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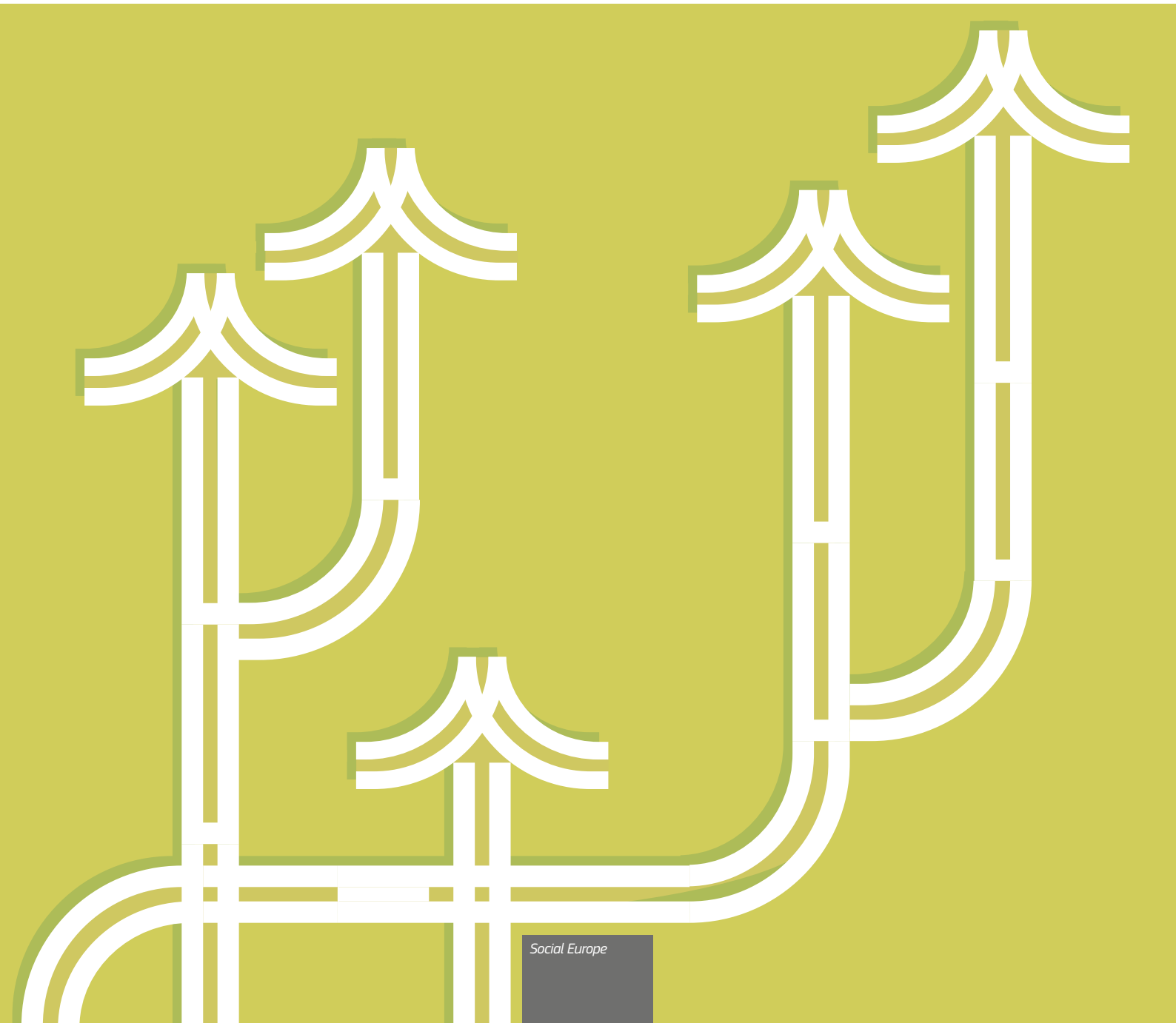

Social Europe

The European Network on Free Movement of Workers within the European Union is composed of independent academic experts, coordinated by the Radboud University Nijmegen, the Netherlands, under the supervision of the European Commission. The network expresses personal views, which do not necessarily reflect the views of the European Commission. The network coordinates the FWM online journal, through its Board of Advisors, under the supervision of the European Commission.

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Foreword

Access to which social rights?

Paul Minderhoud, Coordinator European Network on Free Movement of Workers,
Radboud University Nijmegen, The Netherlands

On 17 and 18 October 2013 the annual conference on Free Movement of Workers took place in Vilnius, Lithuania. It was held under the auspices of the Lithuanian Presidency and in cooperation with Mykolas Romeris University, Lithuania. The presentations of this conference can be found on the website of the Commission:

http://ec.europa.eu/social/main.jsp?catId=475&langId=en

It was emphasised at the conference that 2013 is an important year in the history of EU free movement of workers as it marks the end of transitional restrictions on free movement of workers for nationals of Bulgaria and Romania. Equally, 2013 is an enlargement year with Croatia joining the EU on 1 July. Thirteen Member States, however, are applying transitional restrictions on Croatian workers (Austria, Belgium, Cyprus, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Spain, Slovenia and the UK).

Another issue raised at the conference was the fact that four Member States have shared their concerns regarding the use of free movement rights to gain access to social benefits in other Member States with the Presidency of the Council and the European Commission. The European Commission published in October a study on social tourism setting out the facts and figures which do not provide any evidence that the social security systems of Member States are being burdened by social tourism by (inactive) EU-citizens exercising free movement rights.

In this seventh edition of the Online Journal we have three contributions. In the first contribution Ferdinand Wollenschläger and Jennifer Ricketts examine the right of residence and access to social benefits for jobseekers under the EU Law of Free Movement and its implementation in the Member States. This article is based on the report the authors presented to the Network on Free Movement of Workers in November 2012. The second contribution by Sandra Mantu focuses on the retention of worker status where the person has been employed for longer than 1 year and is involuntarily unemployed in view of the legal provisions applicable, the relevant Court of Justice case-law and the implementation of this right by the Member States.

The third contribution by Irina Burlacu and Cathal O'Donoghue discusses the impact of differential social security systems and taxation on the welfare of frontier workers in the EU. It tackles the issues that frontier workers face as a consequence of interacting with two welfare and fiscal systems, by questioning to what extent the welfare states objectives perform on domestic and frontier workers' welfare.

Contents

About the authors

Ferdinand Wollenschläger and Jennifer Ricketts

Prof. Dr Ferdinand Wollenschläger

In August 2011, **Ferdinand Wollenschläger** (*1976) was appointed professor at the University of Augsburg (Germany), Faculty of Law, where he holds a chair in Public Law, European Law and Public Economic Law. For the academic year 2012/2013, he was appointed visiting professor at the University of Leiden, Faculty of Law.

Ferdinand Wollenschläger has been invited as legal expert on constitutional, administrative and EU law issues by the European Commission, the German Bundestag, the German Bundesrat, and various Parliaments of the German Länder. Moreover, he has been preparing advisory opinions in these areas for various public bodies at national and EU level. He is also member of the advisory board of the Europäische Zeitschrift für Wirtschaftsrecht (EuZW) and of the scientific committee of the forum vergabe e.V. (public procurement law).

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Short description of the article

The article examines the right of residence and access to social benefits for jobseekers under the EU Law of Free Movement and its implementation in the Member States. It is based on the report the authors presented to the Network on Free Movement of Workers in November 2012 and summarises the answers of 27 national experts to a questionnaire of the European Commission. Comparing and analysing the situation communicated by the national experts it can be shown that despite widely acknowledged principles, difficulties in detail remain.

Sandra Mantu

Sandra Mantu is a PhD candidate at the Centre for Migration Law of the Radboud University in Nijmegen, the Netherlands. Her PhD examines state practices of citizenship deprivation in a selection of Member States of the European Union. She holds an LLM in European and International Law from the Radboud University and her research interests are in European citizenship, free movement and human rights. Sandra is a member of the Network on Free Movement of Workers within the European Union and has been involved in writing the annual European report of the Network.

Short description of the article

Among the array of rights enjoyed by EU workers is the possibility to retain worker status even if the employment relationship has come to an end. This is a relatively unexplored aspect of free movement law but in times of economic crisis when there is a move towards the stricter scrutiny of EU workers' rights at the national level, this issue becomes relevant. This contribution focuses on retention of worker status where the person has been employed for longer than 1 year and is involuntarily unemployed in view of the legal provisions applicable, the relevant Court of Justice case-law and the implementation of this right by the Member States.

Keywords: EU workers, worker status, involuntary unemployment, registration.

Irina Burlacu and Cathal O'Donoghue

Irina Burlacu

Irina Burlacu is a PhD researcher at the Maastricht Graduate School of Governance, Maastricht University. She holds a masters degree in comparative social policy from the Catholic University of Leuven and a bachelor degree in sociology from the Moldova State University. Irina is a grant holder for her PhD research project from the National Research Fund of Luxembourg. Key areas of interest: cross-border work in the European Union, free movement for work, social security coordination, personal income taxation.

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Cathal O'Donoghue is head of the Rural Economy and Development Programme. He has studied at UCC, UCD, Oxford, and the London School of Economics, and has degrees in mathematics, statistics, economics, and social policy.

Prior to joining Teagasc, Cathal spent a number of years at the Department of Economics at NUI Galway, Ireland. Earlier, he worked at the Department of Applied Economics, University of Cambridge, for 6 years, at the Economic and Social Research Institute, Dublin, and as a fast-stream civil servant in the UK government. His research is mainly in the area of applied public economics.

Short description of the paper

This paper aims to offer an innovative analytical approach in the field of free movement for work in the European Union. It provides empirical proofs of the impact of the EC Regulation 883/2004 and national welfare state on the welfare of mobile earners. It argues that despite that the coordination regulation has supremacy over the national social security law; the national social security law are more important and decisive for the income of frontier workers when calculating social benefits and taxes. The results highlight the importance of factors, such as taxation, apart from the usually discussed policy duo, such as national law and coordination regulation. This research was funded by the National Research Fund (FNR) in Luxembourg.

Jobseekers' Residence Rights and Access to Social Benefits: EU Law and its Implementation in the Member States

Prof. Dr Ferdinand Wollenschläger, Ass. jur. Jennifer Ricketts (Faculty of Law, University of Augsburg, Germany) [1]

The current economic and financial crisis has led to substantial unemployment rates in many Member States, in particular among European youth. At the same time, however, other Member States experience a significant labour shortage. This imbalance can be mitigated by the free movement of workers guaranteed within the European Union. One crucial and also controversial aspect in this context constitutes the question of jobseekers' residence rights and access to social benefits which this article examines.

This article is based on the thematic report the authors presented to the Network on Free Movement of Workers in November 2012 at its meeting in Valetta, Malta. It analyses the answers of 27 national experts (as at summer 2012) to a questionnaire of the European Commission regarding the situation of jobseekers in the particular Member State. The questionnaire itself was divided into two parts with part one focusing on the residence right of jobseekers and part two on their access to social benefits in other Member States. The article follows this structure and introduces the general EU law framework in both respects (II. 1. and III. 1.) before analysing its implementation in each Member State as reported by the national experts (II. 2. and III. 2.). The conclusion (IV.) will not only summarise the key findings of the comparative analysis, but also highlight general and still existing problems in implementing the EU law framework.

1. Introduction

The free movement of workers within the European Union constitutes one key element of the internal market. Not only does it mean a promise for the individual whose chances on the labour market are improved with all its positive consequences for individual self-development and economic prosperity; it is also crucial for economic growth, in particular in times of high unemployment rates in some Member States and labour shortage in others. Already the third recital of Regulation 1612/68 (now fourth recital of Regulation 492/2011) has stated in this respect:

> '... freedom of movement constitutes a fundamental right of workers ... mobility of labour within the Community must be one of the means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement, while helping to satisfy the requirements of the economies of the Member States ...'

A precondition for making full use of the European Union's labour potential as intended by the free movement of workers is to enable persons not only to take up employment in other Member States, but also to facilitate seeking a job there. Nonetheless, positioning jobseekers in the EU's free movement regime has been a controversial and difficult issue.

For, in a free movement regime granting social and residence rights dependent on one's position as an economically active or inactive person, the situation of jobseekers is not easy to determine in view of their janus-faced status [2]. On the one hand, jobseekers intend to contribute to productivity in the host Member State which justifies their approximation to migrant workers; on the other hand, a jobseeker, as any other non-market actor, is currently unemployed and might never find and take up work. Hence, EC law granted jobseekers a (limited) right of residence, but, unlike migrant workers, no equal access to social benefits. This distinction, however, has come under pressure following introduction of Union citizenship and the ECJ's far-reaching interpretation of this status 'destined'

[1] This article constitutes an updated and shortened version of the thematic report prepared by the authors for the Network on The Free Movement of Workers (21.12.2012). More details, in particular on the situation in the Member States, can be found in the report.

[2] See in more detail Wollenschläger, F., The judiciary, the legislature and the evolution of Union citizenship, in: Syrpis, P. (ed.), The judiciary, the legislature and the EU internal market, 2012, p. 302 (315 seq., 321 seq., 324 seq.), with further references. AG Colomer, in ECJ, Case C-22/08 and C-23/08, [2009] ECR I-4585, para. 55 — *Vatsouras*, considers jobseekers 'midway between being engaged in economic activity and not being so engaged'. See further on the situation of jobseekers under EU law Dougan, M., Free Movement: The Workseeker as Citizen, CYELS (2001), p. 93; Golynker, O., Jobseekers' rights in the European Union, EL Rev. 30 (2005), p. 111; Meulman, J./de Waele, H., Funding the Life of Brian: Jobseekers, Welfare Shopping and the Frontier of European Citizenship, LIEI 31 (2004), p. 275; Wollenschläger, F., Grundfreiheit ohne Markt, 2007, p. 65 seq., 208 seq., 272 seq., with further references.

— according to the Court — 'to be the fundamental status of nationals of the Member States' ([3]). For, the position of economically inactive persons in the EU's free movement regime in terms of residence rights and non-discrimination in the field of social benefits has been improved. This development immediately entailed the question of the consequences for jobseekers: If even the position of non-market actors has been improved in view of the common status of all nationals of the Member States as Union citizens, is it not all the more necessary to improve the position of jobseekers in view of their janus-faced status?

Whereas the Union legislator, except for improvements regarding residence rights, left the situation as it was when re-codifying the free movement *acquis* in 2004 and expressly excluded equal access to social assistance for jobseekers (cf. Article 24[2] Directive 2004/38/EC), the Court, beginning with its *Collins* judgment handed down on 23 March 2004, has extended benefits 'of a financial nature intended to facilitate access to employment in the labour market of a Member State' to jobseekers ([4]). It is not surprising that this tension between the Court's jurisprudence and the Free Movement Directive 2004/38/EC — which has not yet been resolved despite further jurisprudence by the ECJ — has resulted in controversial debates on an EU as well as on a national level and has entailed difficulties when adapting national legislation to the requirements of EU law.

Before analysing the situation of jobseekers in the different Member States, we shall clarify who is considered a 'jobseeker' in this article. Following the questionnaire of the Commission, 'jobseeker' in this context means a person who moves to a Member State other than the one of her/his origin in order to seek employment there. These first-time jobseekers have to be distinguished from EU citizens who retain their status as worker or self-employed person in certain cases after their employment or economic activity has ended. Article 7(3) Directive 2004/38/EC stipulates in this respect:

> 'For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:
>
> (a) he/she is temporarily unable to work as the result of an illness or accident;
>
> (b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a jobseeker with the relevant employment office;
>
> (c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a jobseeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;
>
> (d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.'

2. Residence rights of jobseekers

2.1. Framework of EU law

Article 6(1) Directive 2004/38/EC grants an unconditional right of residence during the first 3 months after arrival:

> 'Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.'

However, according to Article 14(1) Directive 2004/38/EC, an economically inactive person's right of residence may be terminated in case she or he becomes 'an unreasonable burden on the social assistance system':

> 'Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.'

Nonetheless, according to Article 14(3) Directive 2004/38/EC:

> 'An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.'

Article 14(4) lit. b Directive 2004/38/EC, however, excludes the application of paragraph 1 in the case of jobseekers:

> 'By way of derogation from paragrap[h] 1 … an expulsion measure may in no case be adopted against Union citizens or their family members if: …
>
> (b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family

([3]) Cf. only ECJ, Case C-184/99, [2001] ECR I-6193, para. 31 — *Grzelczyk*.

([4]) ECJ, Case C-138/02 [2004] ECR I-2703, para. 63 — *Collins*.

> members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.'

During the second 3 months after arrival, first, certain administrative formalities have to be fulfilled according to Article 8 Directive 2004/38/EC:

> '1. Without prejudice to Article 5(5), for periods of residence longer than three months, the host Member State may require Union citizens to register with the relevant authorities.
>
> 2. The deadline for registration may not be less than three months from the date of arrival. A registration certificate shall be issued immediately, stating the name and address of the person registering and the date of the registration. Failure to comply with the registration requirement may render the person concerned liable to proportionate and non-discriminatory sanctions.'

Moreover, Article 7(1) Directive 2004/38/EC makes the right of residence of non-economic actors dependent on the fulfilment of economic criteria:

> 'All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
>
> (a) are workers or self-employed persons in the host Member State; or
>
> (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or ...'

Since jobseekers are neither workers nor self-employed persons, the economic conditions of residence set out in this article apply to them. These conditions have to be met as long as the person resides in the host Member State. Article 14(2) Directive 2004/38/EC stipulates in this respect:

> 'Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.
>
> In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.'

Yet, again, according to Article 14(4) lit. b Directive 2004/38/EC, jobseekers, unlike other economically inactive persons, must not be expelled even if not fulfilling the economic criteria of residence:

> 'By way of derogation from paragrap[h] ... 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if: ...
>
> (b) the Union citizens entered the territory of the host Member State in order to seek employment.
>
> In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.'

Before entry into force of Directive 2004/38/EC the Court in its *Antonissen* judgment handed down on 26 February 1991 and confirming a right of residence for jobseekers at least favoured a more generous minimum period of unconditional residence. First, the Court held inapplicable a 'declaration recorded in the Council minutes at the time of the adoption of the ... Regulation No 1612/68 and of Council Directive 68/360/EEC' which limited the jobseekers' right of residence:

> 'Nationals of a Member State as referred to in Article 1 [of the Directive] who move to another Member State in order to seek work there shall be allowed a minimum period of three months for the purpose; in the event of their not having found employment by the end of that period, their residence on the territory of this second State may be brought to an end. However, if the above-mentioned persons should be taken charge of by national assistance (social welfare) in the second State during the aforesaid period they may be invited to leave the territory of this second State' ([5]).

For,

> 'such a declaration cannot be used for the purpose of interpreting a provision of secondary legislation where, as in this case, no reference is made to the content of the declaration in the wording of the provision in question' ([6]).

However, the Court held that it is in line with Community law to require proof after the expiry of 6 months that the person concerned is still seeking a job and has chances to be engaged:

([5]) Cf. for the wording of the declaration ECJ, Case C-292/89, [1991] ECR I-745, para. 17 — *Antonissen*.

([6]) ECJ, Case C-292/89, [1991] ECR I-745, para. 18 — *Antonissen*.

> 'In the absence of a Community provision prescribing the period during which Community nationals seeking employment in a Member State may stay there, a period of six months ... does not appear in principle to be insufficient to enable the persons concerned to apprise themselves, in the host Member State, of offers of employment corresponding to their occupational qualifications and to take, where appropriate, the necessary steps in order to be engaged and, therefore, does not jeopardise the effectiveness of the principle of free movement. However, if after the expiry of that period the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged, he cannot be required to leave the territory of the host Member State.' ([7])

In view of this, it is debatable if the Court also accepted shorter periods in which an unconditional right of residence has to be granted to jobseekers (as stipulated by Article 6[1], 14[1] Directive 2004/38/EC) or if 6 months constitutes the minimum. The gap is reduced by two provisions of Directive 2004/38/EC, though. First, jobseekers enjoy a residence right for a period between 3 and 6 months (and above) if meeting the economic criteria of residence (Article 7[1] lit. b Directive 2004/38/EC); failing this, Article 14(4) lit. b Directive 2004/38/EC protects jobseekers at least from expulsion ([8]) if they 'can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged'. Thus, the rules of Directive 2004/38/EC seem to prepone the moment from which jobseekers have to prove their chances on the labour market from 6 to 3 months for persons not fulfilling the economic criteria of residence. However, depending on its interpretation, the ninth recital of Directive 2004/38/EC might require a further application of the *Antonissen* jurisprudence:

> 'Union citizens should have the right of residence in the host Member State for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to jobseekers as recognised by the case-law of the Court of Justice.' ([9])

([7]) ECJ, Case C-292/89, [1991] ECR I-745, para. 21 — *Antonissen*.

([8]) In this case, the right of residence is not terminated, cf. Wollenschläger, F., A new Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for shifting the Economic Paradigm of European Integration, ELJ 17 (2011), p. 1 (19 N. 104), with further references.

([9]) Cf. also ECJ, Case C-127/08 [2008] ECR I-6241, para. 59 — *Metock*: 'The same interpretation must be adopted a fortiori with respect to Directive 2004/38, which amended Regulation No 1612/68 and repealed the earlier directives on freedom of movement for persons. As is apparent from recital 3 in the preamble to Directive 2004/38, it aims in particular to "strengthen the right of free movement and residence of all Union citizens", so that Union citizens cannot derive less rights from that directive than from the instruments of secondary legislation which it amends or repeals.'

For the period exceeding 6 months after arrival, it has to be noted that Directive 2004/38/EC stipulates different conditions for periods of residence below and exceeding 3 months, but does not contain any further rules related to a 6-months threshold. Hence, the standards set out above for periods exceeding 3 months apply. According to the Court's *Antonissen* jurisprudence outlined above a Member State may require at least after the expiry of a period of 6 months a proof that a person 'is continuing to seek employment and that he has genuine chances of being engaged' ([10]).

2.2. Situation in the Member States

Looking at the situation in the Member States in terms of residence rights, most of them do not make **stays of up to 3 months** dependent on any particular conditions or formalities, as is provided for by Article 6(1) Directive 2004/38/EC. Only a few Member States (**Belgium, Spain, France, Cyprus, Latvia, Luxembourg, Poland, Slovenia and Slovakia**) require registration; some define the latter as a condition for obtaining certain benefits, e.g. services of the employment agency. For **periods of residence between 3 and 6 months**, quite a number of Member States require jobseekers to prove reasonable chances to find employment, be it in addition to or without a duty to register. Moreover, in numerous Member States (**Bulgaria, Czech Republic, Ireland, Italy, Lithuania, Luxembourg, Hungary, Austria, Poland, Portugal and Slovenia**) the economic criteria of residence (sufficient resources and a comprehensive health insurance) apply to jobseekers; in this case, protection from expulsion, as stipulated by Article 14(4) lit. b Directive 2004/38/EC, is not always guaranteed by law, even if coercive action against jobseekers might not occur in practice. In many Member States, **periods of residence exceeding 6 months** are not treated in a different way than periods exceeding 3 months. A few Member States, however, tie certain procedural (registration) and/or material (employment chances; economic criteria) criteria to this threshold and not to the 3-month threshold (**Denmark, Greece, France, Cyprus, Malta, Romania and Finland**). Finally, some Member States (**Belgium, Luxembourg and United Kingdom**) consider an advancing period of unemployment as an indication that the person has no chance of being employed, resulting in a loss of privileges jobseekers enjoy (in particular protection from expulsion). As far as **documents confirming the residence right** are concerned, usually no specific documents for jobseekers exist; the criteria for obtaining these documents vary according to the conditions required for obtaining a right of residence. To confirm the status as jobseeker, national authorities demand **evidence** like invitations to job interviews or participation in measures offered by employment agencies; no disproportionate requirements could be detected.

([10]) ECJ, Case C-292/89, [1991] ECR I-745, para. 21 — *Antonissen*.

3. Benefits for first-time jobseekers

Being unemployed, jobseekers might be dependent on public financial support to secure their living; moreover, many Member States provide specific benefits for persons seeking a job in order to facilitate their integration into the labour market. In the context of free movement rights, this raises the sensitive issue if and to what extent EU citizens looking for a job abroad may claim equal access to such benefits in their host Member State. Based on an outline of the EU law framework this chapter analyses the situation in 27 EU Member States (without Croatia as the initial study goes back to summer 2012, see above). Since the European Court of Justice has improved the position of jobseekers following the introduction of Union citizenship in its *Collins* and *Vatsouras* jurisprudence by extending the jobseekers' right to non-discrimination to any 'benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State' ([11]), a first question raised by the Commission's questionnaire is which social benefits in the individual Member States are specifically designated as facilitating access to the labour market and thus covered by this recent case-law. Since there might be further benefits meeting the *Collins* test, an additional issue to be examined is whether there are any further benefits only available to persons who are seeking employment, but not officially designated as related to market place insertion. From the opposite point of view, one may also enquire to which extent Member States exclude a claim to social assistance. Moreover, the question if there are different benefits available for those seeking apprenticeships or carrying out unpaid work will be addressed. In view of federal or decentralised structures in some Member States, a final point to be investigated is whether a system of sub-state-level benefits made available by the regional and local authorities is in operation.

3.1. EU law framework

In terms of equal access to social benefits, jobseekers, in view of their janus-faced status (cf. I.), were largely treated like economically inactive persons and thus excluded from the right to non-discrimination in this regard ([12]). Hence, the claim to equal access to 'social advantages' explicitly provided for by secondary law on the free movement of workers (Article 7[2] Regulation [EEC] 1612/68, repealed by Article 7[2] Regulation [EU] 492/2011) has been limited to persons actually exercising an employment, an interpretation the Court confirmed in its *Lebon* ruling ([13]). Even the new Directive 2004/38/EC on the free movement of Union citizens sticks to the orthodox position by explicitly excluding an 'entitlement to social assistance' for jobseekers from the Union citizen's general claim to non-discrimination (Article 24). Secondary law only requires the Member States not to discriminate against foreign jobseekers in matters regarding access to employment like exchange of applications for jobs or support by the national employment offices (see Article 2 and 5 Regulation [EU] 492/2011).

Nonetheless, matters changed following introduction of Union citizenship, a status common to all nationals of the Member States irrespective of the exercise of an economic activity. For it led to an extension of the claim to equal access to social benefits to non-market actors ([14]). In view of this, it did not seem coherent to treat jobseekers less favourably than other economically inactive persons whose position had been improved, especially since the former, unlike the latter, intend to become market actors. Consequently, in *Collins*, the Court partially revoked its *Lebon* jurisprudence:

> 'In view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of (Article 45[2] TFEU) — which expresses the fundamental principle of equal treatment, guaranteed by [Article 18 TFEU] — a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State. The interpretation of the scope of the principle of equal treatment in relation to access to employment must reflect this development, as compared with the interpretation followed in *Lebon* ...' ([15])

This does not mean, however, that jobseekers enjoy an unlimited claim to such social benefits; rather limits do apply. For the host Member State may 'require a connection between persons who claim entitlement to such an allowance and its employment market', as inferred from e.g. seeking employment in the respective Member State for 'a reasonable period' ([16]). Next to

([11]) Cf. ECJ, Case C-138/02 [2004] ECR I-2703, para. 63 — *Collins*; ECJ, Case C-22/08 and C-23/08 [2009] ECR I-4585, para. 37 — *Vatsouras*.

([12]) Cf. in more detail Wollenschläger, F., *The judiciary, the legislature and the Evolution of Union citizenship, in: Syrpis, P. (ed.), The Judiciary, the legislature and the EU Internal Market*, 2012, p. 302 (315 seq.), with further references.

([13]) ECJ, Case 316/85, [1987] ECR 2811, para. 25 seq. — *Lebon*. Cf. only Wollenschläger, F., The judiciary, the legislature and the Evolution of Union citizenship, in: Syrpis, P. (ed.), *The Judiciary, the legislature and the EU Internal Market*, 2012, p. 302 (316 seq.).

([14]) Cf. in more details Wollenschläger, F., Grundfreiheit ohne Markt, 2007; *idem*, A new Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for shifting the Economic Paradigm of European Integration, ELJ 17 (2011), p. 1.

([15]) Cf. ECJ, Case C-138/02, [2004] ECR I-2703, para. 63 — *Collins*; Confirmed in ECJ, Case C-22/08 and C-23/08, [2009] ECR I-4585, para. 37 — *Vatsouras and ECJ*, Case C-258/04, [2005] ECR I-8275, para. 22 — *Ioannidis*; Case C-367/11, not published yet, para. 25 — *Déborah Prete*.

([16]) Cf. ECJ, Case C-138/02 [2004] ECR I-2703, para. 67 — *Collins*; Case C-367/11, not published yet, para. 33, 47 — *Déborah Prete*.

a certain period of jobseeking, further possible criteria to assess this link are a registration as jobseeker, the period of residence in the host Member State and even family ties ([17]). Moreover, in its judgment in the *Prete* case, the Court even required Member States to take into account all relevant factors ([18]) which questions national rules making benefits conditional upon a single criterion. Of course, this makes rule-making at the national level harder and is problematic with regard to legal certainty ([19]).

Since benefits encompassed by this new line of jurisprudence may finance a jobseeker's living, they might be considered 'social assistance' expressly excluded, however, from the jobseeker's claim to equal treatment by Article 24(2) Directive 2004/38/EC ([20]). Hence, a tension between the Court's case-law and the Union legislator and thus between primary and secondary EU law has become manifest. A solution was expected from the *Vatsouras* judgment handed down on 4 June 2009. The Court, however, took a formalistic way out and so avoided at least an open conflict with the Union legislator. For it held that benefits covered by the *Collins* jurisprudence have to be distinguished from social assistance in the sense of Article 24(2) Directive 2004/38/EC ([21]). Irrespective of whether one agrees with this ([22]), the law stands as it is. Hence, the scope of the term 'benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State' to which jobseekers may claim equal access as opposed to 'social assistance' has to be analysed. In this regard, the Court gave certain hints in its *Vatsouras* ruling:

> '[T]he objective of the benefit must be analysed according to its results and not according to its formal structure. A condition … under which the person concerned must be capable of earning a living, could constitute an indication that the benefit is intended to facilitate access to employment.' ([23])

Moreover, its (formal) 'status under national law' is immaterial ([24]).

Finally, EU coordination law, especially Regulation 883/2004, includes rules on the aggregation of periods of insurance, employment and residence (Article 6, Regulation 883/2004) as well as the waiving of residence clauses in the allocation or preservation of social security benefits (Article 7, Regulation 883/2004) in order to lift obstacles to the free movement of persons because of different national social security systems. These rules also apply to unemployment benefits for jobseekers, but not to 'social and medical assistance' (Article 3, Regulation 883/2004). Moreover, there are special rules for so-called special non-contributory benefits (SNCBs) standing halfway between traditional social security and social assistance (Annex X of Regulation 883/2004 lists non-contributory unemployment benefits for jobseekers in **Germany, Ireland, Finland, and the United Kingdom**). In its recent judgment in the *Brey* case, the Court shed some more light on the relationship between the free movement rules and the coordination regime. It clarified that Article 70(4) does not contain a claim to SNCBs for persons with habitual residence in the Member State of application, but that the general free movement rules on access to social benefits apply:

> 'It should be noted that Article 70(4) of Regulation No 883/2004 — upon which the Commission relies — sets out a 'conflict rule', the aim of which is to determine, in cases involving special non-contributory cash benefits, the applicable legislation and the institution responsible for paying the benefits in question. That provision is intended not only to prevent the concurrent application of a number of national legislative systems and the complications which might ensue, but also to ensure that persons covered by Regulation No 883/2004 are not left without social security cover because there is no legislation which is applicable to them … On the other hand, that provision is not intended to lay down the conditions creating the right to special non-contributory cash benefits. It is for the legislation of each Member State to lay down those conditions … It cannot therefore be inferred from Article 70(4) of Regulation No 883/2004, read in conjunction with Article 1(j) thereof, that EU law precludes national legislation, such as that at issue in the main proceedings, under which the right to a special non–contributory cash benefit is conditional upon meeting the necessary requirements for obtaining a legal right of residence in the Member State concerned. Regulation No 883/2004 does not set up a common scheme of social security, but allows different national social security schemes to exist and its sole objective is to ensure the coordination of those schemes. It thus allows different

([17]) ECJ, Case C-367/11, not published yet, para. 40, 44, 47 — *Déborah Prete*; see also Case C-138/02 [2004] ECR I-2703, para. 72 — *Collins*.

([18]) See ECJ, Case C-367/11, not published yet, para. 51 — *Déborah Prete*.

([19]) Cf., in contrast, ECJ [2008] ECR I-8507, paras. 34 seq. — *Förster*, stressing the importance of legal certainty to justify a residence criterion and not to take into account further criteria.

([20]) Cf. in more detail Wollenschläger, F., The judiciary, the legislature and the Evolution of Union citizenship, in: Syrpis, P. (ed.), The Judiciary, the legislature and the EU Internal Market, 2012, p. 302 (324 seq.).

([21]) Cf. ECJ, Case C-22/08 and C-23/08, [2009] ECR I-4585, para. 45 — *Vatsouras*.

([22]) For a critical view cf. Wollenschläger, F., The judiciary, the legislature and the Evolution of Union citizenship, in: Syrpis, P. (ed.), The Judiciary, the legislature and the EU Internal Market, 2012, p. 302 (325 seq.), with further references.

([23]) ECJ, Case C-22/08 and C-23/08, [2009] ECR I-4585, paras. 42 seq. — *Vatsouras*.

([24]) ECJ, Case C-22/08 and C-23/08, [2009] ECR I-4585, para. 45 — *Vatsouras*.

> schemes to continue to exist, creating different claims on different institutions against which the claimant possesses direct rights by virtue either of national law alone or of national law supplemented, where necessary, by EU law … The Court has consistently held that there is nothing to prevent, in principle, the granting of social security benefits to Union citizens who are not economically active being made conditional upon those citizens meeting the necessary requirements for obtaining a legal right of residence in the host Member State … However, it is important that the requirements for obtaining that right of residence — such as, in the case before the referring court, the need to have sufficient resources not to apply for the compensatory supplement — are themselves consistent with EU law' ([25]).

To sum up: 'It follows that, while Regulation No 883/2004 is intended to ensure that Union citizens who have made use of the right to freedom of movement for workers retain the right to certain social security benefits granted by their Member State of origin, Directive 2004/38 allows the host Member State to impose legitimate restrictions in connection with the grant of such benefits to Union citizens who do not or no longer have worker status, so that those citizens do not become an unreasonable burden on the social assistance system of that Member State' ([26]).

3.2. Situation in the Member States

Having in mind the legal framework outlined above, a central issue for implementation of the European legislation and jurisprudence in the Member States is the distinction between benefits 'of a financial nature intended to facilitate access to employment in the labour market of a Member State', to which first-time jobseekers may claim equal access under certain circumstances according to the *Collins* jurisprudence, and 'social assistance', which is expressly excluded from the jobseekers' right to non-discrimination by Article 24(2) Directive 2004/38/EC. Whereas some Member States grant subsistence subsidies for jobseekers qualifying as *Collins* benefits, in other Member States only social assistance is available from which first-time EU jobseekers are usually excluded. Sometimes, the qualification is controversial (cf. in particular the debate in **Germany** about the qualification of subsistence benefits for jobseekers [§§ 1 seq. German Social Security Code II] under the *Collins* jurisprudence ([27]); furthermore the example of **France** and its Revenue de solidarité active). Regarding EU law as such, it has to be pointed out that the distinction introduced by the *Collins* jurisprudence, despite improving the position of jobseekers, is formalistic and creates, as the national reports confirm, legal uncertainty; a narrow understanding focused on labour market-oriented measures competes with the wide view that also any kind of subsistence benefits may fall under this definition since they constitute a precondition for being able to seek a job. Moreover, it remains to be seen whether the exclusion provided for by Article 24(2) Directive 2004/38/EC is in line with EU primary law.

In those Member States granting benefits covered by the *Collins* jurisprudence, a further issue is whether the (varying) conditions for entitlement are in line with the requirement of a proportionate link with the national labour market. This is definitely not the case if EU jobseekers are generally excluded (cf. the unclear situation regarding the entitlement to Jobseekers Allowance in **Ireland**) and debatable in others (acceptable duration of residence/registration requirements, e.g. **Spain**; requirement of previous education in the Member State, **Belgium**).

Hence, further clarification and a coherent framework for the rights of jobseekers is urgently needed.

4. Conclusions

Summarising the key findings of the report, the free movement of first-time jobseekers may be considered widely acknowledged in principle, but is not without difficulties in detail. General problems seem to be a gap between legal rules and practice, the lack of distinct rules and transparency issues (e.g. in **Bulgaria, Ireland, Latvia, Lithuania, Hungary and in Slovakia**). In particular, the formalistic approach of the Court in its jurisprudence in *Collins* as well as *Vatsouras* and *Koupatanze*, differentiating between 'social assistance' and benefits 'of a financial nature intended to facilitate access to employment in the labour market of a Member State' proves to be impractical for application in the Member States. Moreover, the limits of the claim of jobseekers to social benefits have to be determined in detail. Furthermore, the relationship between Directive 2004/38/EC and the regime of coordination with regard to social benefits under Regulation 883/2004 has to be clarified. Hence, it remains the task of the Court and the Union legislator to solve the open issues regarding free movement rights of jobseekers in the interest of the individual, the internal market and national authorities having to implement a controversial legal framework.

([25]) ECJ, Case C-140/12, not published yet, paras. 39 seq. — *Brey*.

([26]) ECJ, Case C-140/12, not published yet, para. 57 — *Brey*.

([27]) Cf. for further details, e.g. Kingreen, T., Staatsangehörigkeit als Differenzierungskriterium im Sozialleistungsrecht, SGb 2013, 132 seq.; Hofmann, E. and Kummer, M.-T., Sozialleistungen im europäischen Mehrebenensystem, ZESAR 2013, 199 seq.

Protecting EU workers in case of involuntary unemployment: retention of worker status

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Among the array of rights enjoyed by EU workers is the possibility to retain worker status even if the employment relationship has come to an end. This is a relatively unexplored aspect of free movement law but in times of economic crisis when there is a move towards the stricter scrutiny of EU workers' rights at the national level, this issue becomes relevant. This contribution focuses on retention of worker status where the person has been employed for longer than one year and is involuntarily unemployed in view of the legal provisions applicable, the relevant Court of Justice case law and the implementation of this right by the Member States.

Keywords: EU workers, worker status, involuntary unemployment, registration

1. Introduction

Free movement of persons is one of the four fundamental freedoms on which the European Union is built. The rights awarded to workers by the Treaty, now listed in Article 45 TFEU, include the right to look for a job in another EU country, to work in another Member State and to reside there for that purpose, and to stay there after employment has finished. In addition, EU workers enjoy equal treatment with nationals regarding access to employment, working conditions and all other social and tax advantages. One of the main preoccupations in this field of law has been the abolition of all obstacles that may impinge upon the exercise of free movement rights, as attested by various pieces of secondary legislation ([2]). The most recent and important measure adopted is Directive 2004/38 on the right of Union citizens and their family members to move and reside freely within the territory of the Member States that has the stated aim of simplifying the legal framework developed along the years in the field of free movement of persons. At the same time, the directive takes stock of the introduction of European Union citizenship by the Maastricht Treaty and the case-law of the Court of Justice regarding the rights of workers and citizens. By acknowledging the fundamental character of the free movement rules, the Court has interpreted the concept of EU worker in a broad manner and, generally, made it easier to move and take up work in another Member State.

The introduction of the legal status of European Union citizenship has not changed the privileged position enjoyed by workers and their family members, as they continue to enjoy a stronger position in comparison with the general category of EU citizens, and, in some cases, nationals of the host Member State ([3]). The privileged position enjoyed by EU workers is evidenced also by the protection they enjoy in case of involuntary unemployment. Article 7(3) of Directive 2004/38 provides for the possibility to retain worker status upon cessation of the employment relationship in case of involuntary unemployment. This contribution discusses the possibility to retain worker status where the EU worker has been employed for longer than 1 year and is involuntarily unemployed. This relatively unexplored aspect of the rights of EU workers is currently under review by the Court of Justice. In the pending *Jessy Saint Prix* case ([4]), the Court was asked whether the status of EU worker and/or the rules that allow for its retention upon cessation of employment extend to a woman who reasonably gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth. Moreover, in the current political climate, where the rights of EU citizens are increasingly scrutinised by

([1]) This article is based on a wider study carried out by the European Network on Free Movement of Workers within the European Union on behalf of the Directorate-General for Employment, Social Affairs and Inclusion of the European Commission in 2013. The views expressed in this article are those of the author and do not necessarily represent those of the European Network on Free Movement of Workers or those of the European Commission.

([2]) For a description of these instruments see Guild, E. (2009), Free Movement of Workers: From Third Country National to Citizen of the Union, in Minderhoud, P. and Trimikliniotis, N. (eds.), *Rethinking the free movement of workers: the European challenges ahead*, Wolf Legal Publishing, pp. 25–29.

([3]) This is particularly true in case of reverse discrimination, that is, the situation where nationals of the host Member State are treated less favourably than EU citizens deriving rights from EU law are. Family reunification is a most problematic area. See Groenendijk, K. (2006), Family Reunification as a Right under Community Law, *European Journal of Migration and Law* 8, pp. 215–230; Verschueren, H. (2009), Reverse Discrimination: An Unsolvable Problem? in (eds.) Minderhoud, P. and Trimikliniotis, N., pp. 99–118.

([4]) Case C-C-507/12 *Jessy Saint Prix*, pending.

several EU Member States ([5]), the issue of enjoying increased protection in case of unemployment and the right to enjoy social benefits is ever so relevant. This article discusses the legal context of retention of worker status, the relevant case-law of the Court of Justice and the implementation of retention of worker status by the Member States ([6]).

2. The legal context of retention of worker status

The legal framework of the rights of EU workers must be understood in the light of Article 45 TFEU that lays down the right of free movement of workers, and has direct effect in the legal orders of the Member States, the secondary legislation that implements this fundamental freedom, and the jurisprudence of the CJEU on free movement of workers and citizens of the Union.

According to Article 45(3) TFEU, the freedom of movement of EU workers includes the rights to look for a job in another EU country, to work in another Member State and to reside there for that purpose, and to stay there after employment has finished. These rights may be subjected to limitations justified on grounds of public policy, public security or public health. Article 45(2) TFEU states that the freedom of movement of EU workers entails 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. Directive 2004/38 sets out in secondary legislation the right of a Union citizen to reside in another Member State, which finds expression in primary law in the fundamental freedoms and the rules on European Union citizenship. Also relevant for the topic of this article are the abandonment of the residence permit system in as far as EU citizens exercising free movement rights are concerned, and the introduction of the concept of permanent residence which is acquired after 5 years of continuous residence (Article 16 of Directive 2004/38). Where an EU worker has completed 5 years of residence in a host Member State, they will benefit from permanent residence under Article 16 et seq. of Directive 2004/38. These workers and former workers can no longer be made subject to limitations on their residence except in the exceptional circumstance set out in the directive. Where EU workers have resided for less than 5 years in the host Member State and become unemployed, some Member States are looking more and more attentively at whether they have the right to continue to reside, particularly where they claim social benefits. The issue tends to be formulated around the scope of Article 7 of the directive which must be read in conjunction with Article 14 which in (1) allows Member States to consider the position of EU citizens and their family members who have become an unreasonable burden on the social assistance system of the host state and (3) which prohibits the expulsion of an EU citizen or a family member as the automatic consequence of recourse to the social assistance system of the host state. The decision in *Antonissen* is relevant in this context because the Court has held that where an EU national has a reasonable chance of finding employment, they are entitled to reside on the territory of the host Member State ([7]). This reasonable chance cannot be limited to 3 or even 6 months but must be assessed in the light of the relevant circumstances. Directive 2004/38 has codified this aspect of the Court's case-law in Article 14(4)(d).

Article 45(3) TFEU does not expressly list the right to retain worker status. The possibility of retaining EU worker status or self-employed status is expressly provided for in secondary legislation, namely in Article 7(3) of Directive 2004/38. Article 7 of Directive 2004/38 deals with the right of residence for longer than 3 months and is applicable to all categories of EU citizens regardless of whether or not they are involved in an economic activity. The right remains subject to several conditions in the case of students and economically inactive citizens, who must show sufficient resources and comprehensive sickness insurance. Workers do not need to meet other conditions, except that of being an EU worker ([8]). Paragraph 3 of Article 7 deals with the situation in which the status of worker and therefore the right of residence for longer than 3 months is maintained although employment has ceased. It reads as follows:

'Article 7:

[...]

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a jobseeker with the relevant employment office;

([5]) Letter to Mr Alan Shatter, Minister for Justice and Equality (Republic of Ireland), President of the European Council for Justice and Home Affairs, May 2013. https://www.eerstekamer.nl/eu/overig/20130516/afschrift_van_de_brief_aan_het/document

([6]) The information regarding the national regulation and practice of retention of worker status where the person has been employed for longer than 1 year is based on a questionnaire sent out to the 28 national experts of the Network on the Free Movement of EU Workers in the context of the study commissioned by the European Commission on Article 7(3)(b) of Directive 2004/38.

([7]) Case C-292/89 *Antonissen* [1991] ECR I-745.

([8]) This article does not discuss the conditions that have to be met by an EU citizen in order to be considered an EU worker.

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a jobseeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

In the absence of a provision of primary law referring expressly to retention of worker status, the Court's case-law provides some answers to the question of the legal basis of the right to retain worker status. In the *Lair* decision, the Court acknowledged that 'neither Article 7(2) Regulation 1612/68 nor Articles 48 or 49 of the EEC Treaty provide an express answer to the question whether a migrant worker who has interrupted his occupational activity in the host State in order to pursue university leading to a professional qualification is to be regarded as having retained his status as a migrant worker for the purposes of Article 7 of the regulation' ([9]). Yet, the Court found that 'there is nevertheless a basis in Community law for the view that the rights guaranteed to migrant workers do not necessarily depend on the actual or continuing existence of an employment relationship' ([10]). In relation to students who had been previously employed, the Court used the following legal provisions as arguments in favour of this view: Article 48(3)(d) EEC Treaty (now Article 45(3)(d) TFEU) and Regulation 1251/70 implementing it; Directive 68/360 that prohibited the Member States from withdrawing a residence permit under certain circumstances and finally, Article 7(1) of Regulation 1612/68 stating that a migrant worker who has become unemployed should not be treated differently from a national worker as regards reinstatement or re-employment ([11]). Nevertheless, based on the Court's later case-law addressing the legal position of jobseekers, it can be argued that a national of a Member State who has been employed in a host state but who has become unemployed and is seeking employment in that state continues to derive a right to stay in the host state based on Article 45(3) TFEU since he can be said to be staying in that Member State for the purpose of employment. To this extent, it should be noted that the Court of Justice has interpreted Article 45 TFEU as including both workers and jobseekers. This was confirmed in the *Antonissen* case, which involved the right to stay in a host state while seeking employment ([12]). In the same case, the Court stated that Article 45(3) lists in a non-exhaustive way rights that benefit nationals of the Member States in the context of free movement of workers ([13]). This finding can be used as an argument that the legal basis of the right to retain worker status is Article 45 TFEU and that Directive 2004/38 implements this right.

In interpreting the rights provided for in Directive 2004/38, Recital 3 and the therein-stated objectives should be kept in mind: 'Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.' Moreover, in the *Metock* case, the Court stated 'The same interpretation must be adopted a fortiori with respect to Directive 2004/38, which amended Regulation No 1612/68 and repealed the earlier directives on freedom of movement for persons. As is apparent from recital 3 in the preamble to Directive 2004/38, it aims in particular to 'strengthen the right of free movement and residence of all Union citizens', so that Union citizens cannot derive less rights from that directive than from the instruments of secondary legislation which it amends or repeals' ([14]). This approach to the interpretation of the rights conferred by Directive 2004/38 was again confirmed in the the *Lassal* case ([15]). Thus, no interpretation of Article 7 of Directive 2004/38, which will place greater restrictions on the rights of EU workers than existed under the previous legislation, is permissible. Prior to the adoption of Directive 2004/38, Directive 68/360 gave the Member States some scope for restricting the residence of an involuntarily unemployed person, but that scope was limited to the first renewal of the residence permit if involuntary unemployment occurred or existed at that moment ([16]). Even in this scenario, the right of residence had to be awarded for a maximum of 12 months, if the person had been involuntarily unemployed for the last 12 consecutive months ([17]). If unemployment did not occur during the last 12 consecutive months but at some other point during the first 5 years, the first renewal of the residence permit could not limit the duration for which the second residence permit was issued. The Member States retained the power to end residence in case the person no longer

([9]) *Lair*, para. 30.

([10]) *Lair*, para. 31.

([11]) *Lair*, para. 34.

([12]) Case C-292/89 *Antonissen* [1991] ECR I-00745.

([13]) *Antonissen*, para. 13.

([14]) Case C-127/08 *Metock* [2008] ECR I-06241, para. 59.

([15]) Case C-162/09 *Taous Lassal* [2010] ECR I-09217, para. 30.

([16]) Directive 68/360 EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families. As a rule a residence permit was valid for 5 years and automatically renewable. Directive 68/360 has been abrogated by Directive 2004/38 and under the current system, EU citizens no longer need residence permits, although they may be requested to register their stay.

([17]) Article 7(2) of Directive 68/360.

fulfilled the additional condition of being in involuntary unemployment and it was generally understood that a voluntarily unemployed person may have his residence permit revoked ([18]). This interpretation of Article 7 of Directive 68/360 takes into account the scope of the measure, which was the abolition of restrictions on the exercise of the right to free movement for workers and the *effect utile* of the provisions on the free movement of workers, more generally. The possibility of ending the right of residence because of involuntary unemployment is a measure that could deter EU nationals from trying to make use of the right to free movement as workers.

During the negotiation process of Directive 2004/38, some Member States wished to limit the possibility of retaining worker status in case of unemployment. In its original proposal, the Commission argued that Article 7(3) 'broadly takes over certain provisions of Directive 68/360 with clarifications and incorporates Court of Justice case-law regarding retention of worker status where the worker is no longer engaged in any employed or self-employed activity' ([19]). During the negotiations in the Council, Denmark and the Netherlands proposed the introduction of a deadline by which the person in involuntary unemployment ceased to be entitled to residence ([20]). The 2003 amended version of the Commission's proposal did not contain changes to the initial text (the same requirements applied: involuntary unemployment and registration as a jobseeker with the relevant employment office) ([21]). However, the final version of Article 7(3)(b) expressly states that the person must have been employed for at least 1 year before the involuntary unemployment takes place in order to retain worker status. Article 7(3)(c) was also changed during the negotiation process in order to make it clear that in case of employment for less than 1 year or expiration of a short-term contract for less than 1 year, the retention of worker status is limited in time. **By implication**, it follows that in case of Article 7(3)(b), the legislator did not wish to limit the retention of worker status. The joint reading of paragraphs 3(b) and 3(c) of Article 7 indicates that a difference in treatment was envisaged that sets the completion of at least 1 year of employment as a threshold. Once the threshold and the rest of the conditions are met, the retention of worker status cannot be limited.

3. The jurisprudence of the Court of Justice

Although retention of worker status has not been one of the most litigated provisions relating to the free movement of workers, this issue has been examined by the Court in relation to claims to benefits and equal treatment with nationals of the host state. In such cases, holding EU worker status becomes important as it reduces substantially the capacity of the host Member State to deny benefits or to reserve them only for own nationals. This remains the case under the legal regime introduced by Directive 2004/38 since based on Article 24(2) of the directive workers and persons who retain such status may not be excluded from social assistance as opposed to economically inactive EU citizens who may have to wait until acquiring permanent residence in the host state before being entitled to equal treatment on the basis of EU law ([22]).

In one of its earliest cases on workers, the Court acknowledged that the concept of worker had a Community meaning and that the Treaty and its implementing legislation 'did not intend to restrict protection only to the worker in employment but tend logically to protect also the worker who, having left his job, is capable of taking another' ([23]). The case dealt with the meaning of the concept of 'wage-earner or assimilated worker' for the purposes of Regulation No 3 on social security for migrant workers, which was implementing Article 48 EEC (now Article 45 TFEU). The Court's overall position on retention of worker status is well summarised by its findings in the *Martinez Sala* case ([24]). The applicant, a Spanish national, resident in Germany for about 25 years had a patchy employment history with interruptions due to unemployment periods. She applied for a child benefit which was refused due to her lack of a residence permit and/or entitlement and lack of worker status. Although, the Court decided the case on the basis of the applicant's EU citizenship status, regarding her possible worker status it held that 'once the employment relationship has ended, the person concerned as a rule loses his status of worker, although that status may produce certain effects after the relationship has ended, and a person who is genuinely seeking work must also be classified as a worker' ([25]).

The idea that worker status may survive the end of an employment relationship has been confirmed several times in the case law. In *Lair* ([26]), the applicant, a bank clerk, was a French national residing in Germany who had a mixed employment record, consisting of periods of unemployment, retraining or brief employment. After embarking upon university studies in Roman and Germanic languages, Ms Lair applied for maintenance and study grants but was denied them due to her lack of worker status. The Court argued that 'the rights guaranteed to migrant workers do

([18]) Barnard, C. (2004), *The Substantive Law of the EU — The Four Freedoms*, Oxford University Press, p. 270.

([19]) Com (2001) 257 final, p. 12.

([20]) Council Doc 10572/02 p. 22 and Council Doc 6147/03 p. 19.

([21]) Com (2003) 199 final.

([22]) Minderhoud, P. (2013), Access to social assistance benefits for EU citizens in another Member State, in *Online Journal of Free Movement of Workers within the European Union*, No 6, pp. 26–33.

([23]) Case 75/63 *Hoekstra (Unger)*.

([24]) Case C-85/96 *Martinez Sala* [1998], ERC I-2691.

([25]) Case C-85/96 *Martinez Sala*, para. 32.

([26]) Case 39/86 *Lair* [1998], ECR I-3116.

not necessarily depend on the actual or continuing existence of an employment relationship' ([27]) and that persons who have been engaged in an effective and genuine activity as an employed person but who are no longer employed are nevertheless considered to be workers under certain provisions of Community law ([28]). However, the Court imposed an important limitation in respect of the retention of worker status in as much as it required the existence of some continuity between the former employment and the course of study 'unless the person has become involuntarily unemployed and is obliged by conditions on the job market to undertake occupational retraining in another field' ([29]). This approach has been confirmed in later cases, such as *Raulin* ([30]) or *Ninni-Orasche* ([31]) and is now codified by Directive 2004/38 in Article 7(3)(d).

Another category of cases examined by the Court, concerns former frontier workers ([32]) who claimed benefits from their former state of employment relying on the preservation of worker status. In cases such as *Meints* ([33]) or *Leclere* ([34]), the Court has decided that retention of worker status operates only regarding benefits relating to the prior existence of an employment relationship and to the applicant's objective status as worker. (Former) Article 48 EEC and (former) Regulation 1612/68 protect the worker against any discrimination affecting rights acquired during the former employment relationship but benefits relating to events occurring after the end of that relationship are excluded ([35]).

The Court has explained the privileged position of workers in contrast to first-time jobseekers or economically inactive citizens as relating to them having participated in the employment market of a Member State. As such, 'they have in principle established a sufficient link of integration with the society of that state, allowing them to benefit from the principle of equal treatment, as compared with respectively, national workers and resident workers. The link of integration arises, in particular, from the fact that, through the taxes which they pay in the host Member State by virtue of their employment there, migrant workers and frontier workers also contribute to the financing of the social policies of that State' ([36]). Yet, an aspect that remains unclear in the Court's case-law is for how long a person can retain worker status upon involuntary unemployment. In *Collins* ([37]) the Court has limited itself to arguing that there is no retention of worker status in case of an absence of 17 years from the host Member State as 'no link can be established between the activity and the search for another job more than 17 years after it came to an end' ([38]). It can be inferred from *Collins* that as long as the link to which the Court refers can be shown to exist, worker status may be retained. This interpretation would be in line with the manner in which the Court has interpreted the right of first-time jobseekers to remain in the host Member State and look for work. In *Antonissen* ([39]) the Court found that 6 months were an appropriate period of time to look for a job, after which the host state may require the person to leave. However, if the person could show that he was still looking for employment and had genuine chances of being engaged, he cannot be required to leave the territory of the host state ([40]). It can be argued that the condition of being duly registered with the employment office in order to retain worker status on the basis of Article 7(3)(b) of Directive 2004/38 captures well the Court's overall philosophy that retention of worker status is generally related to the person's willingness to continue to look for a job, formulated as early as the *Hoekstra* case and therefore, to continue to have links with the host State's labour market.

Finally, the Court has also shed light on the importance of involuntary unemployment for retention of worker status. As discussed previously, in the case that a person stops working in order to engage in university studies that have no connection with the former occupation, the Court has considered that such a person should not retain worker status and the advantages associated with it. The idea that voluntary unemployment does not deserve the same level of protection fits well with the Union's economic goals and the worker's privileged position in that system. In *Ninni-Orasche*, the Court of Justice has nuanced its position as to what constitutes involuntary unemployment by arguing that a person on a fixed-term contract may nevertheless be considered involuntarily unemployed at the end of that contract, despite its essentially temporary nature ([41]). The following circumstances were judged relevant: (a) practices relevant in the sector of economic activity;

([27]) *Lair*, para. 31.

([28]) *Lair*, para. 33.

([29]) *Lair*, para. 36.

([30]) Case C-357/89 *Raulin* [1992], ECR I-1027.

([31]) Case C-413/01 *Ninni-Orasche* [2003], ECR I-13187.

([32]) Under EU law, a frontier worker can be defined as someone who lives in one Member State and works in another, returning home at least once a week.

([33]) Case C-57/96 *Meints* [1997], ECR 1-6689. The applicant was a German national who had worked in agriculture in the Netherlands but became involuntarily unemployed. In the Netherlands, he applied for a benefit intended to compensate persons in his situation. His claim was rejected on the ground that he was not resident.

([34]) Case C-43/99 *Leclere* [2001,] ECR I-4265. The applicant was a former frontier worker residing in Luxembourg. As a result of an accident at work he was receiving an invalidity pension from Luxembourg, and he never returned to work. He claimed child benefits in Luxembourg for his child who had been born after he stopped working.

([35]) *Leclere*, para 59.

([36]) Case C-379/11 *Caves Krier Frères Sàrl* [2012].

([37]) Case C-138/02 *Collins* [2004], ECR I-2703.

([38]) *Collins*, para. 29.

([39]) Case C-292/89 *Antonissen* [1991], ECR I-745; see also case C-258/05 *Ioannidis* [2005], ECR I-8275.

([40]) *Antonissen*, para. 21.

([41]) Case C-413/01 *Ninni-Orasche* [2003], ECR I-13187 para. 39.

(b) the chances of finding employment in the sector which is not fixed-term; (c) whether there is an interest in entering into only a fixed-term employment relationship or (d) whether there is a possibility of renewing the contract of employment. The Court acknowledged that labour market conditions play a considerable part in the type of contract a person may be awarded in specific sectors and equally, that the worker may not have any bargaining power over the type and duration of contact he may conclude.

4. Retention of worker status in the 28 Member States

Article 7(3)(b) Directive 2004/38 has introduced clear limits to the possibility of retaining worker status: it requires the existence of an employment relationship of at least 1 year, involuntary unemployment and registration with an employment office as evidence of the EU citizen's intention to resume employment. As a result, its transposition has brought more clarity in relation to the conditions that must be met in order to retain worker status in several Member States (**Czech Republic, Luxembourg, Poland and Finland**). In other Member States, it has brought about a more restrictive regime that nevertheless remains within the parameters of the directive (**Belgium, Denmark, Latvia, Netherlands, and the United Kingdom**). In terms of how the Member States have transposed the provisions of Article 7(3)(b), one issue that remains pertinent concerns those Member States that have provided in their national implementing measures for retention of the right to reside but not for retention of worker status (**Belgium, Czech Republic, Germany, Ireland, Italy, Latvia, Hungary, Slovenia, Slovakia and Sweden**). This issue was first identified in the Commission's 2008 report on the application of Directive 2004/38, where the Commission pointed out that retention of the status of worker is a larger concept than retention of the right of residence. It argued 'Retention of a status of a worker has impact not only on the right of residence but also confers additional protection against expulsion, the possibility to acquire the right of permanent residence on favourable conditions and an unrestricted right of equal treatment' ([42]). At the opposite end of the spectrum are those Member States that have transposed verbatim Article 7(3)(b) and where this issue is not relevant (**Denmark, Estonia, Greece, Spain, Croatia, Cyprus, Malta, Netherlands, Austria and Finland**). **Latvia, Romania, and the UK** have transposed the provision in a manner consistent with the text of the directive.

([42]) Report from the Commission to the European Parliament and the Council on the application of 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, Com/2008/0840 final, para. 3.7.

A second issue concerning the national transposition of the directive's provisions on retention of worker status concerns their personal scope. Although Article 7(3) equally refers to the retention of the status of self-employed, not all Member States have transposed the provision as applying to both workers and self-employed persons ([43]). Problems in relation to retention of self-employed status have been reported in the United Kingdom and Ireland, where several court cases have dealt with this issue ([44]). On a positive note, it should be mentioned that in the majority of the Member States no differences in treatment between national and EU unemployed citizens were reported ([45]). When issues are mentioned, they are connected with, for example, an inadequate knowledge of the rules applicable to unemployed EU citizens (some municipalities in Denmark) or a general lack of knowledge about the benefits of being registered with an employment agency that affects both EU and national citizens (Hungary).

5. Registration requirements: registration with the relevant employment office

Most Member States have in their national legislation provisions detailing the requirement of being duly registered with the relevant employment office. This does not seem to be the case in **Ireland**, where the term 'duly registered with the employment office' is not defined in the national legislation and has not been the subject of interpretation in any case-law. However, generally a registration with FÁS, the national training and employment agency, is required in order for a worker to fulfil the 'due registration' requirement. In **Germany**, the relevant issue is not whether one is registered with the employment office, which is assessed to be a purely formal requirement, but whether one is involuntarily unemployed.

The remaining Member States have detailed provisions regarding the steps a person must take and the conditions they must fulfil in order to be registered with an employment office. These provisions differ from state to state, but, at a minimum, they can be said to require that the person be (1) unemployed; (2) able, available and/or willing to work; (3) be actively seeking

([43]) The following Member States have transposed the provisions as applying to both workers and self-employed persons: **Denmark, Germany, Spain, Croatia, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Slovakia, Finland and Sweden**.

([44]) For Ireland see, *Solovastru and Anor v. The Minister for Social protection and Ors* [2011] IEHC 532; *Galian Genov, Florae Gusa v. Minister for Social Protection and Ors* [2013] IEHC 340. For United Kingdom see, *R (Tilianu) v Secretary of State for Work and Pensions* [2010] EWCA Civ 1397.

([45]) The replies from: **Bulgaria, Czech Republic, Ireland, Greece, France, Croatia, Italy, Cyprus, Hungary, Malta, Netherlands, Austria, Poland, Portugal, Romania, Slovakia, Sweden, and the UK**.

work and (4) enter into an agreement with the job centre or agree to a professional plan/job plan listing the steps to be taken towards finding a new job. This agreement or job plan usually details the obligations that a jobseeker has in relation to making job applications, attending courses, vocational training and other measures aiming to facilitate his/her reintegration in the labour market. Moreover, based on the national replies it is possible to assert that jobseekers have a general obligation to provide the employment office with relevant information when asked to do so.

In addition to these general requirements for registration, residence-related conditions are present in **Belgium** (residence in the region), **Bulgaria, Cyprus and Poland**. For example, in **Poland**, an unemployed person who leaves Poland for a period not longer than 10 days or is in any other situation which makes it impossible to be ready to take up employment, must inform the relevant employment office of his unavailability in order to avoid penalties. He is, however, entitled to report only 10 days during a calendar year of such non-readiness to take up employment. An unemployed person, who acquires in Poland the right to unemployment benefits and departs to another Member State in order to seek employment, shall retain the right to unemployment benefit according to provisions on coordination of social security systems. In **Cyprus**, if the unemployed person is no longer resident there, they will no longer be considered as duly registered. In **Denmark**, there is an implied residence requirement since the person must be available to the Danish labour market and job applications submitted abroad are not taken into consideration ([46]).

In most states, failure to comply with the requirements of the employment office or rejection of a job offer will have consequences in terms of one's registration status and/or access to unemployment benefits. For example, in **France** two refusals to accept reasonable job offers may lead to deregistration with the employment office. In **Cyprus**, two refusals to take on employment offers will also end registration as a jobseeker with the Public Employment Office. In **Bulgaria**, refusal to take on a suitable job will result in ending the registration as a jobseeker ([47]). In **Denmark** and **Finland**, failure to fulfil the conditions imposed by the job centre may equally lead to the termination of the registration as a jobseeker. Denmark requires that the person confirm his/her status as jobseeker as a minimum once every 7 days and submit a minimum number of job applications. **Greece** requires a systematic refusal of jobs available and suitable (three times) before the person is considered as no longer duly registered with the employment office.

([46]) Beskæftigelsesudvalget 2011–12, BEU alm. del, endeligt svar på spørgsmål 432, 12 October 2012. Reply of the Minister of Employment to questions in Parliament.

([47]) Article 20(4)(4) of the Law on Employment Promotion.

It is important to note that in most states where refusal of a job offer will have repercussions on registration with the employment office or entitlement to benefits, usually the refusal must relate to a job that is suitable/adequate/reasonable (**Belgium, Germany, Estonia, Greece, France, Italy, Cyprus, Latvia, Lithuania, Malta, Netherlands, Austria, Romania, Slovenia and Sweden**). The criteria used to assess whether a job is suitable or acceptable usually relate to the person's education and qualifications, level of salary or travel time. For example, in **Slovenia**, a difference is made between appropriate and suitable employment based on the person's level of education. Suitable employment relates to a job that requires one level lower than the person's education ([48]). In the **UK**, this issue relates to the requirements of actively seeking work and having a reasonable prospect of securing employment. Although an applicant must be willing and able to take up employment at least for 40 hours per week, he may restrict his availability for employment by placing restrictions on the nature of the employment for which he is available (including rate of remuneration) and the locality or localities within which he is available, providing he can show that he has 'reasonable prospects of securing employment'. After a period of several months of unemployment, the applicant may have to broaden the types of jobs that he is applying for, and also undertake some work training or placements.

In terms of registration status, in the majority of the Member States, there are possibilities to terminate the registration with the employment office (**Bulgaria, Czech Republic, Denmark, Germany, Estonia, Greece, France, Italy, Lithuania, Austria, Poland, Slovenia, Slovakia and Finland**). However, there are several states where it is not possible to terminate the registration status of an unemployed person without their consent, even if they fail to meet the conditions of the job plan or refuses to take up jobs. In these states, sanctions can be applied in relation to entitlement to unemployment benefits and other services. For example, in the **Netherlands**, only the unemployed person can ask to be registered as a jobseeker or have this status prolonged. The relevant authority (UWVWerk) cannot delete the registration even if the person refuses to accept offers of employment or fails to apply for jobs. Although such behaviour will lead to sanctions in relation to unemployment benefits and social assistance benefits, the registration as a jobseeker is unaffected. In **Luxembourg**, the refusal to take up a job may lead to the removal of unemployment benefits or suspension of the file of the unemployed person and loss of access to services provided by the employment office (ADEM) but, in principle, it will not lead to the conclusion that the person is no longer duly registered. A similar situation exists in **Portugal**, where the cancellation of the registration with

([48]) Article 8(1) of Labour Market Regulation Act (Official Gazette of the Republic of Slovenia No 80/2010, 40/2012, 21/2013).

the employment office is not foreseen by the applicable legislation, but the refusal to take on jobs may be relevant for the suspension of the unemployment benefit. **Croatia, Latvia, Malta and Romania** stand out because they have a system that accomodates two categories of unemployed persons: jobseekers entitled to unemployment benefits and 'other' jobseekers. An unemployed person who cannot be considered to be actively seeking work can retain his registration with the employment office under the category of 'other' jobseekers, but his right to unemployment benefits is terminated.

In fact, several Member States link the requirement of being registered with the employment office with the right to obtain unemployment benefits. This is applicable to both national and EU unemployed persons. This seems to be the case in **Belgium, Czech Republic, Denmark, Germany, Croatia, Cyprus, Hungary, Malta, Netherlands, Austria, Portugal, Finland and the United Kingdom**. Thus, failure to fulfil one's obligations as a jobseeker will have an impact upon one's entitlement to unemployment benefits.

6. Voluntary and involuntary unemployment

As discussed in relation to the Court of Justice case-law on retention of worker status, the difference between voluntary and involuntary unemployment is a relevant aspect of Member States' capacity to find that a person does not fall under the provisions allowing for retention of worker status. In general, the Member States make a distinction between voluntary and involuntary unemployment (**Belgium, Denmark, Germany, France, Croatia, Luxembourg, Netherlands, Portugal, Slovenia, Finland and Sweden**). Although it is difficult to speak of a common definition of voluntary unemployment, several common factors seem to play a part in the majority of the national provisions addressing this issue: (1) the unemployed person leaves his/her job out of own volition, (2) his/her conduct is the cause of the termination of employment, and in some cases (3) the employment comes to an end due to mutual agreement.

In terms of how to asses involuntary unemployment, national provisions addressing this issue offer a variety of answers. For example, in **Belgium**, the involuntary character of unemployment is checked based on the reason stated for the end of the employment relationship in the form given to the worker by the employer at the end of the employment relationship. In **Croatia**, voluntary or involuntary unemployment is determined based on provisions found in the Labour Act and the Civil Servants Act. Involuntary unemployment occurs (1) if employment ends because the need to perform certain work ceases due to economic, technological or organisational reasons ('dismissal due to business reasons') and (2) if the employee is not capable of fulfilling his or her employment-related duties because of some permanent characteristics or abilities ('dismissal due to personal reasons'). The **Danish** rules provide that the assessment of the involuntary character of unemployment needs to be made on a case-by-case basis in order to ascertain that the circumstances which objectively speaking are beyond that person's control resulted in the person concerned losing their work ([49]).

The **German** rules can be described as more complex since the involuntary character of unemployment will be assessed in relation to its origin (as a rule, it should not be imputable to the unemployed person) and to its continuation. Unemployment will be assumed to be involuntary if the jobseeker does not deny taking on another reasonable job or takes all necessary measures to end their unemployment. If they consistently refuse to follow the instructions of the employment office, the involuntary character of their unemployment would not be confirmed, which would then end their prolonged worker status. A similar situation can be noted in **Finland**, where a person who fails their obligations as jobseeker will be considered voluntarily unemployed.

In the **Netherlands**, the rules stipulate when a person is not involuntarily unemployed (1) they are fired because of culpable behaviour; (2) they do not appeal against summary dismissal (ontslag op staande voet); (3) they quit the job; (4) they are not registered as jobseeker at the UWV Werkbedrijf and (5) they have refused to accept more than once suitable work ([50]).

The **Portuguese** rules in relation to the involuntary character of the employment are also quite detailed. Unemployment is involuntary when the work contract expires or terminates: (i) on the initiative of the employer, unless the dismissal is grounded on the breach of the employer's obligations ('*justa causa*') or (ii) if the dismissal by the employer did not respect the formalities foreseen in the Labour Code; (ii) on the initiative of the employer based on the breach of the employee's obligations ('*justa causa*'); (iii) based on a revocation agreement between the employer and the employee concluded ([51]).

The difference between voluntary and involuntary unemployment is not relevant in several Member States. For example, **Bulgaria** does not require unemployment to be involuntary in order to benefit from retention of worker status. In the **Czech Republic, Malta** and **Slovakia** being registered with the employment office leads to an automatic assumption

([49]) Guidance on Residence under the EU Residence Order to the Regional State Administration para. 1.1.2.2.

([50]) Vc2000 B10.2.2 new.

([51]) Articles 9 and 10 of Decree-Law 220/2006, as amended by Decree-Law 64/2012.

that unemployment is involuntary. In **Italy**, there is no difference between voluntary and involuntary unemployment as long as the person has met the conditions of registration with the employment office. **Hungarian** law does not define involuntary unemployment, while the Unemployment Act uses a neutral term, 'job-seeking person', and no consequences are attached to the reason for unemployment ([52]). Access to the services of the employment agency and to benefits does not depend upon the voluntary or involuntary character of the unemployment; it depends upon the person having been previously employed and his/her cooperation with the employment agency. **Austria** is another interesting case because there are no clear guidelines as to how to record involuntary unemployment. According to Section 51(3) SRA the Federal Minister of the Interior is authorised to determine in an implementation order how the involuntary unemployment is to be confirmed. No such implementation order has been issued so far and according to information given by the Federal Ministry of the Interior, no such implementation order is planned. The migration authorities have been instructed by the Federal Ministry of the Interior to regard a worker, as 'in duly recorded involuntary unemployment' if they are registered at the employment agency. No further certificates are demanded ([53]). The employment agencies are ready to certify that a person is recorded as unemployed or is receiving unemployment benefits if asked to do so, but in practice, there are no such requests ([54]).

Besides the requirements of being involuntarily unemployed and registered with the relevant employment office, in the majority of the Member States no extra conditions are attached to retention of EU worker status, except for those expressly mentioned in the text of Article 7(3)(b) of Directive 2004/38. Time limits in relation to retention of worker status are not mentioned in any state. In Denmark this issue has been expressly raised in Parliament. The Danish government has stated that it is not possible to provide any statistical information on the amount of time that passes before an EU citizen loses his status after as EU worker after having become unemployed ([55]).

There is little information available on what happens to a person who no longer retains worker status. Although national legislations provide that non-compliance with the instructions of the employment office or refusal to accept job offers may have the consequence that the person is no longer registered with the employment office, they do not expressly regulate what happens after the person no longer fulfils the condition of registration in terms of retention of EU worker status and of the right of residence. For example, in Finland, information provided by the the Ministry of Interior suggests that decisions as to termination of EU~~t~~ worker status will be taken on a case-by-case basis, although there is no clarity as to how to assess this. There is no legal, judicial or administrative practice on this. Furthermore, there are no legislation or administrative guidelines or practices clarifying the legal situation of persons who are no longer regarded to retain their worker status. Regarding social benefits, persons who are no longer regarded to retain their worker status fall outside the scope of the social security system unless they meet the preconditions for being registered on the basis of their residence in Finland. In **Lithuania**, the legal situation of the person will probably depend on whether the residence certificate is still valid or not. In case of validity of the residence certificate, the authorities will not likely question the status. As a rule, the certificate is valid for 5 years and it is valid until it expires or is revoked; revocation is possible on the ground that the person no longer meets the conditions for residence established by the law, but there are exceptions for (1) persons who have concluded labour contracts and are about to start working, or (2) submit documents that they will start self-employment activity, or (3) are registered at the labour exchange office as an unemployed person, are looking for a job and have real chances to get employed. These two national examples suggest that the national authorities enjoy quite some leeway in deciding what consequnces result for a person who no longer retains EU worker status.

7. Conclusions

This article has analysed the scope and meaning of retention of EU worker status in the circumstances prescribed by Article 7(3)(b) of Directive 2004/38, namely, where the person has been employed for longer than 1 year, is involuntarily unemployed and has registered with the relevant employment office. In the system envisaged by Article 7(3) of Directive 2004/38, employment relationships shorter than 1 year receive less protection since the possibility to retain worker status is limited in time. In case of employment relationships longer than 1 year, the possibility to limit retention of worker status is achieved not through time limits but through the insertion of the conditions that the person must register with the relevant employment office as a jobseeker and that unemployment must be involuntary. This approach is in line with the Court's position and the emphasis it has placed on the person continuing to seek work and maintaining a link with the labour market of the host state. The recognition that worker status may be retained stems from the idea that EU nationals may not be willing to exercise

([52]) The Hungarian labour Code differentiates between the termination of the labour relation or contract at the initiative of the employer or of the employee but this has implications only in relation to entitlement to severance pay/ redundancy payment.

([53]) Information given by the Federal Ministry of the Interior via e-mail, 7 June 2013.

([54]) Information given by the employment agency Salzburg via e-mail, 3 June 2013.

([55]) Udvalget for Udlændinge- og Integrationspolitik 2009-10, UUI Alm. del, endeligt svar på spørgsmål 230, 24 June 2010.

free movement rights as workers should they not be entitled to protection in cases of involuntary unemployment. Bearing in mind that the Union's objective is to ensure that all obstacles to the exercise of the free movement rights of workers are removed, affording protection to this category of persons is justifiable. It is important to underline that the retention of worker status provided for under Article 7(3)(b) Directive 2004/38 is conditional and therefore already limited to those former EU workers who fulfil the requirements set by the directive.

At the Member State level, obstacles continue to exist. In this respect, the failure of some Member States to transpose correctly Article 7(3) of Directive 2004/38 means that the problems identified by the Commission in its 2008 report are still relevant. Retention of a right to reside for longer than 3 months is not conceptually the same thing as retention of EU worker status, which has implications in terms of security of residence, equal treatment in relation to social rights and acquisition of the right to permanent residence. In all Member States there are registration requirements and conditions that a person must meet in order to be regsitered with the relevant employment office. It is important to stress that in the majority of the Member States, this is not a purely formal obligation and that failure to meet the conditions set by the employment office will have an impact on registration status and/or on entitlement to benefits in the host state. There are important differences in what counts as a failure to comply with the conditions imposed by the employment office. However, based on the national implementation of Article 7(3), it is possible to conclude that the Member States enjoy sufficient flexibility in deciding when a person is no longer seen as registered with the employment office or no longer involuntarily unemployed.

The impact of differential social security systems and taxation on the welfare of frontier workers in the EU

Irina Burlacu and Cathal O'Donoghue

1. Introduction

More than a half of the EU population (60 %) considers free movement is one of the biggest achievements since the foundation of the European Union (Eurobarometer, 2013). Yet, mobility for work is low within the European Union, compared to the United States or Canada (Bonin, 2008). Reports on labour mobility in the EU indicate a series of obstacles individuals face while working and living in different countries throughout their career. This paper focuses on the barriers related to the differences in social security and taxation systems. On one hand, we are focusing on the impact of social security coordination regulation (Regulation (EC) 883/2004) on the welfare of frontier workers. On the other hand, we investigate the impact of the national welfare state on the welfare of frontier workers, by examining the welfare state objectives. It summarises our work based on results of three papers in Burlacu and O'Donoghue (2012, 2013a, 2013b).

Barr (2004) identifies a series of objectives of the welfare state: administrative feasibility, efficiency, equity and equality. From our perspective, equity and equality are the most important objectives and performance indicators on the impact of the welfare state on the welfare and protection of the individuals; of which, income smoothing, vertical redistribution and horizontal redistribution are the primary objectives we are focusing on.

Frontier workers are individuals who commute daily/weekly/monthly to another country for work (European Parliament, 1997). In the European Union, there are up to 10 million citizens commuting to various EU countries for work, of which up to 1 million are cross-border workers. Frontier mobility accounted for 780 000 people, primarily taking place in the centre of Europe, with increased commuting rates between Baltic and Nordic states (Nerb, G. et al., 2009). Frontier workers are representative for our research question because they interact systematically with social and fiscal policy rules in the country of employment and of residence and can show us the impact of mobility on their income.

Scientific reports illustrate a reduced level of contentment of people moving for work within the EU (Bonin et al., 2008), due to discrepancies in social and fiscal systems. For example, the Irish frontier workers in Northern Ireland state that 'there exist two completely different regimes, maternity and unemployment benefits are much higher in Ireland than in Northern Ireland'; 'Cross-border commuters are taxed on both sides of the border and have to complete two tax returns (Ireland–Northern Ireland); 'The legal framework is still not well known by the workers and employers (Slovenia–Italy)'; 'The region in which cross-border workers have to pay taxes only in their home country extends just 10 km on both sides of the border — a ridiculously outdated small strip. This leads to high taxation and hinders cross-border mobility (Spain–France)'. The wide variation of fiscal rules and social benefits schemes procedures present administrative challenges not only for frontier workers, but also for mobile researchers (Berghman et al., 2010).

The research question is to what extent the difference in social and fiscal systems and the difference in welfare objectives leads to different outcomes for the welfare of domestic and frontier workers. Cross-border workers are part of 'new European migrations, who affect Europe', but 'how' needs further exploration (King, R., 2002; Perkman, M., 2003). Much of the research in this area thus focuses on legal aspects of mobile earners and their social entitlements (European Commission, 2002; Mei, 2003; Weerepas and Pennings, 2006; Dougan, 2009; Pennings, 2013). This article aims to approach frontier work mobility from an applied social policy angle, by investigating the impact of both social security and taxes on the income of active earners and pensioners. Is there any difference in social benefit when a domestic earner becomes unemployed and compared to a frontier worker? Does working across the border lead to lower pensions at retirement? Are the pension replacement rates lower or higher for mobile pensioners, compared to domestic pensioners? Income smoothing is an objective that the welfare state aims to cover in case of unexpected income fall (e.g. retirement, unemployment). Vertical redistribution indicates how much income has been redistributed from rich to poor and horizontal redistribution shows the level of redistribution among families with different structures.

Particularly, we examine the case of Belgium and Luxembourg due to their long tradition of cross-border cooperation and close similarity in welfare system organisation. The welfare of active and retired individuals is examined in two separate models. We use tax-benefit microsimulation because it allowed us to compensate for insufficient or separated data on social

security and taxation records on frontier workers. The results are based on three papers, quoted throughout the study.

The paper is structured in five parts. It starts with an introduction, followed by the theoretical framework on what, how and why the objectives of the welfare states are important to mobility. Section 3 explains how the welfare objectives are measured and the results are presented in Section 4, followed by Section 5 with the main conclusions.

2. The role of the national legislation and coordination regulation in mobility of labour

In this section, the importance of the welfare state and its objectives, along with the Regulation (EC) 883/2004 are discussed.

Free movement of workers is regulated by a set of legal instruments that derive from social security and labour law, called 'Social security coordination'. Its core objective is to promote free movement for work (Pennings, 2009), by protecting mobile earners and their families against any discrimination based on nationality and place of work. A schematic description of how its main principles work can be found in Burlacu and O'Donoghue (2013a) and Burlacu and O'Donoghue (2013b). Regulation 883/2004 has the power to overrule national law; on the other hand, the national social security legislation determines the amount and type of benefits mobile earners are entitled to. The latter can have a different philosophy of functioning and organisation. Some countries rely more on social insurance contributions for social benefits financing, others rather rely on taxes. The Member States have different views on retirement age, on child age, etc. The European Union is expanding and the variation between the systems is becoming increasingly large. Some countries favour certain types of credits and others deductions. This has implications for those earners who operate with these systems in different points in their career, as they have to pay taxes and insurance contributions in different countries.

The historians of the European social policy defined throughout time welfare state objectives that developed as a mechanism against social risks and uncertainty (Flora, 1986; Esping-Andersen, 1990; Ferrera and Rhodes, 2002). This particularly referred to the classical condition when the welfare systems are primarily designed for the needs of the state or region to which the system applies. Yet in the 'age of migration' (Castles, 2009), when labour markets become increasingly globalised, cross-border working and mobility between jurisdiction place pressures on the functioning and flexibility of these systems in relation to the portability and mobility of social benefits across different types of welfare states. That also means that a shift or change in objectives is taking place due to the interaction of individuals with more welfare systems that are differently organised, which produces different outcomes. Pension systems were designed in a time characterised by stable labour markets and limited cross-border capital mobility. Nowadays these have become more complex than 30 years ago and the demarcation between pension schemes and the application of different pieces of the EU legislation appears increasingly difficult (Ghailani et al., 2010).

A widespread classification of welfare state objectives is offered by Barr (2004), according to whom each welfare state follows certain objectives or functions, such as: to increase social cohesion, to fight poverty, to strengthen social inclusion and to reduce inequality. To examine how cross-border work impacts their income we have examined the case of active earners, taking the examples of short-term benefits, such as unemployment, and family benefits; and the case of pensioners, considering a life-earnings trajectory and investigating long-term social benefits, such as pensions and survivors' pension.

3. Applied methodology of tax-benefit micro-simulation and hypothetical data

In this analysis we want to understand how different social and tax policies affect frontier workers' income and we use micro-simulation for that. Micro-simulation modelling of taxes and social security benefits is the common and main methodological framework of all three papers. A tax-benefit microsimulation model allows us to simulate households' income and its recalculation under various scenarios (Immervol and O'Donoghue, 2002). It is the tool that permits the simultaneous application of provisions from national and supranational legislation in the social security field and from rules in personal income taxes. It enables the impact analysis of these rules on domestic and frontier earners, as it envisions both national and cross-border/supranational rules. Moreover, it allows for a wide range of benefits and types of families, both using micro and synthetic data. This section discusses individually these aspects.

It is important to clarify what dimensions are used when explaining the impact of welfare objectives on the welfare of mobile earners. We micro-simulate two separate models that require different measurement approaches: active earners and pensioners. These models include the comparison between domestic versus frontier workers, in the case of the active earner model, and between domestic versus former frontier workers, in the case of the pensioners' model. In this paper, a **Luxembourgish frontier earner** is someone who is commuting daily to Belgium for work and

resides in Luxembourg. A **Luxembourgish mobile pensioner** is someone who has been working and living for half of career (20 years) and commuting to Belgium in the second half of career (20 years), while still residing in Luxembourg. Similarly this is the case for the Belgian earners. A two-by-two comparison is analysed in a two-country setting.

Active Earners Model	Pension Model
Luxembourgish domestic earners	Luxembourgish domestic pensioners
Luxembourgish frontier earners	Luxembourgish mobile pensioners
Belgian domestic earners	Belgian domestic pensioners
Belgian frontier earners	Belgian mobile pensioners

We want to understand the discrepancy in incomes among various types of earners, with respect to whom the frontier workers are to be equal in terms of welfare and equal treatment? to the earners in their country of residence? to the earners in the country of employment? or to other frontier workers? This question is extensively discussed in Burlacu and O'Donoghue (2013b) and we approach this question in the result and conclusion section.

Income or consumption smoothing, as later the author defines it, is the capacity of the social scheme to replace the income that is lost due to unpredicted health condition, unemployment or retirement. In the active earners model, this objective refers to the typical characteristic event that might occur such as unemployment, while in the pension model this objective rather describes the extent to which the pension income replaces the accumulated earnings at retirement, as illustrated in the scheme below.

Table 1. Welfare objectives by models and used formulas

	Objective	Measure	Formula
Active earners model	Income smoothing	Replacement rates, short-term unemployment Replacement rates, long-term unemployment	Ratio of unemployment benefit and disposable income Ratio of unemployment benefit and disposable income
	Vertical redistribution	Redistribution indicator	Ratio of disposable income and gross income
	Horizontal redistribution	Equivalence scales	Ratio of disposable income of two-earner couple and single earner
Pension model	Income smoothing	Pension short-term replacement rates Pension long-term replacement rates of pension	Ratio of pension income and last earnings Ratio of pension income and average earnings
	Vertical redistribution	Pension benefit effectiveness	Ratio of pension income and social assistance eligibility threshold, single earner
	Horizontal redistribution	Equivalence scales	Ratio of male pension income and female pension income

It is argued that there is no such thing as the replacement rate in any country (Vliet van, O., Caminada, K., 2012), because this is calculated depending on the type of household, employee, sector of industry, wage and salary group and the reasons for not working. Thus, the rates need to correspond to the specific personal and family characteristics of the unemployed, their previous history of work and unemployment; most importantly in our case, it depends on the different structures and entitlements of unemployment insurance and social assistance systems in each country and the ways in which these systems interact with tax systems.

To cover these aspects the following welfare state objectives have been examined: income smoothing in case of unemployment, vertical and horizontal redistribution. In Burlacu and O'Donoghue, (2013b) we refer to the close similarity in employees' contributions amounts (7.5% in Belgium and 8% in Luxembourg). Also, we discuss the particularity of Luxembourgish unemployment benefit (which is taxable and is paid as a special solidarity tax of 2.5% of salary). In our calculations, both social insurance contributions in Belgium and in Luxembourg are first subtracted from gross income, and when the taxable income has been obtained, the unemployment insurance premiums are subtracted, to insure comparability. Earners refer to average earners in 'active earner model' and low, average and high income earners in 'pension model'. No particular industry was selected. The recipient either receives social assistance or unemployment benefit, in the first model. In the case of calculations for pensioners, they are entitled to social assistance and minimum pension, which plays an important role in the short- and long-term replacement rate.

Vertical redistribution for active earners consists of a redistribution indicator that is calculated to show the differences in disposable and market income. For a better understanding of the policy effect on income, we calculate the budget constraints for different types of families, which provide information on disposable income compared to the gross income for different types of earners.

Vertical redistribution for pensioners is calculated based on gross pension income only and does not refer to a set of redistribution indicators as it would not have been possible, because of lack of disposable income data. Instead, it refers to another indicator that would suggest the extent to which the pensioners are likely to be seeking social assistance with the pension they have. The 'pension benefit effectiveness' is the ratio of gross pension income and the poverty threshold, which in this case is the means-test income of being eligible for social assistance benefits. Thus, a threshold of EUR 21 306 for Luxembourg and EUR 15 060 in Belgium is considered, for the policy year 2011.

Horizontal redistribution in both models is based on equivalence scales. The difference is that the pension model shows equivalence scales by degrees of education, while the active earners are not classified by education. For final results, we rely on averages only. The comparison categories also vary. The 'equivalized disposable income' is deducted by computing the overall income of the households after taxes divided by the number of members in the household (Eurostat definition). The disposable income of a single active earner is compared to the disposable income of a two earners couple. In the second model, the pension income of male retirees is compared to the pension income of female pensioners.

The calculations of active and pension models are not comparable. For instance, short-term replacement rates for active earners is the ratio between short-term unemployment benefit and disposable income, while short-term replacement rates for pensioners model is the ratio between pension benefit and last earnings. To neutralise the differences in measures, a Lickert scale is applied on the range of indicators of both models. The scale ranges from 1 to 7, where 1 indicates lowest scores for the performance of a certain welfare objective and 7 highest scores, as follows:

1. Lowest scores of objective
2. Lower scores of objective
3. Low scores of objective
4. Average scores of objective
5. High scores of objective
6. Higher scores of objective
7. Highest scores of objective

Each indicator is assigned values on the Lickert scale, Table 2 explains the numerical values that stand behind each grade. It is the key table that indicates the performance of the welfare state relative to certain objectives. Further on, the operationalisation of each indicator will be discussed.

Table 2. Measurements of welfare state objectives by models

Type of welfare objective	Micro-simulation model	
	Active earners	Pensioners
Income smoothing	**01a.** Short-term unemployment benefit replacement rates: (relative to disposable income) **1 –** 54% or lower **2 –** 55–59% **3 –** 60–64% **4 –** 65–69% **5 –** 70–74% **6 –** 75–79% **7 –** 80% or higher	**01b.** Short-term pension replacement rate: (relative to last pension) **1 –** 49% or lower **2 –** 50–54% **3 –** 55–59% **4 –** 60–64% **5 –** 65–69% **6 –** 70–74% **7 –** 75–80% or higher
	02a. Long-term unemployment benefits replacement rate: (relative to disposable income) **1 –** 39% or lower **2 –** 40–49% **3 –** 50–54% **4 –** 55–59% **5 –** 60–64% **6 –** 65–69% **7 –** 70% or higher	**02b.** Long-term pension replacement rate: (relative to average wage) **1 –** 69% or lower **2 –** 70–79% **3 –** 80–84% **4 –** 85–89% **5 –** 90–94% **6 –** 95–99% **7 –** 100% or higher
Vertical redistribution	**03a.** Redistribution indicator scale: (from Table 5) **1 –** 0.69 and lower **2 –** 0.70–0.79 **3 –** 0.80–0.84 **4 –** 0.85–0.89 **5 –** 0.90–0.94 **6 –** 0.95–1 **7 –** 1.1 or higher	**03b.** Pension benefit effectiveness: (social assistance benefit) **1 –** 0.4 and lower **2 –** 0.5–0.99 **3 –** 1–1.4 **4 –** 1.5–1.9 **5 –** 2.0–2.4 **6 –** 2.5–3 **7 –** 3.1 or higher
Horizontal redistribution	**04a.** Equivalence scales for two earner couple: (modified 'OECD' eq. scales) **1 –** 0.5 and lower **2 –** 0.6–0.8 **3 –** 0.9–1 **4 –** 1.1–1.2 **5 –** 1.3–1.4 **6 –** 1.5–1.6 **7 –** 1.7 or higher	**04b.** Equivalence scales for a single earner: (comparing the eq. scales for males and females) **1 –** 0.8 and lower **2 –** 0.9–1 **3 –** 1.1–1.3 **4 –** 1.4–1.9 **5 –** 2.0–2.3 **6 –** 2.4–2.6 **7 –** 2.7 or higher

Short-term replacement rate, the objective 01a, relies on the exhaustive studies in the field on unemployment replacement rate (Vliet van, O., Caminada, K., 2012) for average single earners. It indicates that from 1979 to 2009 the mean of the net replacement rate across 34 countries did not vary over time, although a significant retrenchment in benefit generosity can be observed in the majority of the countries since 1991. According to the authors, the average net replacement rate is 53% (based on 33 countries). According to this dataset: 17–22% are the lowest replacement rates and 70–84% are the highest rates, where Luxembourg belongs to the high replacement rate countries with 84% of replacement rate for single average earners and Belgium to the average category replacement rates, with 59%.

In the case of Objective 1b, we use MacDonald and Moore's (2011) 'rule of thumb' by which the pensioners with gross replacement rates of 70–80% are able to continue their standard of living in retirement. This rule refers to the average earners, and whatever comes above 80% will be considered as very high replacement rates, the range between 60%–70% will be considered average replacements and if the scores are lower than 60% then the rates correspond to lower or lowest. A 100% replacement rate on pension is not the objective of the welfare state; otherwise individuals might prefer to have an early retirement since their out-of-work income will be equal to their in-work income.

Long-term replacement rate, objective 02a shows the ratio between long-term unemployment benefit and disposable income. It corresponds to the long-term unemployment replacement rates at national level, 65% for Luxembourg and 57% for Belgium. While in objective 2b, the benefit amount is relative to the average wage. When the benefit scores 100% it means that its amount equals the average wage. A maximum pension in Luxembourg is 165% of the average wage, in Belgium it is 120%, these are our references for the highest grade.

Vertical redistribution indicators, objective 03a is a set of indices suggesting that any score above one means that frontier workers have higher redistribution than domestic workers. A score that equals one stands for equal redistribution and equal welfare objective achievement and a score below one means that frontier workers have lower redistribution than domestic workers, or that the this welfare objective is better achieved for domestic workers rather than frontier workers. Objective 3b or **pension benefit effectiveness** is a measure of benefit effectiveness relative to the social assistance threshold. A ratio of one means that the pension income equals the social assistance benefit threshold, thus the pensioner has low income.

Equivalence scales, objective 4a refer to two earner couples, to simplify the use of more comparative groups. According to the OECD modified scale, 0.7 stands for the household head, and 0.5 for the second spouse, thus a scale of 1.2 is a reference for the highest equivalence for 2 earner couple. In 4b, the **equivalence scales** for pensioners stand for comparison of pension income between different types of pensioners; for example, those who have been unemployed versus those who were never unemployed, those who had children versus those who did not, widowers versus singles, male pension versus female. Considering that the structural mechanisms of the European pension systems can lead to gender discrimination (Leitner, 2001), we choose the latter example for our analysis. The author argues that only a few countries have additionally established universal pension schemes based on residence instead of employment or family work.

4. Results

The below-presented results are focused on these two dimensions and an additional dimension discusses the overall policy implications of the results. As the calculations took place on two different tax-benefit models, the results are displayed in two dimensions referring to different age categories and employment statuses: active earners and pensioners.

4.1. Active earners model

The analysis focuses on the active wage earners and associated social risk issues that might arise: due unemployment, childcare costs and poverty. Table 3 indicates the performance scores of three objectives: income smoothing, for short- and long-term unemployment; redistribution from rich to poor earner, vertical; and redistribution between less to more numerous families, or other types of families, equivalence scales and horizontal redistribution.

Each column helps in understanding better the objective performance, depending on the location.

In 01, the standard replacement rate for short-term unemployment benefit is 80% for Luxembourg and 60% for Belgium. This suggests that even if the national legislation of residence country sets lower limits for a benefit than in the country of employment (80% in Luxembourg to 60% in Belgium), higher income earned in the country of employment will overrule the ceiling and will remain constant for earners with higher income.

Table 3. Welfare state objectives on Belgian and Luxembourgish, active earners

	Income smoothing (*)		Vertical redistribution (**)	Horizontal redistribution (***)
	Short 01	Long 02	03	04
Belgian domestic workers	60 (60% AW) 44 (160% AW)	53.4 (60% AW) 40 (160% AW)	1.29	1.72
Belgian frontier workers	60 (60% AW) 60 (160% AW)	53.4 (60% AW) 47 (160% AW)		1.81
Luxembourgish domestic workers	80 (60% AW) 80 (160% AW)	70 (60% AW) 57 (160% AW)	0.78	1.69
Luxembourgish frontier workers	80 (60% AW) 60 (160% AW)	70 (60% AW) 49 (160% AW)		1.62

(*) Calculated as the ratio between short-term unemployment benefit and disposable income (01); and ratio between long-term unemployment benefit and disposable income (02).

(**) Calculated generally as the ratio between the disposable income and the market income, called redistribution indicator then the indicator of domestic earners is divided by the indicator of frontier earners.

(***) Calculated as the ratio between the disposable income of single earner versus the disposable income of 2 earner couples.

The higher the income, the lower the replacement rates are, as the benefit is limited by the amount of previous earnings. The rates vary when the salary reaches 160% of average wage (AW). At this level, a Belgian frontier worker has the same replacement rate of 60%. We can conclude that the income that Belgian frontier workers earned in Luxembourg is sufficient to maintain the same benefit level even at 160% AW.

However, this is not the case for the Luxembourgish frontier workers, who face a drop of 20% at the level of 160% AW. Thus, if the ceiling for unemployment benefit is higher in the country of residence, and lower in the country of employment, then high income earners face a drop in their welfare. The differences between the ceilings play an important role for the high income earners, in this case.

The ceilings also play an important role not only in the context of being mobile or not, but also in the case of variation between income groups. The Belgian high income domestic workers have, with 16%, lower replacement rates than the low and average earners. These are rules established by the national legislation and these facts cannot be contested, however they tell us about the conditions of decrease in the slope of benefit generosity. These can be advantageous or disadvantageous.

Generally, the ceilings are: 60% and 53.4% for Belgium; 80% and 70% for Luxembourg. These are percentages extracted from the previous income. Thus when the income is low and the ceiling is low, the benefit is low and oppositely. However, in a two country context, when the ceiling in the country of residence is low and the earnings in the country of employment are high (e.g. Belgian frontier workers), the benefit will be higher. The replacement rates will also be higher than in a situation when the ceilings in the country of residence are higher, but the wage in country of employment is lower (e.g. Luxembourgish frontier workers); therefore, not only the differences in previous income matters, but also the ceilings of the benefit.

When people remain unemployed for a longer period (more than a year), to avoid benefit dependency – the long-term unemployment benefit is usually decreasing from 80% to 70% for the Luxembourgish earners and from 60% to 53.4% for the Belgian earners.

The results of the objective 02 indicate another interesting aspect of the replacement rates. Higher income earners (namely, those with the level of 160% AW) have lower replacement rates than the average or low income earners (the income group belonging to 60% AW), simply because their income is higher and they could use less benefit. However, notably is that their replacement rates vary by earners, which points towards the fact that the ceilings of up to which the benefit can be received or when the benefit starts to decrease are different.

The vertical redistribution indicator is presented in details in Annex 1. The 03 shows the result of an average indicator for Belgium that is above 1 and signifies that the Belgian frontier workers have 29% higher disposable income than the Belgian domestic workers. This is conversely the case for the Luxembourgish frontier workers who earn 22% less than the Luxembourgish domestic earners. In Burlacu and O'Donoghue (2012), we explain that this is related to mobility tax credits and generous child benefits: Luxembourg offers a variety of tax deductions among which mobility deductions and child tax credits that play an important role. A Belgian frontier worker in Luxembourg can obtain a tax deduction of maximum EUR 3000 per year for their commuting expenses (2010). Moreover, a frontier worker is entitled to generous child benefits and topped up with child tax credit to pay for the differences between the Belgian and Luxembourgish child benefit.

The 04 refers to the disposable income of single divided by the disposable income of 2 earner couples. A modified OECD equivalence scale of 1.5 to compare the disposable income of 2 earner couples tells us that the score for all groups is higher than 1.5. Most importantly, to our surprise, the figures indicate that both domestic and frontier Luxembourgish earners have lower equivalence scales (1.69) than the Belgian earners (1.72). This means that compared to a single earner, a domestic 2 earner couple in Luxembourg has 3% less disposable income compared to a domestic Belgian 2 earner couple. Moreover, a frontier couple has 19% less than a single earner in Luxembourg (1.62) than in Belgium (1.81). This contradicts our expectations. Considering high scores for previous objectives and the generosity of the Luxembourgish welfare system, let us further examine each component of the disposable income earners in Belgium and in Luxembourg.

This consists of:

(1) Disposable income $_{LU}$ = (total social assistance (if low income) + total child benefits (if the case) + total income (*)) – total taxes and social insurance contributions (**)

(*) total income = gross income of spouse 1 + gross income of spouse 2

(**) t.t. and sic. = total income tax + total social insurance contributions

(2) Disposable income $_{BE}$ = (total social assistance (if low income) + total child benefits + total income) – total taxes and social insurance contributions

One reason for lower equivalence scale in Luxembourg is the personal income taxation, where the tax unit is the family. Married couples are jointly taxed, based on the splitting method, by which couples' taxable income is first halved and tax liabilities are then calculated as for single persons. O'Donoghue and Sutherland (1999) argue that the general trend in EU countries over the last 20 years has been a move towards independent taxation and away from joint taxation, because studies on joint taxation (Piggott and Whaley, 1994; Immervol, Kleven, Kreiner and Verdelin, 2009;) illustrate that, especially at the bottom of the distribution, this impacts negatively and places more tax burden on married couples. Thus, one might assume that joint taxation does play a role in diminishing the disposable income in Luxembourg (see Annex 2).

4.2. Pension Model

Former mobile earners who retired are the targeted group of this part of analysis. The calculation of pension benefits of individuals who paid social insurance contributions throughout their careers is straightforward (see Section 3). The Regulation (EC) 883/2004 (Article 50) on pension provisions is applied uniformly on all former frontier workers, but the outcomes vary from country to country, from single type of family to couples, from couples to widowers and from low to high income pensioners. However the outcome on mobile pensioners' income is often not so straightforward and equal, considering the multitude of differences between the structures of public pension systems among the MS.

The 01 in Table 4 ought to be compared to the 70%–80% rule of thumb of MacDonald and Moors (2009), by which the pension benefit ensures a decent level of living of the recipient. The lowest rate belongs to the Belgian frontier workers (45.4%). The rate of 64% (OECD, 2011 ([1])) for the Belgian domestic workers is considered as an average for Belgium, thus the rule of thumb is already too high for the Belgian rules. Does that mean that the Belgian pensioners live below standards? We use the calculated rate of 57.2 (%) for the Belgian domestic earners to identify the trend for domestic versus mobile pensioners.

([1]) http://www.oecd-ilibrary.org/docserver/download/8111011ec018.pdf?expires=1384960478&id=id&accname=guest&checksum=CF5D01854440EDA7FDFD1367F1C9FABE

Table 4. Welfare state objectives on Belgian and Luxembourgish, pensioners

	Income smoothing (*)		Vertical redistribution (**) 03	Horizontal Redistribution (***) 04
	Short 01	Long 02		
Belgian domestic pensioners	57.2	69	1.6	1.07
Belgian mobile pensioners	45.4	74.4	2.5	1.1
Luxembourgish domestic pensioners	85	120	2.7	1.08
Luxembourgish mobile pensioners	88.4	104	2.14	0.96

(*) Calculated as the ratio between pension benefit and last market income (01); and ratio between pension benefit and average wage (02).

(**) Calculated as the ratio between the disposable income and the market income. Presented in the graph as the average score of redistribution indicators for: single; 2 earner couples; 2 earner 1 child couples; 1 earner domestic and 1 earner frontier worker (mixed), no children; mixed couple 1 child; 1 earner 1 child.

(***) Calculated as the ratio between the pension of male and female.

Our results indicate that the national pension system affects significantly the pension of mobile pensioners. Despite high earnings lastly gained before retirement, as in the case of the Belgian mobile pensioners in Luxembourg, the pension system in the country of residence determines the generosity of the received pension.

In the Luxembourg case, it worked to the benefit of the pensioner (88.4%) while for the Belgian mobile pensioners this is not the case (45.4%). These results are the averages of low, average and high income pensioners. In Burlacu and O'Donoghue (2013a), the latter separate rates are calculated and a similar pattern is concluded that the Belgian low and average mobile pensioners have lower replacement rates than domestic pensioners, due to reduced minimum pension and reduced allowances and deductions from Luxembourg. In order to address growing pension concerns, the current Belgian government proposed to raise effective retirement ages and also increase taxes on pension funds. The gap between the state pension age, 65 for men and women, and the actual retirement age is almost the highest in Europe. On average, men retire at 58.5 years and women on average retire at 56.8 years. This is of course a problem and the government has therefore agreed to implement changes to tax rates on pensions. For individuals retiring at 60, retirement funds will be taxed at 20%, an increase of 3.5% from the previous 16.5% figure and for those people choosing to retire at 62, they will be hit by a tax rate of 18% ([2]). This is not common only to the EU, but also in the US, approximately 18.5% of Americans aged 65 and over were working in 2012, according to the Bureau of Labour Statistics.

([2]) http://www.europeanpensions.net/ep/april-all-change-in-belgium.php

Long-term replacement rates have a particularly important role as these illustrate the amount of the pension benefit relative to the average standard of living. In 02, when the pension benefit is 100%, its amount equals the average wage. The comparison thresholds are the maximum pension ceilings (165% in Luxembourg of AW and 120% AW in Belgium). Only the Luxembourgish pensioners have a mandatory pension higher than the average wage. Despite the fact that the Belgian frontier workers have about 5% higher pension than the Belgian domestic earners, neither groups have a mandatory pension equal to the average wage.

Vertical redistribution indicates that the pension benefit effectiveness relative to the probability that mobile pensioners will claim a social assistance benefit, the results indicate that in fact the Belgian mobile pensioners are most likely to claim a pension benefit (1.6 versus 2.5 for the Belgian domestic pensioners). Annex 3 presents statistics for domestic and mobile pensioners. European statistics show that Luxembourg is the country with the lowest population over 65 who live at risk of poverty and social exclusion and that among the EU-27, Belgium has about 2% of elderly over 65 at risk of poverty (Marlier and Natali, 2010). We can conclude that generally, both country cases ensure than their pensioners are not inclined to poverty, regardless if they had been mobile before or not.

The 04 is essentially comparing the pension income of males and females. The amount of 1 shows an equal income for both groups and higher than 1 indicates that males have higher pension income. The discrepancy is not high in most of the cases. The Luxembourgish mobile female pensioners have higher pension income than male pensioners due to the averages included in the calculations, that refer only to the

average and high income female pensioners. While in the case of male pensioners, the low income pension decreases slightly the overall average. Therefore, from the results we can conclude that no significant differences between the pension income of female and male pensioners exist in our case, regardless whether they are mobile or domestic pensioners.

4.3. Welfare state objectives

Table 5 converts the results from Tables 1 and 2 on a seven-level Lickert scale and presents the overall picture on how the welfare state objectives perform for the domestic earners and pensioners compared to their mobile earners and pensioners.

Table 5. Welfare state objectives scores (*) for Luxembourgish and Belgian domestic and mobile earners and pensioners (**)

	Income smoothing		Vertical redistribution	Horizontal redistribution
	Short 01	Long 02	03	04
Active earners model				
Belgian domestic workers	3 1	3 2	7	7
Belgian frontier workers	3 3	3 2		7
Luxembourgish domestic workers	7 7	7 4	2	6
Luxembourgish frontier workers	7 3	7 2		6
Pension model				
Belgian domestic pensioners	2	1	4	6
Belgian mobile pensioners	1	2	6	7
Luxembourgish domestic pensioners	7	7	7	6
Luxembourgish mobile pensioners	7	7	5	6

(*) The scale varies from 1 to 7, where 1 means the lowest scores and performance and 7 means the highest scores and performance of certain welfare objectives.

(**) The mobile earners are defined as former frontier workers who worked previously in a country other than the country of residence, while the mobile pensioners are individuals, who worked for half of their career in the same country where they resided, and in the second half of career, kept living in the same country, but working in the neighbouring country.

In the category of the **lowest, lower and low scores** the following objectives fall:

- Short-term and long-term replacement rate for the Belgian domestic and frontier workers, at 120% and 160% of average wage (AW) level;
- Short-term and long-term replacement rate for the Luxembourgish frontier workers, at 160% AW level only;
- Vertical redistribution for the Luxembourgish frontier workers;
- Short-term and long-term replacement rate for the Belgian mobile pensioners.

Average scores correspond to the following groups:

- Long-term replacement rate for the Luxembourgish frontier workers, at 160% AW level;
- Horizontal redistribution for the Luxembourgish frontier workers;
- Vertical redistribution for the Belgian domestic workers.

High, higher and highest scores belong to:

- Short-term and long-term replacement rate for the Luxembourgish domestic and mobile workers 160% AW level;
- Short-term replacement rate for the Luxembourgish domestic workers 120% AW level;
- Vertical and horizontal redistribution for the Belgian mobile workers;
- Horizontal redistribution for the Luxembourgish domestic workers;
- Short and long-term replacement rate for the domestic and mobile Luxembourgish pensioners;
- Vertical and horizontal redistribution for the Luxembourgish domestic and mobile pensioners;
- Vertical and horizontal redistribution for the Belgian mobile pensioners;
- Horizontal redistribution for the Belgian domestic pensioners.

The final column indicates that on average there are many positive performances of welfare objectives at different levels, but what the table as a whole indicates is that despite the 'equality of treatment' principle praxis, the impact of mobility is diverse on Luxembourgish and Belgian earners.

The model of active earners and pensioners is characterised by few large jumps between the scale scores. This indicates that the differences in social security systems and personal income taxation can have asymmetric impact on the welfare of mobile earners. For example, Luxembourgish mobile earners have the highest score on income smoothing objective (7) at the level of 120% average wage, while they score 3 and 2 at the level of 160% average wage. Or the example of vertical redistribution for the Luxembourgish frontier workers; this has a score of 2 and for the Belgian frontier workers a score of 7. This is previously explained by the existence of the Luxembourgish mobility tax credits, that contribute to the disposable income of the Belgian frontier workers. Considering these results, we could assume that among 450 Luxembourgers, those who are single earners (Benelux General Secretariat, 2009) currently working in Belgium have 22% lower disposable income than the Luxembourgish domestic workers and conversely, among the 32600 Belgian single earners working in Luxembourg they have 29% higher disposable income than the Belgian domestic workers.

5. Conclusions

The goal of the current study is to assess the outcomes that result from the difference between two social security and fiscal systems on the welfare of frontier workers on one hand and the impact of Regulation (EC) 883/2004 provisions on the other hand. By examining two country cases that belong to the same welfare regime and have closely similar organisation of welfare systems, we are able to focus on the effects of the Regulation (EC) 883/2004 on the income of frontier workers from Luxembourg and Belgium.

To compensate for insufficient social security and fiscal data on frontier workers, we build a set of hypothetical cases of low to high income earners and pensioners that in the case of pensioners emulates actual data (ECHP, 2001). Two types of models were created: active and retired frontier workers. Three types of policy rules were applied: the coordination regulation's provisions on frontier work unemployment benefits, child benefits and state pension benefit (Ist pillar); national provisions on social assistance, national benefits ceilings and conditions; and national personal income tax rates.

Regulation (EC) 883/2004 is in place to promote free movement for work (Pennings, 2009). It subordinates national laws, at the same time it ensures 'to respect the special characteristics of national social security legislation and to draw up only a system of coordination' (Preamble 4). One of its 'real innovations' is the provision on equal treatment of benefits, income and facts. The sensitive question of 'equality of treatment' arises frequently when analysing the income of migrant workers with the income of domestic workers in the receiving country. In the case of mobile earners, we approach the equality of treatment as a comparison between frontier workers and domestic workers, who reside in the same country, because we are assessing the welfare state treatment towards its citizens, who are both frontier workers and domestic. The present findings generally suggest that the treatment is not the same between domestic and frontier workers and demonstrate that the treatment varies depending on the type of welfare objective.

The income smoothing objective aims to compensate for the sudden fall in income due to certain social risks situations, such as unemployment, health issues, and retirement. This objective raises question such as: how much income a worker has when unemployed compared to when working? Or how much pension one received when retired compared to the last income or compared to the average income in the country?

The scores for O1 and O2 in Table 5 lead us to the conclusion that the benefit ceilings play a crucial role in how much or less the treatment is equal between the welfare (income) of domestic and frontier workers. When the ceiling in the country of residence is lower and the earnings in the country of employment are higher, then the rates are higher and when the ceilings in the country of residence are higher, but the wage in country of employment is lower, then the replacement rates are lower. Thus, the differences in ceilings can be advantageous or disadvantageous to the mobile earners. In the case of mobile pensioners, the results indicate that despite high earnings gained just before retirement, as in the case of the Belgian mobile pensioners in Luxembourg, the pension system in the country of residence determines the generosity of the received pension.

The redistributive measure indicates the role of taxes in the discrepancy between the income of high income and low income earners. The O3 indicates that our results are in line with general statistics on redistribution indicators in Luxembourg and Belgium. We can conclude that both Belgium and Luxembourg ensure that pension income suffices for retirees not to be affected by poverty, regardless whether they had been mobile before or not. The O4 indicates that there are no significant differences between the pension income of female and male pensioners existing in our case, regardless whether they are mobile or domestic pensioners.

The model of active earners and pensioners is characterised by few large jumps between the scale scores, that in the case of systems with close ties and many similarities. We assume that the differences are much higher in countries with significantly larger differences in welfare characteristics and organisations. This can be the case in cross-border regions between Estonia and Finland, Spain and France, Austria and Italy, Poland and Germany. Similarly with taxation, the non-existence of any common EU provision on mobile earners or the existence of 28 × 28 and more bilateral tax agreements makes it very difficult for active EU citizens to foresee their allowances and deductions when they travel for work or become retired.

Despite the fact that coordination regulation has supremacy over national social security law, when calculating unemployment, family and pension benefits, national social security and tax law are more important and decisive for the income of frontier workers. However, the national legislations vary widely. 'For responding to the big social risks of the life cycle, the broad-based national insurance schemes remain today the most efficient and equitable institutions at our disposal. But these schemes need to be updated and modernised', argues Ferrera (2010).

The current 'patchwork of EU social policies' does not sufficiently address the differences between fiscal and social systems across the Member States. The outcome of coordination regulation and that of the national welfare state is different and from our point of view this can result in incentives and disincentives for mobile earners. The redistributive measures and income smoothing objectives are only a selected dimension that identified strong incentives for the Belgian frontier workers and disincentives for the Belgian mobile pensioners, or disincentives for the Luxembourgish frontier workers. We believe these dimensions need further exploration and behavioural analysis, using actual data.

The 'Youth on the Move' action suggests the importance of being mobile in a modern Europe. One of the top priorities of the European Commission over the last couple of years has been the realisation of a European Research Area (ERA). The Commission estimates that the combination of the completion of the ERA and the implementation of the EU's new research and innovation funding programme — Horizon 2020 — could give rise to an extra 1% of growth and almost 1 million more jobs per annum by 2030.

Investigating in depth the factors that can boost the incentives to work, to save and to be mobile within the European Union needs careful elaboration and study. Other fields of research that become particularly important in the context of increasingly mobile generation are occupational pensions or supplementary pension.

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Annex 1. Redistribution indicators, active earners model

Family types	Ratio of redistribution indicator
Single	**DW/FW (*)**
Luxembourg	0.86
Belgium	1.28
2E	**DW/FW**
Luxembourg	0.76
Belgium	1.74
2E1CH	**DW/FW**
Luxembourg	0.78
Belgium	1.46
1E0E1CH	**DW/FW**
Luxembourg	0.62
Belgium	1.27
1E0E0CH	**DW/FW**
Luxembourg	0.808
Belgium	0.980
1E1E1CH	**DW/FW**
Luxembourg	0.84
Belgium	1.15
1E1E0CH	**DW/FW**
Luxembourg	0.84
Belgium	1.20

(*) DW, domestic workers; FW, frontier workers.

Annex 2. Formula on joint taxation (O'Donoghue and Sutherland, 1999)

The concept of joint taxation, can be divided into aggregate, split and quotient.

Personal income tax (p.i.t.): Split taxation = Tax = 2 × T ((YM + YF)/2),

where the tax schedule 'T' is applied independently to the incomes 'YM' (male) and 'YF' (female) of the couple. Joint taxation and income splitting do not take into account the presence of children. While in Belgium, couples are taxed individually:

Personal income tax (p.i.t.): Independent taxation = Tax = T (YM) + T (YF)

Annex 3. Poverty effectiveness (*), pensioners' model.

Education levels	Belgium			
	Domestic pensioners		Mobile pensioners	
	Male	Female	Male	Female
Lower degree	1.4	1.2	2.3	n/a (**)
Secondary degree	1.6	1.6	2.7	2.3
Higher degree	1.9	1.9	2.7	2.7
Education levels	**Luxembourg**			
	Male	Female	Male	Female
Lower degree	2	n/a	1.6	n/a
Secondary degree	2.64	2.02	1.97	1.81
Higher degree	3.63	3.19	2.69	2.55

(*) Ration between pension income and threshold for being eligible for social assistance benefit.

(**) The lack of value for lower degree female earners is due to the insufficient data in the ECHP data on Luxembourg, thus the Belgian cross-border model for low-educated females.

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