 (2) Common Market Law Review 253.

Brown R C, 'ASEAN: Harmonizing Labor Standards for Global Integration' (2016) 33 (1) CLA Pacific Basin Law Journal 57.

Burawoy M, ‘The Functions and Reproduction of Migrant Labor’ (1976) 81 (5) American Journal of Sociology 1050-1087.

Button K and Fleming M, 'The Changing Regulatory Regime Confronting the Professions in Europe' (1992) 37 (2) Antitrust Bulletin 448-449.

Chalanwong Y, *The study of an effective demand for and management of Alien Workers in Agriculture, Fisheries and Related sectors and Construction Sectors* (2008 Development Research Institute of Thailand) 6-16.

Christian D, ‘Resistance to International Workers Mobility: A Barrier to European Unity’ (1955) 8 (3) Industrial and Labour Relations Review 3, 385-386.

Clark W and Maas R, ‘Interpreting Migration Through the Prism of Reasons for Moves’ (2015) 21 (1) Population, Space and Place 54-67.

Dahlberg K A, ‘The EEC Commission and the Politics of the Free Movement of Labour’ (1967) 6 (4) Journal of Common Market Studies 311.

Desierto D A, 'ASEAN's Constitutionalization of International Law: Challenges to Evolution under the New ASEAN Charter' (2011) 49 (2) Columbia Journal of Transnational Law 299-303.

Donner A M, 'The Court of Justice of the European Communities' (1961) 1 International and Comparative Law Quarterly Supplementary Publication 66.

Dreyer H, ‘Immigration of Foreign Workers into the Federal Republic of Germany’ (1961) 84 (1) International Labour Review 1-25.

Fairfield L, 'Notes on Prostitution' (1959) 9 (3) British Journal of Delinquency 164-173.

Fawkes J, ‘Sex working feminists and the politics of exclusion’ (2005) 24 Social Alternatives 22-23.

Feld W, 'The Significance of the Court of Justice of the European Communities' (1963) 39 (1) North Dakota Law Review 41

— — and Slotnick E, 'Marshalling the European Community Court: A Comparative Study in Judicial Intergration' (1976) 25 (2) Emory Law Journal 323-324.

Fennelly N, ‘The European Union and Protection of Aliens from Expulsion’ (1999) 1 (3) European Journal of Migration and Law 317-318.

Fernandes M, 'The Free Movement of Persons: The Ever Changing Face of Europe' (1992) 3 (12) European Business Law Review 328-329.

Friedlander J, ‘Securing a Lawyer's Freedom of Establishment within the European Economic Community’ (1987) 10 (4) Fordham International Law Journal 733-749.

Fukunaga Y and Ishido H, ‘Values and Limitations of the ASEAN Agreement on the Movement of Natural Persons’ (2015) 1 (20) Economic Research Institute for ASEAN and East Asia Discussion Paper Series 1-103.

Gerven W, 'The Right of Establishment and Free Supply of Services within the Common Market' (1966) 3 (3) Common Market Law Review 353-358

Gülzau F, Mau S and Zaun N, ‘Regional Mobility Spaces? Visa Waiver Policies and Regional Integration’ (2016) 54 (6) International Migration 168.

Hahn H J, ‘International and Supranational Public Authorities’ (1961) 26 (4) Law and Contemporary Problems 640-641.

Harcourt C and others, ‘Sex work and the law’ (2005) 2 (3) Sexual Health 121-12.

Heidelberg F C, ‘Parliamentary Control and Political Groups in the Three European Regional Communities’ (1961) 26 (3) Law and Contemporary Problems 434-435.

Hettne B and Söderbaum F, ‘The New Regionalism Approach’ (1998) 17 (3) Politeia 6-21.

Hoekman B, ‘Assessing the General Agreement on Trade in Services’ (1995) World Bank Discussion Paper No. 307.

Hopkins W J, ‘Falling on stony ground: ASEAN’s acceptance of EU constitutional norms’ (2015) 13 (3) Asia Europe Journal 275.

Huisman W and Kleemans E R, ‘The challenges of fighting sex trafficking in the legalized prostitution market of the Netherlands’ (2014) 61 (2) Crime, Law and Social Change 215–228.

Hurtig S, ‘The European Common Market’ (1958) 32 International Conciliation 356.

International Labour Organisation, ‘Migration and Economic Development - The Preliminary Migration Conference, Geneva’ (1950) 62 (2) International Labour Review 94-95.

Isaac J, ‘International migration and European Population Trends’ (1952) 66 (3) International Labour Review 194-195.

ISEAS-Yusof Ishak Institute, ‘ASEAN and the EU in Perspective’ (2016) ASEAN Focus 5.

Keohane R O, ‘Reciprocity in International Relations’ (1986) 40 (1) International Organization 8; Carolyn Rhodes, ‘Reciprocity in trade: the utility of a bargaining strategy’ (1989) 43 (2) International Organization 276.

Kerr C, ‘Labor Markets: Their Character and Consequences’ (1950) 40 (2) The American Economic Review 280.

Korner H and Mehrlander U, ‘New Migration Policies in Europe: The Return of Labour Migrants, Remigration Promotion and Reintegration Policies’ (1986) 20 (3) The International Migration Review 672-675

Kuhn A, ‘Market Structures and Wage-Push Inflation’ (1960) 13 (4) Industrial and Labour Relations Review 161-162

Kusakabe K and Pearson R, ‘Cross-border childcare strategies of Burmese migrant workers in Thailand’ (2012) 20 (8) Gender, Place and Culture 960-978.

Lagrange M, 'The Court of Justice as a Factor in European Integration' (1967) 15 (4) American Journal of Comparative Law 723-724.

Lando O, 'EEC Council and Commission in their Mutual Relationship: A Survey of Law and Practice' (1963) 12 (2) Journal of Public Law 343-344

— —, ‘The Liberal Professions in the European Communities’ (1971) 8 (3) Common Market Law Review, 345-346.

Lannes X, ‘International Mobility of Manpower in Western Europe: I’ (1956) 73 (1) International Labour Review 2-4.

— —, ‘Recent Developments in the Clearance of Manpower Between Western European Countries’ (1959) 79 (2) International Labour Review 183.

Lavenex S, ‘Regional migration governance – building block of global initiatives?’ (2019) 45 (8) Journal of Ethnic and Migration Studies 1284.

Leiter R, ‘The Contributions of Wage Theory’ (1953) 4 (6) Labour Law Journal 394.

Lenhoff A, 'Jurisdictional Relationship between the Court of the European Communities and the Courts of the Member States' (1963) 12 (2) Buffalo Law Review 324-325.

Lewin K, ‘The Free Movement of Workers’ (1965) 2 (3) Common Market Law Review 310-312.

Lewis W, ‘Economic Development with Unlimited Supplies of Labour’ (1954) 22 (2) The Manchester School 139.

Limsiritong N, ‘How to Apply Protocol to the ASEAN Charter on Dispute Settlement Mechanisms 2010’ (2017) 1 (1) Asian Political Science Review 8-13.

— —, ‘The Deadlock of ASEAN Dispute Settlement Mechanisms and Why ASEAN Cannot Unlock It’ (2016) 3 (1) Asian Political Science Review 18-25.

Lowenfeld A F, ‘How the European Economic Community is Organized’ (1963) 19 (1) Business Lawyer (ABA) 127.

McCrudden C, ‘Legal research and the social sciences’ (2006) 122 Law Quarterly Review 633-635.

Maestripier C, ‘Freedom of Establishment and Freedom to Supply Services’ (1973) 10 (2) Common Market Law Review 156-157.

Marjolin R, ‘Prospects for the European Common Market’ (1957) 36 (1) Foreign Affairs 135.

Martin P, ‘Lower Migration Costs to Raise Migration’s Benefits’ (2014) 16 (2) New Diversity 9-19.

Mashaw J L, 'Federal Issues In and About the Jurisdiction of the Court of Justice of the European Communities' (1965-1966) 40 (1) Tulane Law Review 38.

Massey D S and others, ‘Theories of International Migration: A Review and Appraisal’ (1993) 19 (3) Population and Development Review 431-466.

McMahon J F, 'The Court of the European Communities Judicial Interpretation and International Organization' (1961) 37 British Year Book of International Law 325-326.

Menkhoff L and Suwanaporn C, ‘10 Years after the crisis: Thailand's financial system reform’ (2007) 18 (1) Journal of Asian Economics 4.

Menon J, Todd L, Hashim A and Alias A, ‘ASEAN Integration Report’ (2019) 3 ASEAN Prosperity Initiative Report 6.

Miller J and Schwartz M D ‘Rape myths and violence against street prostitutes’ (1995) 16 (1) Deviant Behaviour 1-23.

Minattur J, 'The Court of Justice of the European Communities' (1964) 3 (3) Philippine International Law Journal 39-40.

Naldi G, ‘The ASEAN Protocol on Dispute Settlement Mechanisms: An Appraisal’ (2014) 5 Journal of International Dispute Settlement 136.

Nawarat N, ‘Education obstacles and family separation for children of migrant workers in Thailand: a case from Chiang Mai’ (2018) 38 (4) Asia Pacific Journal of Education 489.

Oliveira A C, ‘Workers and Other Persons: Step-By-Step from Movement to Citizenship – Case Law 1995-2001’ (2002) 39 Common Market Law Review 77.

Olsen E, ‘Regional income differences within a common market’ (1965) 14 (1) Papers of the Regional Science Association 35-36.

Outshoorn J, ‘Pragmatism in the Polder: Changing Prostitution Policy in The Netherlands’ (2004) 12 (2) Journal of Contemporary European Studies 165–176.

Paitoonpong S, ‘Different Stream, Different Needs, and Impact: Managing International Labor Migration in ASEAN: Thailand (Immigration)’ (2011) Philippine Institute for Development Studies Discussion Paper Series No. 2011-28.

Parnes H, ‘Research on Labour Mobility: An Appraisal of Research Findings in the United States’ (1954) 65 New York: Social Science Research Council 147-150.

Philip A, ‘Social Aspect of European Economic Co-operation’ (1957) 76 (3) International Labour Review 249-250.

Polach J G, 'Harmonization of Laws in Western Europe' (1959) 8 (2) American Journal of Comparative Law 157.

Policy Department C: Citizens' Rights and Constitutional Affairs, ‘Obstacles to the right of free movement and residence for EU citizens and their families: Comparative analysis’ (2016) European Parliament 12, 100-102.

Post C, Brouwer J and Vols M, ‘Regulation of Prostitution in the Netherlands: Liberal Dream or Growing Repression?’ (2019) 25 (2) European Journal on criminal policy and research 99-118.

Pouyat A, 'Freedom of Movement within the Common Market' (1968) 9 (2) Journal of the International Commission of Jurists 50.

Quayle L, ‘‘Rubbery’ ASEAN: mediating people-movement in Southeast Asia’ (2019) 5 (3) International Journal of Migration and Border Studies 176.

Rabibhadana N and Hayami Y, ‘Seeking haven and seeking jobs: Migrant workers’ networks in two Thai locales’ (2013) 2 (2) Southeast Asian Studies 243–283.

Ramacciotti C, ‘European Workers: Human and Social Problems Placed by the Free Circulation of Workers’ (1965) 2 (1) The International Migration Digest 21.

Richards D, ‘Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution' (1979) 127 (5) University of Pennsylvania Law Review 1195-1287.

Rooks H R, 'The Principal Institutions of the European Common Market' (1959) 4 (1) Section of International and Comparative Law Bulletin 9-10.

Roth W, ‘The European Economic Community’s Law on Services: Harmonisation’ (1988) 25 (1) Common Market Law Review 41-45

Sallman J, ‘Living with stigma: Women’s experiences of prostitution and substance use’ (2010) 25 (2) Journal of Women & Social Work 146-159.

Salt J, ‘The Future of International Labour Migration’ (1992) 26 (4) The International Migration Review 1077-1111.

Salter M B, ‘The Global Visa Regime and the Political Technologies for the International Self: Borders, Bodies, Biopolitics’ (2006) 31 (2) Alternatives: Global, Local, Political 170.

Sanders T and Campbell R, ‘Criminalization, protection and rights: Global tensions in the governance of commercial sex’ (2014) 14 (5) Criminology & Criminal Justice 535–554.

Saunders P, ‘Traffic Violations: Determining the Meaning of Violence in Sexual Trafficking Versus Sex Work’ (2005) 20 (3) Journal of Interpersonal Violence 343-360

Sawer G and Doeker G, 'The European Economic Community as a Constitutional System' (1962) 4 (2) Inter-American Law Review 226.

Schmitter B, ‘Sending States and Immigrant Minorities—the Case of Italy’ (1984) Comparative Studies in Society and History 26 (3) 325-334.

Sewer G and Doeker G, ‘The European Economic Community as a Constitutional System’ (1962) 4 (2) Inter-American Law Review 219.

Sharma S, ‘Beyond the IMF Medicine: Thailand's Response to the 1997 Financial Crisis’ (2002) 5 (1) International Area Review 27.

Shoham S and Rahav G, ‘Social Stigman and Prostitution’ (1968) 8 (4) British Journal of Criminology 402-411.

Sim E W, 'The Outsourcing of Legal Norms and Institutions by the ASEAN Economic Community' (2014) 1 (1) Indonesian Journal of International & Comparative Law 324-325.

Simpson A W B, ‘The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature’ (1982) 3 (4) University of Chicago Law Review 632.

Skouris V, ‘Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance’ (2006) 17 (2) European Business Law Review 226-228.

Stark O and Bloom D, ‘The New Economics of Labour Migration’ (1985) 75 (2) The American Economic Review 173-178.

Stein E, 'Assimilation of National Laws as a Function of European Integration' (1964) 58 (1) American Journal of International Law 15-16, 33-34.

Tan E, 'The ASEAN Charter as Legs to Go Places: Ideational Norms and Pragmatic Legalism in Community Building in Southeast Asia' (2008) 12 Singapore Year Book of International Law 181.

Taylor J E, 'Undocumented Mexico-U.S. Migration and the Returns to Households in Rural Mexico' (1987) 69 American Journal of Agriculture Economics 626.

Thomas A, 'Degrees of Inclusion: Free Movement of Labour and the Unionization of Migrant Workers in the European Union' (2016) 54 (2) Journal of Common Market Studies 408.

— —, 'The Borders of Solidarity? Trade Unions, Social Entitlements and Regional Integration' (2013) 18 (1) Geopolitics 157

Turack D, 'Freedom of Movement and Travel Documents in Community Law' (1968) 17 (2) Buffalo Law Review 435-453.

— —, 'Freedom of Movement in Western Europe: The Contribution of the Council of Europe' (1966) 15 (4) The American Journal of Comparative Law 782-785, 796.

Vanwesenbeeck I, 'Sex Work Criminalization Is Barking Up the Wrong Tree' (2017) 46 (6) Archives of Sexual Behaviour 1631–1640.

Verschueren H, 'Free Movement of EU Citizens: Including for the Poor?' (2015) 22 Maastricht Journal of European and Comparative Law 10.

Waegenbaur R, 'Free Movement in the Professions; The New EEC Proposal on Professional Qualifications' (1986) 23 (1) Common Market Law Review 94-97.

Wagenaar H and Altink S, 'Prostitution as Morality Politics or Why It Is Exceedingly Difficult to Design and Sustain Effective Prostitution Policy' (2012) 9 (3) Sexuality Research and Social Policy 279–292.

Watson P, 'Freedom of Establishment and Freedom to Supply Services; Some recent Development' (1983) 20 (4) Common Market Law Review 785.

Whitlow R S, 'The European Economic Community: some aspect of judicial personality, sovereignty and international obligation' (1958) 13 (4) Business Lawyer 816.

Wickramasinghe A and Wimalaratana W, 'International Migration and Migration Theories' (2016) 1 (5) Social Affairs: A Journal for the Social Sciences 24-27.

World Bank, 'The Policy Challenges of Migration: The Origin Countries' Perspective' (2006) Global Economic Prospects 27-30, 57-60.

Wunderlich J, 'Comparing regional organisations in global multilateral institutions: ASEAN, the EU and the UN' (2012) 10 (2) Asia Europe Journal 129-130.

5. Research Papers

Archavanitkul K, Charusomboon W, and Varangrathna A, *Complexities and Confusions on Migrants in Thailand* (Institute for Population and Social Research, Mahidol University, Thailand 1997).

― ― and Vajanasara K, *Employment of migrant workers under the Working of Alien Act 2008 and the list of occupations allowed to foreigners* (Institute for Population and Social Research, Mahidol University, Thailand 2009).

Department of Employment, *Research Report of the Implementation of the Management of Foreign Workers from Myanmar, Lao, Cambodia under the 2007 Cabinet Resolution* (Ministry of Labour 2007).

ILO Regional Office for Asia and Pacific, *Review of the effectiveness of the MOUs in managing labour migration between Thailand and neighbouring countries* (GMS Triangle Project 2015).

Kongdecha P, *ASEAN Dispute Settlement Mechanisms* (Legislative Paper, ASEAN Community Center of the Secretariat of the House of 2020) 6.

Napaumporn B, *Analysis of Nationality Verification of Migrant Workers in Thailand* (Thesis M.A. Human Rights, Mahidol University Thailand 2012).

Navaratna N and others, *The Study of Protection of Migrant Workers in Thailand and Solutions* (Graduate School of Public Administration, Burapha University Thailand 2011) 2-3.

Songitthisuk P, *The impact of the promulgation of the Emergency Decree to the management of the foreigners in B.E. 2560 for workers strange in Mae Sot district in Tak Province* (Kamphaeng Phet Rajabhat University 2017).

6. Jurisprudence

6.1 European Court of Justice

6/62 *Van Gend and Loos v Netherlands Inland Revenue Administration* [1963] ECR 4-16.

6/64 *Flaminio Costa v E.N.E.L* [1964] ECR 588-600.

76-72 *Michel S v Fonds national de reclassement social des handicapés* [1973] ECR 458-466 [16].

152-73 *Giovanni Maria Sotgiu v Deutsche Bundespost* [1974] ECR 154-167 [8].

2-74 *Jean Reyners v Belgian State* [1974] ECR 632-657 [21].

9/74 *Donato Casagrande v Landeshauptstadt München* [1974] ECR 774-780 [9].

33-74 *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverhei* [1974] ECR 1300-1313 [13].

41-74 *Yvonne van Duyn v Home Office* [1974] ECR 1338-1352 [18].

67-74 *Carmelo Angelo Bonsignore v Oberstadtdirektor der Stadt Köln* [1975] ECR 297-308 [6].

36-75 *Roland Rutili v Ministre de l'intérieur* [1975] ECR 1220-1237 [20].

48-75 *Jean Noël Royer* [1976] ECR 498-520 [2].

8/77 *Concetta Sagulo, Gennaro Brenca and Addelmadjid Bakhouche* [1977] ECR 1496-1508 [6-7].

11/77, Patrick v Ministere des Affaires Culturelles [1977] ECR 1199.

30-77 *Régina v Pierre Bouchereau* [1977] ECR 200-215 [35].

136/78 *Ministre Public v Auer* [1979] ECR 437.

246/80 *C Broekmeulen* [1981] ECR 2312

65/81 *Francesco Reina and Letizia Reina v Landeskreditbank Baden-Württemberg* [1982] ECR 34-46 [18].

115, 116/81 *Rezguia Adoui v Belgian State and City of Liège; Dominique Cornuaille v Belgian State* [1982] ECR 1668-1669.

271/82 *Auer* [1983] ECR 2729.

5/83 *H G Rienks* [1983] ECR 4234.

14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] 1892-1911.

107/83 *Onno Klopp* [1984] ECR 2972.

221/83 *Commission v Italy* [1984] ECR 3249.

249/83 *Vera Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout* [1985] ECR 982-990 [20].

261/83 *Carmela Castelli v Office National des Pensions pour Travailleurs Salariés* (ONPTS) [1984] ECR 3200-3215 [13].

267/83 *Aissatou Diatta v Land Berlin* [1985] ECR 574-591 [10].

29/84 *Commission v Germany* [1985] ECR 1667

152/84 M. *H. Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 737-751.

205/84 *Commission v Germany* [1986] ECR3793-3815 [21].

306/84 *Commission v Belgium* [1987] ECR 675.

66/85 *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2139-2148 [12].

352/85 *Bond van Adverteerders and others v The Netherlands State* [1988] ECR 2124-2137 [12].

49/86 *Commission v Italy* [1987] ECR 3000.

222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others* [1987] ECR 4099.

321/87 *Commission v Belgium* [1989] ECR 1007-1012 [12].

130/88, *van de Bijl* [1989] ECR 3057.

C-54/88, C-91/88 and C-14/89 *Nino and others* [1990] ECR I-3545.

C-61/89 *Bouchoucha* [1990] ECR I-3552.

C-340/89 *Vlassopoulou* [1991] ECR I-2358.

C-376/89 *Panagiotis Giagounidis v Stadt Reutlingen* [1991] ECR I-1086-1094 [22].

C-16/90, Panagiotopoulou v European Parliament [1992] ECR II-90.

C-167/90 *Commission v Belgium* [1991] ECR I-2537.

C-168/90 *Commission v Luxembourg* [1991] ECR I-2541.

C-296/90 *Commission v Italy* [1991] ECR I-3851.

C-309/90 *Commission v Greece* [1991] ECR I-5312.

C-310/90 *Ulrich Egle* [1992] ECR I-178.

C-166/91 *Gerhard Bauer* [1992] ECR I-2789.

C-319/92 *Salomone Haim* [1994] ECR I-439.

C-40/93 *Commission v Italy* [1995] ECR I-1328.

C-154/93 *Tawil-Albertini* [1994] ECR I-45.

C-277/93 *Commission v Spain* [1994] ECR I-5526.

C-447/93 *Nicolas Dreessen* [1994] ECR I-4095.

C-7/94 *Landesamt für Ausbildungsförderung Nordrhein-Westfalen v Lubor Gaal* [1995] ECR I-01040-1050 [31].

C-17/94 *Gervais and others* [1995] ECR I-4368.

C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I4186-4201 [27].

C-107/94 *Asscher v Staatssecretaris van Financiën* [1996] ECR I-3113-3132 [26].

Case C-164/94 *Aranitis* [1996] ECR I-148.

C-307/94 *Commission v Italy* [1996] ECR I-1021.

C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.

C-158/96 *Raymond Kohl* [1998] ECR I-1935.

C-24/97 *Commission v Germany* [1998] ECR I-2140-2146 [15].

C-93/97 *Fédération Belge des Chambres Syndicales de Médecins ASBL* [1998] ECR I-485.

C-131/97 *Carbonari and Others* [1999] ECR I-1119.

C-371/97 *Cinzia Gozza and Others* [2000] ECR I-7899.

C-49/98 *Finalarte Sociedade de Construção Civil Ld* [2001] ECR I-7884-7913.

C-58/98 *Josef Corsten* [2000] ECR I-7942

C-168/98 *Luxemburg v European Parliament* [2000] ECR I-9161.

C-421/98 *Commission v Spain* [2000] ECR I–10392.

C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* [2001] ECR I-8657-8690 [38]

C-31/00 *Nicolas Dreessen* [2000] ECR I-677.

C-294/00 *Kurt Gräbner* [2002] ECR I-6540.

C-110/01 *Tennah-Durez* [2003] ECR I-6258.

C-215/01 *Bruno Schnitzer* [2003] ECR I-14871.

C-285/01 *Isabel Burbaud* [2003] ECR I-8246.

C-313/01 *Christine Morgenbesser* [2003] ECR I-13493.

C-496/01 *Commission v France* [2004] ECR I-2377.

C-102/02 *Ingeborg Beuttenmüller* [2004] ECR I-5438.

C-330/03 *Colegio de Ingenieros de Caminos, Canales y Puertos* [2006] ECR I-826.

C-514/03 *Commission v Spain* [2006] ECR I-993

C-506/04 *Wilson* [2006] ECR I-8643.

C-274/05 *Commission v Greece* [2008] ECR I-7792.

C-286/06 *Commission v Spain* [2008] ECR I-8029.

C-39/07 *Commission v Spain* [2008] ECR I-343.

C-136/07 *Commission v Spain* [2008] ECR I-7795.

C-47/08 *Commission v Belgium* [2011] ECR I-4156.

C-51/08 *Commission v Luxemburg* [2011] ECR I-4235.

C-61/08 *Commission v Greece* [2011] ECR I-4033.

C-359/09 *Donat Cornelius Ebert* [2011] ECR I-271.

C-422/09, C-425/09 and C-426/09 *Vandorou and Others* [2010] ECR I-12413.

C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* [2014] ECR I-2358.

6.2 Opinion of Advocate General

Opinion of Advocate General: *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* (8 May 2001).

Opinion of Advocate General: *Rezguia Adoui v Belgian State and City of Liège*; *Dominique Cornuaille v Belgian State* (16 February 1982).

6.3 International Court of Justice

Cambodia v Thailand 'Request for Interpretation of the. Judgement of 1962' (2013) ICJ Reports 151.

Cambodia v Thailand 'Sovereignty over Preah Vihear Temple' (1962) ICJ Reports 24.

Indonesia v Malaysia 'Sovereignty over Pulau Ligitan and Pulau Sipadan' (2002) ICJ Reports 625.

Malaysia v Singapore 'Sovereignty over Pulau Batuputeh Middle Rocks and South Ledge' (2008) ICJ Reports 12.

6.4 World Trade Organisation Dispute Settlement Body

Malaysia v Singapore 'Request for Consultation: Polyethylene and Polypropylene' (1955) WTO DSB.

Thailand v Philippines 'Cigarettes' (2011) WTO DSB.

6.5 Permanent Court of Arbitration

Malaysia v Singapore 'Railway Land Arbitration' (2014) PCA no. 2012–01.

7. Online Material

7.1 Websites

ASEAN, 'ASEAN Healthcare Services' (2016) <http://aseanhealthcare.org> [accessed 21 February 2020].

— —, 'Establishment' (2018) <https://asean.org/asean/about-asean/overview> [accessed 28 February 2021].

— —, 'AEC Monitoring' (2016) <https://asean.org/asean-economic-community/aec-monitoring/> [accessed 3 March 2021].

ASEAN Secretariat, 'ASEAN Economic Community' (2017) <https://asean.org/wp-content/uploads/2012/05/7c.-May-2017-Factsheet-on-AEC.pdf> [accessed 23 February 2021].

— —, 'ASEAN Integration Report' (October 2019) <https://asean.org/storage/2019/11/ASEAN-integration-report-2019.pdf> 35-36 [accessed 3 March 2021].

— —, AEC Scorecard (2010) <https://www.asean.org/wp-content/uploads/images/archive/publications/AEC%20Scorecard.pdf> 13 [accessed 3 March 2021].

— —, AEC Scorecard (2012) <https://www.asean.org/wp-content/uploads/images/documents/scorecard_final.pdf> 17 [accessed 3 March 2021].

— —, 'Study of the Implementation of Visa Exemption for ASEAN Nationals and the Possible Establishment of an ASEAN Common Visa for Non-ASEAN Nationals' (2012) <https://bit.ly/3j87kYl> [accessed 28 February 2021].

ASEAN Tourism Professional Registration Website <https://www.atprs.org/?state=account> [accessed 21 February 2021].

ATPRS, 'ASEAN Tourism Curriculum and Qualifications Framework' (2018) <https://s3-ap-southeast-1.amazonaws.com/asean-asia/documents/RQFSRS_52_Quals_AtAGlance.pdf> [accessed 21 February 2021].

Department of Employment, 'Management of Migrant workers under the Cabinet Resolution 20 August 2019' (2019) <https://www.doe.go.th/prd/ar7/news/param/site/143/cat/7/sub/0/pull/detail/view/detail/object_id/28084> [accessed 3 March 2021].

European Commission, 'Annual Report on Intra-EU Labour Mobility' (2019) <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8242&furtherPubs=yes> [accessed 21 February 2021].

Foreign Worker Administration Office, 'Employment Process under MOUs' (2018) <https://www.doe.go.th/prd/assets/upload/files/alien_th/670e57cc84a2daa0aa612df9fe2b0a33.pdf> [accessed 3 March 2021].

International Labour Organisation, 'Countries of Origin and Destination for Migrants in ASEAN' (2015) <http://apmigration.ilo.org/resources/ilms-database-for-asean-countries-of-origin-and-destination-for-migrants-in-asean> [accessed 21 February 2021].

— —, 'Ratifications of 1979 Migration for Employment Convention (No. 97)' <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312242> [accessed 21 February 2021].

— —, 'Triangle in ASEAN Quarterly Briefing Note' (2020) <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/genericdocument/wcms_735103.pdf> [accessed 21 February 2021].

International Organisation of Migration, 'International Dialogue on Migration Intersessional Workshop on Free Movement of Persons in Regional Integration Process' (2007) <https://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/microsites/IDM/workshops/free_movement_of_persons_18190607/idm2007_handouts.pdf> [accessed 21 February 2021].

Royal Thai Government, 'Summary of the Meeting of the Cabinet' (15 April 2020) <https://www.thaigov.go.th/news/contents/details/29124> [accessed 3 March 2021].

United Nations Action for Cooperation against Trafficking in Persons, 'International Symposium on Migration' (1999) <https://www.iom.int/sites/default/files/jahia/webdav/site/myjahiasite/shared/shared/mainsite/policy_and_research/rcp/APC/BANGKOK_DECLARATION.pdf> [accessed 2 March 2021].

United Nations Treaty Series Vol. 30, Agreement No. 447, Agreement between Belgium and France designed to Facilitate the Movement of Persons (April 1949) Page 45-51. <https://treaties.un.org/doc/Publication/UNTS/Volume%2030/v30.pdf> [accessed 2 March 2021].

United Nations Treaty Series Vol. 160, Agreement No. 2110, Agreement between Belgium and France for the Issue Free of Charge of a Temporary Residence Visa to Wage-

Earners, (October and November 1952) Page 261-265 <https://treaties.un.org/doc/Publication/UNTS/Volume%20160/v160.pdf> [accessed 21 February 2021].

US Department of State, The Trafficking in Persons Report (2014) <https://2009-2017.state.gov/documents/organization/226849.pdf> 372-374 [accessed 2 March 2021].

7.2 Blog Posts

Anderson B and Blinder S, 'Who Counts as a Migrants? Definitions and their Consequences' (2015) <http://migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/Briefing-Who_Counts_as_a_Migrant.pdf> The Migration Observatory [accessed 21 February 2021].

Auethavornpipa R, 'Thailand's new migrant worker policy is a step onto uncertain ground' (2017) <http://www.eastasiaforum.org/2017/08/10/thailands-new-migrant-worker-policy-is-a-step-onto-uncertain-ground/> East Asia Forum [accessed 3 March 2021].

Fabbrini F, 'Suing the BVerfG' Verfassungsblog (13 May 2020) <https://bit.ly/3dOKvoA> [accessed 2 March 2021].

Garner O, 'Squaring the PSPP Circle' Verfassungsblog (22 May 2020) <https://bit.ly/2BXxOdQ> [accessed 2 March 2021].

Jakab A and Sonnevend P, 'The Bundesbank is under a legal obligation to ignore the PSPP Judgment of the Bundes-verfassungs-gericht' Verfassungsblog (25 May 2020) <https://bit.ly/2Bq68i1> [accessed 2 March 2021].

Maduro M P, 'Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court' Verfassungsblog (6 May 2020) <https://bit.ly/2ZuDNPy> [accessed 2 March 2021]

Morsa M, 'The European Regulations on Social Security Coordination from the Perspective of the Belgian Authority' (2019) <https://socialsecurity.belgium.be/sites/default/files/content/docs/fr/publications/rbss/2019/rbss-2019-1-european-regulations-on-social-security-coordination-belgian-authority-fr.pdf> Revue Belge de Securite Social [accessed 2 May 2021].

Visinsky R, 'European Integration and the Welfare State - European Social Policy: From Rome to Maastrich' (2000) <https://www.pitt.edu/~heinisch/eu_integ2.html> Pittsburgh University [accessed 2 May 2021].

7.3 Press and Press Releases

Human Rights Watch, 'Thailand: Migrant Worker Law Triggers Regional Exodus' (7 July 2017) <https://www.hrw.org/news/2017/07/07/thailand-migrant-worker-law-triggers-regional-exodus> [accessed 3 March 2021]

Bangkok Post, 'Decree spurs migrant worker exodus' (2 July 2017) <https://www.bangkokpost.com/news/general/1279203/decree-spurs-migrant-worker-exodus> [accessed 3 March 2021].

Ministry of Labour, 'Gen. Adul is pleased to bring more than 1.18 million foreign workers to the system thanks to all parties involved' (3 July 2018) <https://www.mol.go.th/en/news/gen-adul-is-pleased-to-bring-more-than-1-18-million-foreign-workers-to-the-system-thanks-to-all-parties-involved-2/> [accessed 3 March 2021].

Ministry of Labour, 'Gen. Adul satisfied with the registration of foreigners 96%, with a plan to handle the record of 3.5 hundred thousand people' (1 April 2018) <http://www3.mol.go.th/en/content/68711/1522723239> [accessed 3 March 2021].

Paichareon N, 'Migrant worker exodus after the new decree' (3 July 2017) <https://www.benarnews.org/thai/news/TH-migrants-07032017162454.html> [accessed 3 March 2021].

8. Statistics

Casavola P, 'Unemployment Rate in Italy: Historical Series' (1955-1998) Bank of Italy Statistic.

Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (2006) <https://www.doe.go.th/prd/assets/upload/files/alien_th/d3390d3de75da8d717407c7a92990fcf.pdf> 148 [accessed 2 March 2021].

Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (2009) <https://www.doe.go.th/prd/assets/upload/files/alien_th/0d84c155a7b24af91bd63b4643dbea55.pdf> 11, Table 18, 56 [accessed 2 March 2021].

Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (2010) <https://www.doe.go.th/prd/assets/upload/files/alien_th/f51f1de7d1fe32c1086af6c77cdf00e7.pdf> Table 19, 58 [accessed 2 March 2021].

Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (2011) <https://www.doe.go.th/prd/assets/upload/files/alien_th/512ca06076423ca92b7128b598a3bfaa.pdf> Table 19, 41 [accessed 2 March 2021].

Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (2012) <https://www.doe.go.th/prd/assets/upload/files/alien_th/de207faef896013d98242b3149fa1d80.pdf> Table 19, 41 [accessed 2 March 2021].

Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (2013) <https://www.doe.go.th/prd/assets/upload/files/alien_th/06f47d520fee81270a315f7c84d4e7ae.pdf> Table 4, 5, 31, 36 [accessed 2 March 2021].

Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (2014) <https://www.doe.go.th/prd/assets/upload/files/alien_th/5f790ebd8469fb89efbe60674b585459.pdf> Table 2, 4, 30, 35 [accessed 2 March 2021].

Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (2015) <https://www.doe.go.th/prd/assets/upload/files/alien_th/cea979ea00fbb2f2ad2b6d5e53d5dde8.pdf> Table 5, 24, 34, 54 [accessed 2 March 2021].

Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (December 2016) <https://www.doe.go.th/prd/assets/upload/files/alien_th/b579b43c5c135321afec8d83c4ed4aa4.pdf> Table 5, 27, 32, 71 [accessed 2 March 2021].

Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (December 2017) <https://www.doe.go.th/prd/assets/upload/files/alien_th

/94ec1760f83293298787bf9d0fd3496a.pdf> Table 5, 27, 33, 72 [accessed 2 March 2021].

Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' June 2018) <https://www.doe.go.th/prd/assets/upload/files/alien_th/16bed499a1338fc3219355b6ddea8ba8.pdf> Table 4, 14, 31, 59 [accessed 2 March 2021].

Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (December 2019) <https://www.doe.go.th/prd/assets/upload/files/alien_th/c33cea75dc3c81eb7497c3eb809327e9.pdf> Table 4, 26, 36, 59 [accessed 2 March 2021].

Department of Employment, 'Statistic: Foreign Workers Allowed to Work in Thailand' (September 2020) <https://www.doe.go.th/prd/assets/upload/files/alien_th/720399013704bebb95073b457d9b4ed5.pdf> [accessed 2 March 2021].

Eurostat, 'EU Citizens Living in Another Member State – Statistical Overview' (2019) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=EU_citizens_living_in_another_Member_State_-_statistical_overview> [accessed 21 February 2021].

Eurostat, 'Unemployment rates, seasonally adjusted: Italy' (October 2020) <https://ec.europa.eu/eurostat/documents/portlet_file_entry/2995521/3-02122020-AP-EN.pdf/3b4ec2e2-f14c-2652-80bd-2f5e7c0605c2#:~:text=The%20EU%20unemployment%20rate%20was,office%20of%20the%20European%20Union> [accessed 21 February 2021].

Executive Secretariat of the Commission of the European Economic Community, 'Revised proposal for a regulation and a directive relating to free movement of workers within the Community – Submitted by the Commission to the Council on 17 May 1963' (1967) Supplement to Bulletin of the European Economic Community No. 7 <http://aei.pitt.edu/6870/> [accessed 21 February 2021].

Standard Eurobarometer, 'Public Opinion in the European Union: European Union Citizenship and Democracy' (July 2020) <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/WhatsNew/index> [accessed 22 February 2021].

9. Other Sources

Levi-Sandri L, 'Speech on social policy by President of the social affairs group of the Commission of the European Economic Community' Dortmund (21 July 1962) 1-6,15.