

Legal Framework of Labor Migration Governance in the Eurasian Economic Union and the European Communities: Comparative Analysis

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Abstract: This article provides a comparative analysis of the legal regulation of labor migration in regional integration organizations: the European Communities (ECs) and the Eurasian Economic Union (EAEU). Methodologically, we argue that a synchronous comparison of the European Union (EU) in its current shape and the EAEU is rather inadequate and draw on a diachronic comparison of labor migration regulation in the EAEU and the ECs. On the one hand, we identify a number of important differences. We show, in particular, that while regulatory mechanisms in the EEC aimed at stimulating new migration flows, in the post-Soviet space mechanisms of regional migration governance provide the existing migration flows with an appropriate normative framework. We also show that in the case of the EAEU, the founding Treaty provided for a number of essential social rights for workers from EAEU Member States, whereas in the EEC these rights appeared at a much later stage. Regulation of labor migration in the EEC and the EAEU also differs in terms of distribution of competencies in this area between national and Community / Union levels. On the other hand, we also find a number of similarities, which hint at dynamics of policy learning. This is, in particular, evident in the development of mechanisms aimed at protection of migrants' rights. This is also the case of the Agreement on pensions for workers of the EAEU member states, which seems to borrow from the EU experience opting for coordination of Member States' retirement systems instead of their unification. Overall, some of EEC/EU 'best practices' have contributed to important positive developments in the regulation of intra-Union labor migration in the EAEU.

Keywords: Regional migration governance; Eurasia; post-Soviet space; labor migration; free movement; Eurasian Economic Union; Russia; European communities; European Union; migrant rights

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I. Introduction

The article focuses on a comparative analysis of the legal regulation of labor migration in regional integration organizations: the European Communities (ECs) (mainly in the European Economic Community (EEC) and in the European Coal and Steel Community (ECSC)) and the Eurasian Economic Union (EAEU). Methodologically, the work is based on a diachronic comparative analysis of the development of labor migration regulation in the EAEU and the ECs. This issue has not been previously approached in a comprehensive way from this perspective. This is unfortunate, since such a comparison allows us to identify and analyze dynamics in regulation of the freedom of movement of workers

within these regional organizations at relatively similar stages of their development. Taking into account different conditions in which migration legislation in both organizations was being developed (Leonov and Korneev, 2019, pp. 205–223), this approach provides an opportunity to address the following questions. Is the EAEU regime of labor migration — free movement of workers — modelled after the ECs' experience? To what extent could the ECs' experience in labor migration regulation be applicable for further developments within the EAEU? Could it contribute to better regulatory and implementation dynamics within the EAEU and help to avoid mistakes made in the ECs? An analysis of similar and diverging trends in the development of labor migration law in the EAEU and the ECs, as well as an assessment of advances and drawbacks in the ECs could help us to better analyze further reforms of the EAEU legal framework and to propose approaches that would help improve regulation of labor migration in the EAEU. Using this method of historic legal comparison, we presume that every complex integration structure inevitably goes a long way of genesis and development, building its identity and getting its particular characteristics. The ECs have passed through several decades to build a genuine free movement regime and create a common labor market. Obviously, the latter did not appear overnight. The EAEU is now only at the very first stage of its development. For this reason, we argue that a synchronous comparison of the European Union (EU) in its current shape and the EAEU would not allow us to properly address our research questions and advocate for more diachronic comparative works in this field.

The theoretical framework of the article builds on legal and interdisciplinary research focusing on the Eurasian migration system (Gabov, Kashirkina, Lukyanova et al., 2012; Ivakhnyuk, 2007, pp. 37–56), freedom of movement in the EU and the EAEU (Bisson and Potemkina, 2014; Davletgildeev, 2018, p. 597), migration governance in the Eurasian (post-Soviet) space (Korneev and Leonov, 2021; Leonov and Korneev, 2019, pp. 205–223; Molodikova, 2018, pp. 334–358; Ryazantsev and Korneev, 2013; Sagynbekova, 2017).

Thus, the aim of this paper is to compare the dynamics of legal regulation of free movement of workers in two migration systems —

those of the European Communities and of the Eurasian Economic Union, to identify similar and diverging characteristics of labor migration regulation within these systems at similar historic periods, and to address the widely discussed issue of borrowing best practices and policy learning.

The article proceeds in the following way. The first section briefly summarizes main legal developments in the field of labor migration in the post-Soviet space before the adoption of the EAEU Treaty. Then, we look at provisions of the EAEU Treaty regulating labor migration; analyze its outcomes and challenges. In the second section, we analyze dynamics of labor migration regulation within the ECs from the beginning to the 1970s. In both sections, we identify certain parallels between two legal systems in terms of labor migration regulation. In the final part, we bring together, discuss all similar and diverging points in both systems, and conclude with a reflection of positive dynamics of legal regulation of labor migration in the EAEU and importance of policy learning between the EAEU and the EEC/EU.

II. Dynamics of Labor Migration Regulation in the Eurasian Migration System

II.1 Before the EAEU Treaty

Although the EAEU Treaty entered into force in 2015, in a broad sense the history of the EAEU is that of the post-Soviet space, starting with the collapse of the USSR. Already in article 5 of the *Agreement on the Establishment of the Commonwealth of Independent States (CIS) of 1991*, as well as in article 19 of its *Charter of 1993*, the member states agreed to guarantee the freedom of movement of nationals within the CIS. The consolidation of this freedom is one of the main achievements of the founding acts of the CIS. As international regional organization, the CIS actively promoted the idea of freedom of movement (Molodikova, 2017). Furthermore, the *Bishkek Agreement* of 1992 established a visa-free regime for nationals of the CIS member states. Although in the early

2000s it transformed into a bilateral agreements scheme on mutual visa-free travels of citizens of the CIS member states, the reality of visa-free movement has remained (Leonov and Korneev, 2019, pp. 205–223; Molodikova, 2018, pp. 334–358). *The Treaty on the Establishment of the Economic Union of 1993*, which became a legal basis for the implementation of the CIS Charter, and for development of integration ties within the Commonwealth, included a set of provisions (e.g., Chapter 5. Social Policy), which we would later find in the Treaty on the EAEU, and which, in many ways, resembled *the Treaty Establishing the European Economic Community (EEC Treaty)* of 1957. Obviously, this case does not mean a similar scope of the respective provisions. However, such a comparison gives cause to think about borrowing the EU legislative experience by the CIS (Davletgildeev, 2018).¹

One of the important steps towards the EAEU was the *Treaty on Deepening Integration in the Economic and Humanitarian Spheres* of 1996. Article 2 of the Treaty proclaimed building of a single economic space as a goal of integration within the CIS. It would provide effective functioning of a common market of goods, services, capital and labor. Article 12 of the Treaty provided for a mutual recognition of diplomas, documents on conferring academic degrees and titles. Article 13 gave an opportunity for a simplified procedure for obtaining citizenship.² This treaty did not involve specific measures to create a common labor market and was rather of a framework nature. However, like the CIS Charter, it was one of the first to proclaim free movement of workers as a goal.

On February 26, 1999, Russia, Belarus, Kazakhstan, Kyrgyzstan and Tajikistan signed the *Treaty on the Customs Union and Single*

¹ Rustem Davletgildeev points to a “tangible” impact of the EU during the creation of the Treaty on the EEC. He argues that the impact consists in “the value that the member states of the CIS attached to the legal experience of the Western European states within the European Union while creating legal framework of economic integration within the CIS.”

² Agreement between the Republic of Belarus, the Republic of Kazakhstan, the Kyrgyz Republic and the Russian Federation on deepening integration in the economic and humanitarian fields. Available at: docs.cntd.ru/document/1901125 [Accessed 07.01.2021].

Economic Space (CU/SES Treaty).³ The goal of building a single economic space consisted in an efficient functioning of the common market of goods, services, capital and labor (article 3). In the CU/SES Treaty there appeared *Section 6 “Common Labor Market and Social Policy,”* which provided for the following set of rights of workers: freedom of movement; abolition of discrimination; creation of a unified legal regime of employment, remuneration and other work and employment conditions; national treatment for those crossing the borders of the member states; the right to stay in one of the member states being engaged in labor market; the right to remain on the territory of a member state after termination of employment contract; crediting the length of service (seniority) in the state of employment to the total length of service, including calculating pensions and benefits; free emergency medical service. The CU/SES Treaty did not provide a full national treatment for workers of the SES. Instead, it guaranteed for nationals of the member states permanently residing on its territory a legal status “as close as possible to the status of citizens of the country of residence” (article 39 of the CU/SES Treaty). Member states kept the option to impose additional restrictions on the right of workers to choose their place of residence and to engage in economic activity. The Treaty did not provide for a right to education although the state parties should ensure the creation of coherent systems of education, uniform rules and conditions for admission to schools and universities, mutual recognition and equivalence of education documents, academic degrees and titles (article 45). The treaty had a tendency to expand the rights of migrant workers, to eliminate obstacles at border crossing.

Some scholars point to similar elements of the CU/SES Treaty and the Treaty on the Functioning of the European Union (TFEU) (as amended by the Lisbon Treaty) in terms of securing freedom of movement, border crossing, and the right to stay on the territory of a member state during and after the end of employment (Davletgildeev and Sycheva, 2015). When comparing it with the EEC Treaty, we can pick out a set of almost identical provisions, as well as some divergences. Unlike the CU/SES

³ Treaty on the Customs Union and Single Economic Space (signed in Moscow on 26.02.1999). Available at: http://www.consultant.ru/document/cons_doc_LAW_31914/ [Accessed 07.01.2021].

Treaty, the EEC Treaty does not explicitly mention national treatment for workers. It only arises from a totality of its provisions. Moreover, the EEC Treaty is less explicit in establishing the rights of workers of member states arising from non-discrimination principle based on nationality (article 39 of the CU/SES Treaty and article 48 of the EEC Treaty). The CU/SES Treaty clearly states the intention of the member states to use citizenship for stimulating intra-Union mobility: it provides for a simplified procedure for obtaining and denouncing of nationality in order to facilitate mobility and ensure non-discrimination. There is no such provision in the EEC Treaty. Neither does it mention a single visa policy in relation to third countries in order to prevent uncontrolled migration, as provided for in the CU/SES Treaty. In the EEC/EU primary law, such norm appears later.

In essence, both treaties contain general framework norms, which require further legislation for its implementation. In the case of the CES, the common labor market and freedom of movement are implemented through secondary Community legislation and practice of the Court of Justice (analyzed later in the article). In the case of the CU and the SES it is done through agreements between member states as provided in article 39 of the Treaty.

In October 2000, the member states of the CU and the SES signed the Treaty on the Eurasian Economic Community⁴ (EurAsEC), which provided an organizational and institutional framework for the implementation of the CU/SES Treaty, and did not introduce essential changes into its content. Given this, we do not analyze the EurAsEC Treaty in the paper.

During the first decade of the 21st century, the pace of integration within the SES was extremely low. Only three states – Belarus, Kazakhstan and Russia – were genuinely ready and willing to implement the CU/SES Treaty. Inherently, that status quo in the field resembled a multi-speed integration that took place in the European Union where some member states wanted to move forward quicker than the others did. By 2010, these three states prepared 17 agreements creating the SES within

⁴ Treaty on the Eurasian Economic Community (signed in Astana on 10.10.2000). Available at: www.consultant.ru/document/cons_doc_LAW_106656/ [Accessed 06.01.2021].

its borders. Two of them aimed at regulating freedom of movement of workers: *The Agreement on the Legal Status of Migrant Workers and Members of Their Families*⁵ and *The Agreement on Cooperation against Illegal Labor Migration from Third States*.⁶ The first agreement introduced some new definitions: “labor activity,” “migrant worker,” “family member of a migrant worker,” “discrimination.” The term “labor activity” included only activity based on an employment contract.

This agreement supplemented the legal status of a migrant worker with the following rights: exemption of migrant workers and their family members from registration within 30 days from the date of entry on the territory of the state of employment (art. 5); the right to conclude a new employment contract within 15 days after the termination of the previous one (art. 8); the right to information about conditions of and procedure for staying and carrying out labor activity (art. 9); the right to join trade unions (art. 16); the right to own, use and dispose of their property and the right to free transfer of funds (art. 14). For the first time, rights of family members of a migrant worker were enshrined in this document. Children of a migrant worker who live together with him/her have the right to attend preschool institutions and receive education in accordance with the legislation of the state of employment (art. 12). However, there were a number of unresolved issues in the Agreement. For example, the concept of “discrimination” was provided in article 1, but there was no explicit prohibition of discrimination in the Agreement. It did not guarantee national treatment either.

Kyrgyzstan, Tajikistan and Uzbekistan put themselves outside the scope of these agreements, giving priority to bilateral arrangements in labor migration issues. These different paths taken by post-Soviet states prevented development of a genuinely regional system of migration governance in post-Soviet Eurasia. Instead, they contributed to the development of several partially overlapping sub-

⁵ Agreement on the Legal Status of Migrant Workers and Members of Their Families (signed in St Petersburg on 19.11.2010). Available at: www.consultant.ru/document/cons_doc_LAW_117291/ [Accessed 06.01.2021].

⁶ The Agreement on Cooperation against Illegal Labor Migration from Third States. Available at: <http://www.eurasiancommission.org/ru/act/finpol/migration/tm/Pages/sogl2.aspx> [Accessed 06.01.2020].

regional regimes of migration governance, including those regulating freedom of movement of workers (Leonov and Korneev, 2019, pp. 205–223). Almost two decades after the collapse of the USSR and the creation of the CIS, and ten years after the CU/SES Treaty there was neither consistency nor significant progress in regulating the common labor market in the post-Soviet space. At the respective stage of development of the EEC, on the contrary, the progress was obvious: the EEC grew from six to nine members over a twenty-year period;⁷ the Community adopted secondary legislation aimed at implementing the founding treaties provisions on the freedom of movement of workers and their rights; judicial practice was playing an important role in its development.

II.2. The EAEU Treaty Framework for Labor Migration

On January 1, 2015, the Treaty on the Eurasian Economic Union entered into force. It played a key role in Eurasian integration and became a starting point for a genuine common labor market. In terms of migration issues, the EAEU Treaty replaced the Agreement on the Legal Status of Migrant Workers and Members of Their Families. The Agreement on Cooperation against Illegal Labor Migration from Third States remains in force in parallel with the EAEU Treaty.

The Treaty provides for a set of basic rights of the EAEU workers. Article 1 establishes the four freedoms within the EAEU, necessary for building a common market: freedom of movement of goods, services, capital and labor. One of the goals of the Union, enshrined in article 4, is building a common market of labor resources. Labor migration provisions are found in Section XXVI “Labor Migration” of the EAEU Treaty. It should be noted that the vast majority of labor migration rules included in the Treaty were borrowed from the Agreement on the Legal Status of Migrants and Members of Their Families. However, the EAEU Treaty introduces a number of novelties and changes into the legal status of a migrant worker that has been developing since 2010. An important novelty refers to some legal definitions and concepts enshrined in article 96. The Treaty no longer uses the concept of a “migrant worker”

⁷ Ireland, Denmark and the UK joined the EC on January 1, 1973.

and replaces it by the term “worker of a member state,” which means a national of a member state, legally residing and legally carrying out labor activity on the territory of the state of employment, of which he/she is not a citizen and in which he/she does not reside permanently.⁸ The definition completely coincides with that used in the Agreement on the legal status of migrant workers of 2010, but the wording has been changed. Thus, it emphasizes a fundamentally new approach to a migrant worker in the integration union. Labor activity now includes both activity on the basis of an employment contract and activity on the basis of a civil-law contract. It is a meaningful change in comparison with the Agreement of 2010. This novel expanded the *ratione personae* of the Treaty. The Treaty simplifies the entry procedure for nationals of the Union member states: when entering the territory of a member state, using an international passport (not a national ID), they can be exempted from using a migration card if the duration of their stay does not exceed 30 days from the date of entry. The Treaty explicitly distinguishes between workers from the Union member states and labor migrants from beyond the Union (from the CIS and outside), who (the latter) are required to obtain either a work patent (non-visa migrants) or a work permit (visa migrants). There are no quotas applicable for workers from the Union member states,⁹ and the Treaty provides for assistance to organized recruitment. This practice has been greatly promoted in the region by the World Bank and IOM (Korneev, 2017). However, it has been criticized by many researchers who believe that migrant networks are a more effective and natural tool to facilitate the mobility of labor migrants.

A significant development of the EAEU Treaty is the establishment of a single taxation scheme for nationals of the EAEU member states. Since they are subject to national treatment, their income from the first day of their work is taxed at the same rate that applies to the income of nationals (tax residents) of the state of employment. In the Russian

⁸ Treaty on the Eurasian Economic Union (signed in Astana on 29.05.2014) (as amended 15.03.2018). Available at: www.consultant.ru/document/cons_doc_LAW_163855/71efc1f8e602fbec2b04586c62051e164f507f14/ [Accessed 06.01.2021].

⁹ Quotas are neither applicable for non-visa labor workers who are required to buy patents.

case, it arises to 13 percent, while income taxation rate for migrant workers from other CIS countries is set at 13 per cent only after six months of employment. The first six months of work they are subject to 30 percent rate of income tax, the same as for nationals from all other states. Andrey Leonov and Oleg Korneev argue that “unification of taxation rules that cover the rights of labor migrants is an important step towards the creation of a genuine single labor market” (Leonov and Korneev, 2019, p. 213).

An indisputable achievement of the EAEU Treaty is consolidation of social rights of workers and members of their families, such as the right to free medical service on an equal basis with nationals of the host state, social insurance, crediting the length of service in the state of employment to the total length of service, the right of children residing with a worker in the state of employment to attend preschool institutions and to receive education in accordance with the legislation of the state of employment. This set of rights contributes to make labor market of a particular host state more attractive, acting as a driver for migration. They also aim at stimulating integration of migrants in a broad sense, especially in socio-economic dimension; help to resolve the issue of irregular labor migration. The provisions of article 98 of the EAEU Treaty are fully in line with the highest international standards of labor migrants rights and, in particular, with those enshrined in the *Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CRMW) of 1990*. As argued by Andrey Leonov and Oleg Korneev, this fact is especially important in the context of non-participation of Russia and Kazakhstan in this convention, since it may point to a greater efficiency of regional mechanisms of migration governance in comparison with universal ones (Leonov and Korneev, 2019, p. 213). In other words, states are more willing to assume obligations within a clearly defined circle of counterparties, rather than to adherer to a universal agreement.

An important reform within the EAEU, which has been prepared by the Eurasian Commission since 2014, is that of pension benefits of the workers of the member states of the EAEU and members of their families. *The Pension Agreement for Working Population of the*

*Eurasian Economic Union Member States*¹⁰ was signed on December 20, 2019 and came into force on January 1, 2021.¹¹ This agreement is an important step towards ensuring the freedom of movement within the common market, since the pension systems of the EAEU countries differ in terms of retirement age, pension benefits, and structure of financing pension payments (Dyatlov, Feygin and Lebedeva, 2017). According to article 3 of the Agreement, workers of member states of the EAEU enjoy pension rights on the same conditions as nationals of the state of employment. Article 5 establishes a right of a family member to pension upon the death of a worker.¹² The amount of pension benefits depends on the length of service on the territory of a member state. Moreover, they are calculated in line with national rules of the state of employment. The agreement provides for an export mechanism of pension benefits between the member states of the EAEU. For the purpose of implementation of the Agreement, the Council of the Eurasian Commission has adopted a procedure and mechanism for interaction between competent authorities of the EAEU countries and the Eurasian Economic Commission.¹³

It is not the time to assess efficiency of the Agreement since it has just been launched, and we can forecast rather a challenging implementation given the issue is complex and particularly sensible. Nevertheless, from the perspective of the goals of the Agreement we argue that it should contribute to reducing illegal labor activities through

¹⁰ In translation from the website of the Eurasian Economic Commission.

¹¹ The Pension Agreement for Working Population of the Eurasian Economic Union Member States enters into force. Available at: <http://www.eurasiancommission.org/ru/nae/news/Pages/12-01-2021-01.aspx> [Accessed 20.02.2021] (In Russ.).

¹² The Pension Agreement for Working Population of the Eurasian Economic Union Member States. Available at: https://docs.eaeunion.org/docs/ru-ru/01424533/itia_13012020 [Accessed 20.02.2021] (In Russ.).

¹³ On the Procedure for Interaction between Authorized Bodies, Competent Bodies of the Member States of the Eurasian Economic Union and the Eurasian Economic Commission on the Application of the Pension Agreement for Working Population of the Eurasian Economic Union member states of December 20, 2019, Decision of the Council of the Eurasian Economic Commission, No 122, 23 December, 2020. Available at: https://docs.eaeunion.org/docs/ru-ru/01428255/err_31122020_122 [Accessed 20.02.2021] (In Russ.).

offering a comprehensive system of financial benefits and guarantees to foreign workers coming from other member states of the EAEU.

Up to date, there are some challenges related to migration regime established by the EAEU Treaty. Mostly they occur during its implementation. It should be noted that there is an objective difference in the socio-economic development of the present member states. It has a significant impact on the efficiency of the Treaty implementation. However, some scholars, for example, Caress Schenk notes that major problems preventing from smooth implementation of the Treaty are mostly associated with Russia, as the main receiving country within the EAEU (Schenk, 2015). They often refer to its bureaucratic system which is not willing, in their view, to fully implement the provisions of the Treaty.

Some researchers note insufficient level of ensuring the rights of workers within the EAEU, pointing out, in particular, at the imbalance between the status of workers from the Russian Federation and Belarus, on the one hand, and workers from Armenia, Kyrgyzstan and Kazakhstan, on the other hand. They refer to the special regime within the Union State of Russia and Belarus, which, in terms of migration issues, is considered as national treatment (Davletgildeev, 2016, p. 306). However, such an imbalance is the result of a more advanced cooperation between Russia and Belarus, established long before the EAEU Treaty, which has nothing in common with the latter. In our view, this “gap” is a good example of multi-speed integration, which can be found within the European Union after the enlargement 2004.

Another “weak point” of the EAEU Treaty often referred to by some academics is a lack of explicit nationality-based non-discrimination provision (Davletgildeev, 2016, p. 306), which could have been modelled on article 6 of the TFEU. Problems of (or deliberate unwillingness to) bringing national legislation in line with the EAEU Treaty has also been fairly criticized by scholars. In particular, some administrative legislation provisions of the member states, and above all, of the Russian Federation, are often cited in connection with the so-called “black lists” of migrants who have been banned from entering the Russian Federation (Kluczevska, 2014). Another problem is the reluctance of employers to enter into formal contractual (labor) relations with

foreign workers from the EAEU countries, which obviously reduces the efficiency of the Treaty. In this regard, the case of Russia is referred to most of all. Such situations are sometimes considered as failures of the EAEU Treaty (Schenk, 2015). Nevertheless, most of the issues come from the implementation of the Treaty and not from the text itself. Weak implementation in terms of legislation harmonization, adaptation of respective national acts to Treaty provisions, proper law enforcement measures results in above-mentioned cases.

When analyzing the EAEU migration regime and its shortcomings, some scholars argue that relationship within the EAEU in the field of migration regulation should evolve from economic and political logic to civilizational one.¹⁴ Thus, it could provide an integration model in which host member states do not make any distinctions between their citizens and the citizens of other Union members in labor migration issues, granting national treatment and equal rights to all workers. However, we cannot ignore that labor migration is a part of state economy; it is largely regulated by market rules, the thesis which is supported by most classical and postclassical approaches to labor migration (Zhulikova and Strizheus, 2019, pp. 21–32). Therefore, economic rationale (Korneev and Leonov, 2021) will be always prioritized over migrants' rights, especially when it comes to large flows of labor migration typical for the EAEU with its clear distinction between receiving and sending countries.

For this comparative study, it is important to consider the difference between the EU and the EAEU in terms of the scale of internal labor migration mobility. In the EU, decades after the development of the free movement regime, only around 3 per cent of EU citizens actively use this right (Boswell and Geddes, 2011). From 1961 to 1967, 1 753 818 initial work permits were issued to workers moving within the EEC, which accounts to about 1 % of the population of the six member states of the EEC.¹⁵ Both relative and absolute figures of internal labor mobility

¹⁴ About Eurasian migration system, its factors and trends see Ivakhnyuk, 2012.

¹⁵ Complete freedom of movement for workers now a reality. Information Memo P-50/68, July 1968. [EU Commission — Press Notice] (archives of the University of Pittsburgh. Available at: <http://aei.pitt.edu/id/eprint/29937>). It is interesting to mention that 80 % of all workers granted with work permits during that period were Italian nationals.

within the EAEU are many times greater. The reason for this lies in the fundamentally different goal setting of European and Eurasian integration in labor migration and free movement issues. In the EEC Treaty (as well as in the ECSC Treaty (art. 69)), the provisions on freedom of movement are aimed at stimulating labor mobility between member states for the sake of economic integration and development of a common market (De Bruycker 2017; Geddes, 2000). In other words, the treaties seek to create a new migration reality in Western Europe (Leonov and Korneev, 2019, pp. 205–223): its provisions contributed to unlimited labor migration between the EEC member states. In the EAEU, the situation is quite the opposite: the provisions of Chapter 26 of the EAEU Treaty reflect and create rules for the migration situation “on the ground” that has been existing between the member states for many years before and after the collapse of the Soviet Union. Unlike the EU, intra-Union labor migration in the EAEU is significant, and the Treaty only creates legal framework for it and contributed to its facilitation. It may explain why no member state raised objection to the provisions on labor migration (Chapter 26 of the Treaty) when signing the Treaty. By contrast, in the case of the EEC Treaty only Italy (dependent on immigration and remittances) and Belgium supported the provisions on free movement of workers (Groenendijk, 2009, pp. 11–24).

III. Labor Migration Governance in the European Communities: Uneasy Path to a Genuine Freedom of Movement

Today the European Union is the most developed integration organization that has built a genuine internal market and provided the four freedoms necessary to create a common market. Freedom of movement is not only a legal right, but, due to its importance, is a principle of the EU internal market. As noted above, it would not be entirely fair to compare the EAEU and the EU in terms of the current state of legal regulation of freedom of movement, given that the EU is a much more mature organization with almost seventy years of history. In this regard, we will consider the main stages and features of legal development of the freedom of movement of workers during the first

three decades of the European Communities. Although it significantly exceeds the five-year history of the EAEU, it is quite commensurate with post-Soviet development of regional law in the field of freedom of movement and labor migration.

European integration started as economic integration. The construction of a common market would be impossible without effective freedom of movement of goods, services, capital and persons. Therefore, freedom of movement of workers is enshrined in the first constituent documents. *Treaty establishing the European Coal and Steel Community of 1951* contains chapter VIII “Wages and movement of workers.” The treaty provided for elimination of all restrictions based on nationality upon the employment in the coal and steel industries of workers who are nationals of Member States and have recognized qualifications in a coalmining or steelmaking occupation. However, states were free to apply restrictions based on the requirements of health and public policy (article 69). Discrimination in payment and working conditions of migrant workers was prohibited.¹⁶

The freedom of movement of workers was further enshrined in the *Treaty establishing the European Economic Community of 1957 (EEC)*. The treaty aims at economic integration by means of creating a common market. For this purpose, a transition period of 12 years was established, shortly before the end of which the common market became a reality. This happened in three consecutive stages through adoption of three regulations in 1961, 1964 and 1968. The Regulation 1612 was adopted 18 months before the planned transition period was over. It meant that by that moment the consensus on the free movement of workers among the EEC member states took place. For the sake of our comparison, we should note that it took a decade, which had passed since the adoption of the Rome Treaty, when out of all members only Italy had actively supported that idea.

Article 48 establishes the right of workers of the member states to free movement within the Community, the abolition of any discrimination on national grounds against workers of the member

¹⁶ Treaty establishing the European Coal and Steel Community. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:xy0022> [Accessed 20.09.2021].

states with regard to recruitment, remuneration and other working conditions and employment. Paragraph 3 of article 48 guarantees the right of member states' nationals to accept offers of employment actually made within the labor market of the member states, to move freely within their territory for this purpose, to stay in a member state for the purpose of employment and to remain in its territory after having been employed in that state.

The founding treaties do not give much attention to workers' rights, which confirms an instrumental character of the freedom of movement as a tool of economic integration. The treaties indicate willingness of the member states to support measures for protection of national labor markets. They establish freedom of movement only for workers, not for all nationals of the member states. They could enjoy this freedom only for employment purpose in one of the members of the EEC.

As noted above, the creation of a single labor market and freedom of movement in the EEC happened through the secondary law of the Community and the Court of Justice practice, which develop and specify the provisions of the Treaties. The first acts of this kind were *Council Regulation No 15 of August 16, 1961, on initial measures to bring about free movement of workers within the Community*¹⁷ and *Council Directive of August 16, 1961, on administrative procedures and practices governing the entry into and employment and residence in a Member State of workers and their families from other Member States of the Community*. These acts were adopted pursuant to article 49 of the EEC Treaty, which empowered Community institutions to take "measures necessary to implement free movement of workers through directives or regulations."

While establishing the right of workers from the EEC member states to enter and stay on the territory of another member states, these legal acts, nevertheless, largely retained the priority of interests of national labor markets. These acts required obtaining a work permit to start working on the territory of a EEC member state and respecting a three-week period after the opening of a vacancy so that state authorities could

¹⁷ Règlement n° 15 relatif aux premières mesures pour la réalisation de la libre circulation des travailleurs à l'intérieur de la Communauté, OJ 57, 26.8.1961.

make sure that no appropriate national candidate was willing to take up that offer (article 1 of Regulation No 15). This provision is a protectionist one. A worker could only move to another EEC member state if there was a job offer and the purpose of his/her move was to accept it. Moreover, a worker could be limited in terms of the territory of his/her stay, where he/she received the right to work, and of the type of activity that he/she was entitled to carry out (article 4 of Directive 57, articles 3 and 6 of Regulation No 15). Only after four years of regular work in a member state could a foreign worker receive an unlimited access to the labor market as to types of activities and in five years he/she could work without territorial restrictions. The freedom of movement extended to family members of a worker, although only legal spouses and children under the age of 21 were considered as such. Important achievements of Regulation No 15 and Directive 57 were that they 1) prohibited quotas on the number of foreign workers from the EEC member states and 2) abolished the requirement to obtain visas to cross internal borders for employment purposes.

Subsequent European acts expanded the list of workers' rights in the EEC. Thus, *Regulation 38/64 "On the free movement of workers within the Community"* and *Directive 64/240*, adopted in 1964, cancelled the priority of the interests of the national labor market¹⁸ and the requirement of three weeks' waiting period. The Regulation 38/64 applied to all wage earners and not only to permanent workers. It covered frontier and seasonal workers to whom Regulation No 15 did not apply and who were accorded the same rights as other worker. The Regulation formally abolished "national priority" clauses established in the previous acts (article 8 of Regulation 38/64). This abolition was, however, subject to derogation applied by Member States: they were entitled to reintroduce priority measures in cases where some regions and trades areas had surplus work force. By default, nationals of six Member States had access to employment throughout the EEC on a footing of full equality, with only one important exclusion that

¹⁸ Regulation and Directive on free movement of workers – second stage. Information Memo P-20/64, April 1964. [EU Commission – Press Notice] (Archives of the University of Pittsburgh. Available at: <http://aei.pitt.edu/15326/>) [Accessed 20.09.2021].

foreigners had to obtain a work permit. We should note that work permits established by the Directive of August 16, 1961, was then enshrined in the Regulation 38/64 and became directly applicable in the member states. A certain dynamics took place in the field of family rights of foreign workers. The Regulation guaranteed the right of workers to be joined by his/her family members whose list was considerably extended. Apart from spouses and children under the age of 21, it included relatives both descendants and ascendants, as well as spouse's relatives, dependent on the worker or his/her spouse. This right was conditional on worker's dwelling available for his family. It should be assessed normal under the same criteria as for nationals working in the same region (article 17 (3) of Regulation 38/64).¹⁹ Thus, these new acts were an advanced step in progressive introduction of freedom of movement of workers in the EEC pursuant article 49 of the EEC Treaty.

Regulation 1612/68 on the free movement of workers within the community of October 15, 1968, is one of the most important EEC acts in the field of labor migration law and a significant advance in the field of freedom of movement and workers' rights in the Community. This Regulation was designed to create a genuine single labor market all over its space. It removed remaining discriminatory elements making difference between national workers and foreign workers from other member states, and represented an important milestone on the road to European citizenship for Community workers.²⁰

It prohibited both direct and indirect discrimination against foreign workers. Article 7 prohibited discrimination based on nationality regarding conditions of employment and work, wages, dismissal, reinstatement and re-employment. Article 3 of the Regulation aimed at eliminating indirect discrimination through national legislative and administrative acts or administrative practice, targeted at restricting access of foreign nationals to labor market of a particular Member State.

¹⁹ This requirement was later examined by the EU Court in 249/86 Commission v. Germany, 1986, ECR 1263.

²⁰ Complete freedom of movement for workers now a reality. Information Memo P-50/68, July 1968. [EU Commission — Press Notice] (Archives of the University of Pittsburgh. Available at: <http://aei.pitt.edu/id/eprint/29937>). [Accessed 20.09.2021].

The Regulation abolished work permits for common market workers. They had to comply only with requirements for residence permits, which were issued for a five years period and were automatically renewable. Community workers enjoyed the same tax treatment and social benefits with nationals, had equal access to housing and property. Moreover, the Regulation guaranteed a right of foreign workers to study in vocational schools, to join trade unions. Article 10 established the right of community workers to be joined by family members and dependants in their place of residence. It also guaranteed the rights of family members to employment and education.²¹

The concept of “worker” is a key one within this Regulation. It received a broad interpretation in the practice of the Court of the European Communities (Entin and Pirker, 2019), according to which it had a single meaning throughout the EEC and did not depend on national labor legislation. As the Court pointed out, “an essential characteristic of an employment relationship is the fact that one person for some time provides services for the other person under his direction in exchange for which he receives remuneration.”²² Due to such a broad approach, freedom of movement of workers was significantly expanded to professional sportsmen, trainees, as well as persons who had de facto labor relations with their employers.

The *Directive on the abolition of restrictions on movement and residence of workers of the Member States and their families within the Community* involved changes necessary to harmonize its provisions with the Regulation 1612/68. In particular, all workers changing their place of residence within the Community were granted standard residence permits entitled “Residence permit of a national of an EEC Member State.” With the adoption of these acts, creation of freedom of movement envisaged by the EEC Treaty entered into its final stage (De Bruycker, 2017).

Regulation (EEC) No 1251/70 of the Commission of June 29, 1970, on the right of workers to remain in the territory of a Member

²¹ Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31968R1612> [Accessed 20.09.2021].

²² Affaire 344/87 “Bettray”, Rec.

*State after having been employed in that State*²³ expanded the scope of freedom of movement of workers by guaranteeing to the workers residing in the territory of a Member State the right to remain in that territory when he/she ceased to be employed in that State because of a retirement age, by reason of permanent incapacity to work or after three years of continuous employment and residence in the territory of that state, even if he/she worked as an employed person in another member state, while retaining his/her residence in the first state, to which he regularly returned (article 2).

Although the freedom of movement in the EEC was primarily an instrument of economic integration, it would have been impossible without establishing social rights and guarantees. In the early 70s, the EEC started developing legal regulation on social issues. In order to coordinate various social security systems, the Council of the EEC adopted the *Regulation No 1408/71 of June 14, 1971, on the application of social security schemes to employed persons and their families moving within the Community*.²⁴ Article 4 of the Regulation applied to all legislation concerning different branches of social security: sickness and maternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits, family benefits. The Regulation laid down the rules workers had to comply with in order to receive benefits, the procedures for exchange of information between social security institutions of the EEC members, for refunds between institutions, etc.

Despite the fact that over two decades the EEC witnessed a significant evolution in the regulation of freedom of movement, nevertheless the latter was limited exclusively to workers and not all individuals moving within the EEC. Further changes and shifts from purely

²³ Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31970R1251> [Accessed 20.09.2021].

²⁴ Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31971R1408> [Accessed 20.09.2021].

economic rationale of freedom of movement took place in the seventies and eighties. The Court of Justice played a significant role in that process through gradually expanding the scope of freedom of movement. Nevertheless, that process was not easy. Thus, the initiative of the Commission to adopt new directives to complete Community law in this area by extending the right of residence to those European citizens who did not yet have that right on the basis of existing Community acts (articles 48–86 of the EEC Treaty; Regulations 1812/68 and 1251/70 and Directives 68/360, 73/148 and 75/34) (students, persons receiving pension or allowance, *etc.*) was blocked by the Council in 1979 and practically postponed for 10 years.²⁵ In other words, the path that the EEC travelled in establishing a genuine freedom of movement for all persons, and not only for workers, was difficult and took almost four decades.

IV. Discussion and Conclusion

Historically, European and Eurasian region-building projects have started with steps in the field of economic integration. However, the degree and significance of economic goal setting were different in these two cases, especially in regards to regulating mobility of workers coming from member states of the respective regional organizations to the territory of other member states. In the EEC, workers moving within the Community were perceived as a factor of production ensuring the creation of internal market. This reflected a market-oriented rationale of European integration. We argue that Eurasian integration is more multifaceted in terms of interests, goals and needs, which were at its basis. In the field of labor migration governance, this process was largely justified by needs of reintegration of the post-Soviet space, preservation and maintenance of relations between former republics of the USSR, linked through family, economic, cultural and other ties between their peoples. Political and legal instruments in the field

²⁵ Proposal for a Council Directive on the right of residence for students. Proposal for a Council Directive on the right of residence for employees and self-employed persons who have ceased their occupational activity. Proposal for a Council Directive on the right of residence. COM (89) 275 final, 26 June 1989. Archives of the University of Pittsburgh. Available at: <http://aei.pitt.edu/12236/> [Accessed 20.09.2021].

of migration regulation, thus, have reflected the realities of the post-Soviet space. In particular, they targeted those migration flows that already existed and required such region-level regulation. In this sense, the economic background, which exists in both cases, was turned upside down: whereas in the EEC integration tools aimed at stimulating new migration flows, in the post-Soviet space they provided the existing ones with a normative framework.

Due to economic priorities, issues of social protection in the early years of the EEC and the EAEU were either insignificant or mostly of framework nature. The rights to free border crossing and employment opportunities were prioritized within both organizations. However, establishing freedom of movement of workers was impossible without taking into account their social rights, which could be subject to limitation after border crossings and changing state jurisdiction. Therefore, in both cases there was a tendency to expand the scope of rights of workers and members of their families. It is important to note that in the case of the EAEU, already the founding treaty itself initially provided for a number of essential social rights for Union workers, which was important for a more comfortable integration of foreign workers in the state of employment. In the EEC, these rights appeared only in the Regulations of 1964 and 1968.

The EAEU Treaty prohibits establishing any restrictions in order to protect national labor markets, with the exception of special cases that also took place in the EEC law and remain to this day in the European Union. The trend of protecting national labor markets characterized the European integration during the first few years of the EEC. Moreover, unlike the EAEU, in the EEC those restrictions were established by the founding Treaty, and were removed only by the Regulation of 1964.

Pension reform is one of the recent positive legal developments in the EAEU. The agreement on pensions for workers of the EAEU member states borrowed the EU experience. In particular, the EAEU took the path of coordinating pension systems of the member states, as in the EU, and not unification. This initiative should contribute to reducing illegal labor activities through offering a comprehensive system of financial benefits and guarantees to all Union workers.

In the Eurasian migration system, there is a tendency to borrow the EU experience in developing fundamental rights of migrants. It can be traced back to the CU/SES Treaty of 1999. We find similarities in the way the objectives of the EEC and the Single Economic Space were established in the respective treaties, namely “effective functioning of the common market for goods, services, capital and labor, improving living standards of the population.” Article 39 of the CU/SES Treaty prohibited discrimination in employment, remuneration and work conditions. The Treaty established the right to remain on the territory of a member state, guaranteed crediting the length of service. The CU/SES Treaty provided forward-looking provisions, some of which, unfortunately, were not included in the current EAEU law. One of the most prominent examples is the principle of non-discrimination, which was guaranteed by the CU/SES Treaty, but was not explicitly included into the EAEU Treaty. We argue, however, that comprehensive interpretation of the Treaty confirms the compliance to this principle. Rustem Davletgildeev notes that “keeping quiet about the principle of non-discrimination is not accidental, but is due to the lack of anti-discrimination legislation in the EAEU Member States” (Davletgildeev, 2019, p. 185). We believe that this principle should have been explicitly formulated in the EAEU Treaty as basis for legal status of all nationals of the EAEU states moving within the Union with purposes of employment under the labor law or service provision under the civil codes of respective countries.

Today in the EAEU, there is some imbalance in the rights of workers from EAEU member states arriving in Kazakhstan, Armenia, Kyrgyzstan, on the one hand, and Russia and Belarus, on the other. Some researchers consider this as a shortcoming of the EAEU Treaty (Davletgildeev, 2019, p. 185). The Treaty establishing the Union of Belarus and Russia set up a national regime in terms of wages, working hours, rest time and other issues of employment with respect to citizens of the Union state. We agree that such imbalance should be removed or smoothed down in the EAEU on its way to a genuine freedom of movement. However, within a framework of a diachronic comparison, it is interesting to point out that this situation is very similar to the coexistence of the Benelux Economic Union (1958) and the EEC. In the Benelux Economic Union (as well as in the Union state of Belarus and Russia) there was a genuine

freedom of movement of all citizens of member states.²⁶ This was very different from the situation in the EEC, which came to the freedom of movement of nationals (and not workers) only 60 years later (Guild, 2009, pp. 25–38).

Regulation of labor migration in the EEC and the EAEU also differs in terms of distribution of competencies in this area between national and Community/Union levels. According to the EAEU Treaty, the Union does not enjoy the competence in the field of freedom of movement of workers. This power belongs to the member states and is implemented within the framework of intergovernmental cooperation (article 96). In the EEC, the competence in the field of intra-community labor mobility was initially assigned to the Community. We believe that in the EAEU this step should be considered as crucial for further creation of a genuine common labor market, and these changes should be established in the EAEU Treaty.

One of the best practices of the EEC that is worth borrowing is a significant role of the Court of Justice in the interpretation of freedom of movement of workers. As noted above, it was the Court that contributed to the development of the concept of “worker” and of other relevant provisions in the field. To date, the EAEU Court is very limited in such legal opportunities. Expanding the scope of competence of the EAEU Court should be an important step towards the development of a common labor market in the EAEU.

Overall, the EAEU is characterized by important positive developments in the regulation of intra-Union labor migration. To some extent, positive experience and good practices of the EEC and the EU have also contributed to this. Since its creation, the EAEU labor market regulation was even more advanced on some issues than its European counterpart was. This can be explained by the fact that the EAEU has been developing against the background of the existing EU common market, and has at least partly used an opportunity to learn from its experience.

²⁶ Treaty Establishing the Benelux Economic Union, The Hague, February, 3 1958. See Article 2 establishing freedom of movement of people and equal treatment.

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