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Free movement of workers: Commission improves the application of worker's rights – frequently asked questions

(see also IP/13/372)

What are the main obstacles to free movement of workers?

The right to free movement of workers within the EU was enshrined in the Treaty more than 50 years ago and is one of the pillars of the Single Market. Article 45 of the Treaty on the Functioning of the European Union (TFEU)sets out the right of EU citizens to move to another Member State for work purposes. This right entails in particular the right not to be discriminated against on the grounds of nationality as regards access to employment, remuneration and other conditions of work. Regulation (EU) No 492/2011 further details the rights derived from free movement of workers and defines specific areas where discrimination on grounds of nationality is prohibited.

Nevertheless, European citizens can still face problems and obstacles when moving within the EU borders.

The numerous complaints addressed to the Commission reveal that many workers are discriminated against on the basis of their nationality when applying for jobs, even though there is also proof that EU migrant workers are - more often than nationals – over-qualified for the posts they hold. In addition, there are a range of discriminatory practices and obstacles that affect EU migrant workers once they have obtained a post.

Experience shows that although many obstacles are of a cultural or socio-economic nature, there is evidence documenting the existence of obstacles of an administrative or legal nature. These hamper citizens from enjoying the rights which are conferred on them directly by EU law.

Eexamples of discriminatory practices and obstacles include:

- different recruitment conditions for EU nationals
- nationality conditions to access certain posts
- nationality quotas for EU citizens (e.g. in the field of professional sport)
- different working conditions in practice (remuneration, career prospects, grade, etc.)
- access to social advantages (such as study grants) subject to conditions which are more easily met by nationals than by EU citizens (e.g. a residence condition)
- professional experience acquired in other Member States (in particular in the public sector) not properly taken into account
- professional qualifications acquired in other Member States not taken into account or taken into account in a different way.

These practices and obstacles are compounded by the fact that citizens working in a foreign country are often unaware of where to find information about their rights. Indeed, a recent public consultation by the Commission found that 74% of citizens felt not well-informed or not at all informed about what they can do when their rights as EU citizens are not respected.

The proposed Directive would target this issue by providing the means to bridge the gap between EU rights and practice, and therefore allow workers to exercise fully their rights.

Why is the European Commission proposing this Directive?

EU rules on free movement of workers are long-established and clear but the way in which they are applied in practice can give rise to barriers and discriminatory practices for EU migrant workers when working or looking for work in another Member State . Even though information tools and procedures to enforce workers' rights already exist at national level, there is a lack of awareness and consistency in the application of workers' rights to free movement.

The proposal for a Directive would give full effect to the application of Article 45 TFEU and Regulation (EU) 492/2011 while giving Member States flexibility to design implementing measures best suited to their national context. In some Member States, for example, equality bodies or other similar structures already exist and only certain adjustments to the powers and tasks of such bodies will be necessary. The proposed Directive would require Member States to take concrete actions to guarantee a more effective and homogeneous application of EU law on free movement of workers in practice.

Infringement proceedings launched by the Commission concerning breach of workers' right to free movement have invariably been against countries where information and support systems are not effective. The Directive would therefore aim to reduce the number of infringement cases against Member States.

Is free movement of workers sustainable in the context of the economic crisis, in particular in those Member States with high rates of unemployment?

Ensuring adequate matching between labour supply and demand is even more crucial in the current economic crisis, where there are massive gaps between the EU Member States in terms of unemployment rates and job vacancy rates. Even in the current context, any restriction on free movement of workers can only be a temporary derogation. This is why remaining transitional restrictions on the free movement of Bulgarian and Romanian workers will be, in line with the Accession treaties, end on 31 December 2013 without exception.

Does free movement of workers lead to so-called "social benefit tourism"?

No. The vast majority of people moving to another Member State do so to work. . This is borne out by statistical evidence such as EU barometers on mobility and the EU labour force survey that show that the main incentives for citizens moving to another Member State are related to employment and work prospects.

Looking at the population of migrants by labour status, EU- labour force survey data (2012Q3) indicate that 68.1% of the EU working-age (15-64) citizens living in another Member State are in employment and only 9.3% are jobseekers (Eurostat, EU- labour

force survey). Finally, among the mobile EU citizens who are unemployed, the vast majority lost their job in their current destination country, not before migrating.

No Member State has given the Commission any statistical evidence that "social benefits tourism" exists to any significant extent.

What specific examples does the Commission have of obstacles and discrimination met by people working or seeking work in another EU country?

In **The Netherlands**, Lukasz, a Polish worker in the construction sector, doing the same job as his Dutch colleagues, receives a lower salary. This nationality-based discrimination, operated by private employers in relation to working conditions including salary, is prohibited by Article 45 TFEU and Article 7 (1) of Regulation 492/2011. Lukasz can claim before the national courts for equal pay but it could be very difficult and costly for him to initiate administrative and/or judicial procedures. The proposal for a Directive, in its Article 5 (equality bodies), would help people like Lukasz by requiring Member States to establish bodies for assisting and advising EU migrant workers in such a situation. Moreover, Article 4 of the proposal, would allow associations with a legitimate interest or trade unions to engage, either on behalf of or in support of Lukasz in any judicial and/or administrative procedure provided for the enforcement of equal treatment rights.

Job advertisements by a private company for English teachers in **Spain** required applicants to be native speakers. As a consequence, Aliute, a Lithuanian candidate with sufficient knowledge of English to carry out the job was not accepted. According to the EU law on free movement of workers, language requirements must be reasonable and necessary for the job in question and cannot constitute grounds for excluding workers from other Member States. Once the Directive were adopted and implemented, Aliute, could ask for assistance and advice from the equality bodies foreseen in Article 5 of the proposal.

Helmut, an Austrian teacher with 15 years of work experience in Austria was hired by a public school in **Italy**. However, his work experience was not taken into account for determining his salary. He was put on the lowest pay scale. According to EU law on free movement of workers migrant workers' previous periods of comparable employment acquired in other Member States must be taken into account by public sector employers for the purpose of access to posts and for determining working conditions in the same way as working periods acquired in the host Member State's system. The proposed Directive would allow Helmut to benefit from the new enhanced information requirements imposed on Member States by and, if he went to court to assert his right to pay commensurate with his experience, he could be assisted by the new equality bodies required by the proposed Directive.

Tino is an Italian national who plays senior hockey on skates in **France**. He resides in France and holds a working contract with a French hockey on skates club. In June 2012, the French Roller Sports Federation adopted a new rule which stipulates that only three foreign players can take part in each official match. Tino is concerned that he will lose his job because of this new rule. Although the French Roller Sports Federation is strictly not a government body, the settled case-law of the Court of Justice makes clear that Article 45 TFEU can be relied upon in these circumstances to outlaw discrimination on grounds of nationality. Tino would be able to benefit from Article 5 of the proposed Directive as it would require Member States to set up equality bodies to provide support to migrant workers to enforce their rights.

Joanne, a UK national working in **Finland**, complained that she was unable to get her fixed-term contract converted into an open-ended contract on the grounds that she did

not speak Finnish. Her employer was nonetheless happy to offer her another fixed-term contract. This form of indirect discrimination in relation to working conditions is contrary to Article 7(1) of Regulation 492/2011. Article 4 of the proposed Directive would ensures, for example, that Joanne's trade union could take action to assist her to enforce her rights under the Regulation.

José, a Spanish national looking for work, was told by the employment services in **Ireland**, that he could not apply for certain jobs as the employer would accept only Irish nationals. Article 5 of Regulation 492/2011 requires a Member State's employment services to give the same assistance to nationals of other states as to their own nationals. Article 5 of the proposed Directive would require Member States to set up a designated equality body to which people like José could complain about the practice he experienced in the Irish employment office.

Jean-Claude is a frontier worker who works in **Luxembourg**, but lives with his family in France. His son wants to apply for a study grant from Luxembourg but is prevented from doing so due to the requirement that he must be resident there. Article 7(2) of Regulation 492/2011 confers equal treatment as regards social advantages on the children of migrant workers. Jean-Claude and his son would be able to benefit from Article 5 of the proposed Directive as it would require Member States to set up an equality body to assist migrant workers and their family members to pursue their rights.

Kasia, a Polish national, worked in the **UK** but then was injured in a road traffic accident. The accident prevented her from working and, due to complications in her condition; she was unable to return to work for at least 6 months. Kasia made a claim for an incapacity benefit to enable her to have some income whilst she was unable to work. Her claim was refused on the basis that she was an inactive migrant and not entitled to such a benefit. But under EU law a worker who is temporarily incapacitated as a result of illness or accident retains the status of worker. Kasia was therefore entitled, even whilst not working, to the same social advantages as UK nationals. Kasia would benefit from the new enhanced information duties imposed on Member States by Article 7 of the proposed Directive. Moreover, Article 4 of the proposed Directive would ensure, for example, that NGOs with a legitimate interest could assist her to request a review of the welfare authorities' decision.

Access to all jobs in the Ministry of the Interior in **Bulgaria** are restricted to Bulgarian nationals. Such restrictions are, according to the Court of Justice's interpretation of Article 45 TFEU, permissible only in very restricted circumstances. Dimitrios is a qualified lawyer but was prevented from applying to work in the Bulgarian Ministry on the basis that he is a Greek national. Article 5 of the proposed Directive would require Bulgaria to set up a designated equality body in Bulgaria to advise Dimitrios on the legality of the exclusion and, if appropriate, to assist him to challenge his exclusion from applying for the job.

Biser is a Bulgarian national working in the construction industry in **Germany**. His employer pays him a salary but does not make any social insurance payments for him. When Biser suffered an accident at work, he found out he was not entitled to healthcare for his condition. Articles 4 and 5 of the proposal would require Germany to establish associations and equality bodies to advise and assist EU migrant workers on their rights and on how to enforce them.

What do we know about mobility within the EU?

Mobility within the EU remains relatively low: according to the EU-Labour force survey, in the third quarter of 2012, only 3.1% of the working-age European citizens (15-64) lived in another EU Member State than their own.

A 2009 Eurobarometer on geographical and labour mobility showed that around 10 % of EU citizens have already worked and lived in another country at some time, but 38 % for less than one year (and 13% for a period between one and two years).

Data available on intra-EU mobility and comparison to other regions in the world (US, Australia, Canada) lead to the conclusion that the right to free movement is underused.

The perception from workers is that mobility is potentially costly for them and subject to many obstacles. This led to 60% of them expressing the opinion that free movement of workers is good for the European integration but only 48 % of them stated that it was a good thing for individuals (2009 Eurobarometer on labour and geographical mobility).

EU citizens working in an EU Member State other than their own (excluding cross-frontier workers), by nationality, in thousands (and in % of total employment in their origin country), 2012

Citizens from:	Number of workers in thousands	In % of total employment in the origin country
AT	138.9	3.3
BE	114.1	2.5
BG	221.8	7.6
CY	16.1	4.1
CZ	69.7	1.4
DE	376.0	0.9
DK	53.3	2.0
EE	25.2	4.0
ES	210.0	1.2
FI	49.0	2.0
FR	315.3	1.2
EL	241.7	6.4
HU	121.4	3.1
IE	196.8	10.7
IT	676.2	3.0
LT	142.8	11.2
LU	16.5	7.0
LV	75.6	8.5
MT	8.1	4.7
NL	228.4	2.7
PL	1,016.3	6.5
PT	542.9	11.7
RO	1,212.9	13.1
SE	59.4	1.3
SI	19.2	2.1
SK	121.6	5.2
UK	329.8	1.1
All EU citizens	6,599.0	3.1

Source: Eurostat, EU-LFS. Note: Value for MT workers unreliable due to small sample size.

EU-nationals working in another Member State in 2012, in thousands and in % of total population

Member State of Residence	EU nationals in thousands	EU nationals in % of total population
BE	300.5	6.6
BG	:	:
CZ	34.1	0.7
DK	81.2	3.0
DE	1,612.0	4.0
EE	2.0	0.3
IE	200.4	10.9
EL	59.0	1.6
ES	761.7	4.4
FR	608.4	2.4
IT	769.3	3.4
CY	53.8	13.8
LV	2.1	0.2
LT	:	:
LU	107.8	45.7
HU	17.2	0.4
MT	1.8	1.0
NL	165.7	2.0
AT	226.3	5.4
PL	10.4	0.1
PT	27.5	0.6
RO	:	:
SI	2.4	0.3
SK	3.1	0.1
FI	29.0	1.2
SE	118.8	2.6
UK	1,402.0	4.8
EU27	6,599.0	**3.1**

Source : Eurostat, EU-Labour force Survey

For more information

IP/13/372

News item on DG Employment website: http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=1830&furtherNews=yes

László Andor's website: http://ec.europa.eu/commission_2010-2014/andor/index_en.htm

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EUROPEAN
COMMISSION

Brussels, 26.4.2013
COM(2013) 236 final

2013/0124 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers

(Text with EEA relevance)

{SWD(2013) 148 final}
{SWD(2013) 149 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

General context

Freedom of movement for workers is one of the four fundamental freedoms on which the Single Market is based. It is one of the core values of the European Union and a fundamental element of EU citizenship. Article 45 TFEU enshrines the right of EU citizens to move to another Member State for work purposes. It specifically includes the right not to be discriminated against on the grounds of nationality as regards access to employment, remuneration and other conditions of work. It also includes the removal of unjustified obstacles to the freedom of movement of workers within the European Union. The Charter of Fundamental Rights of the European Union confirms in Article 15(2) that every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.

Regulation (EU) No 492/2011[1] details the rights derived from the freedom of movement of workers, and defines the specific areas where discrimination on the grounds of nationality is prohibited, in particular as regards[2]:

- access to employment
- working conditions
- social and tax advantages
- access to training
- membership of trade unions
- housing
- access to education for children

Article 45 TFEU and Regulation (EU) No 492/2011 are directly applicable in all Member States. This means that there is no need to adopt national legislation to transpose those provisions. Any national authority at any level and any employer, whether public or private, must apply and respect the rights stemming from those provisions.

In spite of this, EU citizens who want to move or who actually move from one Member State to another for work purposes continue to face problems in exercising their rights. The difficulties they face go some way to explaining why geographical mobility between EU Member States has remained at a relatively low level: according to the EU-Labour Force Survey, in 2011, only 3.1% of the working-age European citizens (15-64) lived in an EU Member State other than their own[3].

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1 Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ L 141, 27.5.2011, p. 1–12. This regulation codifies Regulation 1612/68 and its successive amendments.

2 For a full description of the rights stemming from article 45 TFEU and Regulation 492/2011, please consult the Communication of the Commission «Reaffirming the free movement of workers : rights and major developments" COM(2010) 373 final of 13 July 2010, supplemented by the Commission Staff Working Document.

3 Eurostat, EU-Labour Force Survey 2011. However, it should be noted that available data sources tend to underestimate the number of mobile EU citizens living/working in other EU Member States, either because those citizens do not register when living in other Member States or because existing surveys

A Eurobarometer survey in 2009 showed that while 60% of European citizens considered free movement of workers to be a good thing for European integration, only 48% thought it was positive for individuals. Moreover, according to the results of a more recent Eurobarometer (September 2011)[4], 15% of European citizens would not consider working in another Member State because they feel there are too many obstacles.

Similarly, the European Parliament's report on 'Problems and prospects concerning European citizenship' of 20 March 2009 detailed persisting obstacles to the cross-border enjoyment of rights. It called on the Commission to produce a list of obstacles to the exercise of EU citizens' rights, based on the results of a public consultation, and make specific proposals to address those obstacles.

More recently the European Parliament by its Resolution on promoting workers' mobility within the European Union of 25 October 2011 calls on the Commission and Member States to take measures in order to *"to guarantee…the correct implementation of the existing legislation on non-discrimination, to take practical measures to enforce the principle of equal treatment of mobile workers…"*[5]

In its Conclusions of EPSCO Council of March 2009 on Professional and geographical mobility of the workforce and the free movement of workers within the European Union, the Council invited the Commission and the Member States 'to promote measures supporting labour and social mobility as well as the equal treatment and non-discrimination of migrant workers in line with the acquis' and to 'further develop appropriate strategies and tools for the identification and analysis of barriers to geographical and professional worker mobility and to effectively contribute to the removal of existing barriers, in accordance with the Treaties'.

The report delivered by Mr Monti on 9 May 2010 (‘A new Strategy for the Single Market’) underlines the fact that the overall freedom of movement of workers is a success from a legal point of view, but it is the least used of the four freedoms of the Single Market. The report points out that the majority of Europeans see too many obstacles to working elsewhere in the EU and a number of legal and administrative barriers still remain in the field of free movement of workers. According to the report, obstacles in this area are the hardest to overcome.

In July 2010, in its Communication on "Reaffirming the free movement of workers: rights and major developments"[6] the Commission pointed out that it will explore ways of tackling the new needs and challenges (in particular in the light of new patterns of mobility) facing EU migrant workers and their family members, and in the context of the new strategy for the single market will consider how to promote and enhance mechanisms for the effective implementation of the principle of equal treatment for EU workers and members of their families exercising their right to free movement.

This objective was reinforced in the 2010 EU Citizenship Report "Dismantling the obstacles to EU citizens rights"[7] of 27 October 2010. The Commission identified the divergent and

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mainly cover persons who are 'usually resident' in a country and not the short-term mobile workers (e.g. staying only a few months.

4 Eurobarometer 363 "Internal Market: Awareness, Perceptions and Impacts", September 2011 http://ec.europa.eu/public_opinion/archives/ebs/ebs_363_en.pdf

5 http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/provisoire/2011/10-25/0455/P7_TA-PROV(2011)0455_EN.pdf

6 COM(2010) 373 final of 13 July 2010

7 COM(2010)603

incorrect application of EU law on the right to free movement as one of the main obstacles that EU citizens are confronted with in the effective exercise of their rights under EU law. Accordingly, the Commission announced its intention to take action to 'facilitate free movement of EU citizens and their third-country national family members by enforcing EU rules strictly, including on non-discrimination, by promoting good practices and increased knowledge or EU rules on the ground and by stepping up the dissemination of information to EU citizens about their free movement rights'[8].

In its Employment package of 18 April 2012 (Communication from the Commission "Towards a job-rich recovery")[9], the Commission announced its intention to "present a legislative proposal (information and advice) in order to support mobile workers in the exercise of rights derived from the Treaty and Regulation 492/2011 on freedom of movement for workers within the Union".

President Barroso (Political guidelines for the 2010-2014 Commission) has also underlined the gap between theory and practice and has called for the principle of free movement and equal treatment to become a reality in peoples' everyday lives. In his State of the Union address on 12 September 2012, President Barroso underlined the need to create a European labour market, and make it as easy for people to work in another country as it is at home[10].

The gap between the rights that EU citizens have in theory and what happens in practice has also been underlined in several reports from institutions and, increasingly, the European Union is being called upon to act in this regard[11]. 2013 has been designated as the European Year of Citizens[12]. It will focus on citizens' rights and on EU action ensuring that these rights are effectively enforced for the benefit of citizens and the EU as a whole.

Over the years, the Commission has received a lot of complaints from citizens who want to move, or who have actually moved to another EU country for work purposes, and whose rights are not respected. Citizens feel unprotected in the host Member State and unable to overcome the obstacles they face.

The Problem

There are many different examples of obstacles and problems:

(a) Public authorities not complying with EU law (non-conforming legislation or incorrect application) and the effect on EU migrant workers

Problems with compliance of national legislation and general practices still persist in Member States and continue to be reported to the Commission. These include:

– different conditions applied for recruitment of EU nationals;

8 Action 15 of the 2010 EU Citizenship Report

9 COM(2012) 173 final of 18 April 2012

10 http://ec.europa.eu/soteu2012/

11 Report by the European Parliament on promoting workers' mobility within the European Union of July 2011; opinion of the European Economic and Social Committee on the identification of outstanding barriers to mobility in the internal labour market of March 2009.

12 Decision 1093/2012/EU of the European Parliament and of the Council of 21 November 2012 on the European Year of Citizens (2013), OJ L 325, 23.11.2012, p. 1

- nationality conditions for access to posts which are not covered by the exception in Article 45(4) TFEU;
- introduction of nationality quotas for EU citizens (e.g. in the field of sport at professional level);
- different working conditions for EU nationals (remuneration, career prospects, grade, etc.);
- access to social advantages made subject to conditions which are more easily met by nationals than by EU citizens (e.g. a residence condition);
- professional qualifications and experience acquired in other Member States are not taken into account or they are taken into account in a different way than those obtained in the host Member State for the purpose of access to employment (e.g. additional points are awarded to the latter);
- residence condition required by national legislations for access to study grants for EU migrant workers and members of their families despite well-established case law of the CJ in this area;
- discrimination against frontier workers.

(b) Employers and legal advisors not complying with EU law

Information collected by experts and by the Commission[13] suggests that there is a recurrent problem with public and private employers' awareness of EU rules, regardless of whether the legislation at national level is compliant or not. Being unaware of the rules and lack of understanding seem to be the main reasons for this problem, especially when it comes to private employers (e.g. only residents for a certain period can apply for a job vacancy, no recognition of previous professional experience or professional qualifications acquired in another Member State, excessive language requirements etc.).

Legal advisors are also not always aware or familiar with Union law on free movement of workers.

(c) EU migrant workers not having access to information or the means to ensure their rights

In several surveys[14], citizens have mentioned that they do not know where to turn to when faced with problems concerning their EU rights. There is also evidence that migrants find it difficult to access the protection available to them, for example, they are not aware of national procedures and systems, they lack the linguistic ability to access services or the cost of legal advice and assistance is too high.

The problems identified affect EU citizens who move to another Member State for employment purposes and come back to their Member State of origin in order to work.

Objectives

In order to tackle these problems specific objectives have been identified:

- lessening discrimination against EU migrant workers on the grounds of nationality;

- closing the gap between EU migrant workers' rights on paper and their exercise in practice by facilitating the correct implementation of existing legislation;

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13 See below under point 2.

14 Eurobarometer 363 "Internal Market: Awareness, Perceptions and Impacts", September 2011 http://ec.europa.eu/public_opinion/archives/ebs/ebs_363_en.pdf

– reducing the incidence of unfair practices against EU migrant workers;

– and empowering EU migrant workers to ensure their rights are respected.

2. RESULTS OF CONSULTATION WITH INTERESTED PARTIES AND OF IMPACT ASSESSMENT

2.1. Consultation with interested parties

(a) Network of experts on free movement of workers

The network of legal experts in the field of free movement of workers reports annually on the legal situation pertaining in the European Union[15].

The first report[16], finalised in January 2011, focused on the enforceability of the right to equal treatment on the basis of nationality as regards EU migrant workers and on the existing legal framework in each Member State. The report came to the conclusion that this right is rarely given the same level of protection and guarantees as the right to equal treatment on other grounds (such as race, age and sex). EU migrant workers are still perceived in most of the EU countries as holding a status closer to that of third-country national workers than to that of national workers. Many EU migrant workers facing discrimination based on their nationality have to rely on a generous interpretation of national law adopted to implement the EU equality Directives combating discrimination on other grounds.

The second report, submitted in October 2011, presented an overview of the main problems surrounding application of the rules on free movement of workers identified in each Member State. There are some problems, apparently of a systemic nature in some Member States, which simply constitute unlawful discrimination. Most of the problems stem from indirect discrimination or unjustified restrictions on the exercise of workers' right to free movement. For example, residence criteria governing eligibility for certain social and tax advantages, excessive language requirements, or Member States failing to take into account years worked in a similar post in other EU Member States for the purpose of calculating a public-sector employee's seniority and associated advantages.

(b) Discussion within the Advisory Committee on free movement of workers

Barriers to free movement of workers, problems of discrimination on the grounds of nationality and the need to better enforce the current EU rules were discussed at a series of meetings of the Advisory Committee on Free Movement of Workers between October 2010 and October 2012. The members of the Advisory committee, made up of representatives of Member States and Social Partners represented at European and national level, were also asked to reply to a questionnaire issued by the Commission. The questionnaire was designed

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[15] The Annual European Reports provided by the network since 2006 are available at the following link: http://ec.europa.eu/social/keyDocuments.jsp?type=0&policyArea=25&subCategory=475&country=0&year=0&advSearchKey=consolidated+report&mode=advancedSubmit&langId=en
They are based on annual national reports for each Member State, available at http://ec.europa.eu/social/keyDocuments.jsp?type=0&policyArea=25&subCategory=475&country=0&year=0&advSearchKey=%22national+report%22&mode=advancedSubmit&langId=en

[16] Thematic report "Application of Regulation 1612/68", January 2011 http://ec.europa.eu/social/main.jsp?catId=475&langId=en

to identify what action is being taken at national level to inform, assist, support and protect EU workers in relation to the implementation of Regulation (EU) No 492/2011.

The members of the Committee acknowledged the importance of the real and effective application of existing rights. Suggested responses to this need ranged from awareness raising activities to stronger enforcement of the rules and better access to information and support for EU migrant workers. During the meeting of the Advisory Committee on free movement of workers of 30th October 2012, Social partners, both ETUC and Business Europe, expressed broadly favourable positions to the proposal of a Directive.

(c) Public consultation

The Commission carried out a public consultation between June and August 2011. Citizens, national authorities, labour unions, employers' organisations, and associations (NGOs, associations of independent professionals, etc.) gave their views on the main problems workers face when exercising their right to free movement, on the current level of workers' protection and on the need for the EU to act in order to help workers fully enjoy their rights.

A total of 243 replies were received, of which 169 were from citizens and 74 were from organisations, including national authorities. Among the responses from organisations, trade unions were the most active in providing contributions (27% of the respondents), followed by NGOs (17%), national authorities (15%) and employers' organisations (12%).

The majority of respondents agreed that EU workers should be better protected against discrimination on the grounds of nationality. Adoption of EU legislation was the most important course of action suggested by trade unions, NGOs, private companies, regional and local authorities and citizens. National authorities were divided. Employers clearly indicated that awareness-raising is very important. Setting up contact points or structures in the Member States was seen as an important measure by the majority of respondents. Exchanges of practice between EU countries was also considered an important tool, while non-profit organisations, trade unions, private companies and regional authorities[17] saw supporting organisations as important.

2.2. Impact assessment

In line with its policy on better regulation, the Commission conducted an impact assessment of policy alternatives, based on an external study[18], which concluded in April 2012.[19]

The different policy alternatives contain a range of options representing different degrees of EU intervention: maintaining the status quo, effecting change without regulation, or regulating. With respect to the latter, the options provide differentiated scenarios ranging from soft intervention (non-binding legal instrument such as a Recommendation) to maximum intervention in the form of a binding legal instrument such as a Directive.

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17 A summary of the responses received is included in annexes 7 and 8 of the Commission Staff working document annexed to this proposal "Initiative to support EU migrant workers in the exercise of their rights to free movement".

18 Multiple Framework Contract VT 2011/012, Study to analyse and assess the socio-economic and environmental impact of possible EU initiatives in the area of freedom of movement of workers, in particular with regard to the enforcement of the current EU provisions (VC/2011/0476).

19 Study to analyse and assess the impact of possible EU initiatives in the area of freedom of movement for workers, in particular with regard to the enforcement of current provisions, by Ramboll, http://ec.europa.eu/social/main.jsp?catId=474&langId=en

All these options were analysed against the general objectives.

The Impact Assessment demonstrated that a binding legislative initiative would impact tangibly on the exercise of free movement rights. A binding legal instrument imposing obligations on Member States to adopt appropriate measures to ensure that there are effective mechanisms for the dissemination of information and advice to citizens is an effective and efficient way of achieving the stated objectives.

The preferred option is a Directive combined with other initiatives, such as common guidelines on specific subjects to be adopted by the Technical Committee[20] on free movement of workers. A Common Guidance document would address the specific issue of the application of EU law in the field of the free movement of workers.

A Directive introducing measures intended to support EU migrant workers confronted with problems of free movement would aim to raise national authorities' awareness of the issue and increase their action against discrimination on the grounds of nationality. Through increased visibility of the issue, citizens would become more informed about their rights and public and private sector employers and other stakeholders' (NGOs, Social Partners…) would also become more aware. Moreover, without creating additional burdens on employers, a Directive would significantly contribute to better understanding and enforcement of EU law by specifically requiring Member States to ensure that stakeholders are better informed. Additionally, by providing a specific means of redress against any breach of rights under Article 45 TFEU and allowing third parties to intervene on behalf of EU migrant workers, it will become easier for citizens to exercise their rights and receive support in doing so.

The draft impact assessment was endorsed by the Impact Assessment Board ('IAB') in July 2012. The opinion of the IAB as well as the final Impact Assessment and its executive summary are published together with this proposal.

3. LEGAL ELEMENTS OF THE PROPOSAL

3.1. General context — summary of the proposed action

The present proposal for a Directive aims to improve and reinforce the way in which Article 45 TFEU and Regulation (EU) No 492/2011 are applied in practice across the European Union by establishing a general common framework of appropriate provisions and measures for facilitating a better and more uniform application of rights conferred by EU law on workers and members of their families exercising their right to free movement.

The proposal for a Directive introduces, in particular, legal obligations in order to:

- guarantee EU migrant workers an appropriate means of redress at national level. Any EU worker who believes that he/she has been the victim of discrimination on the grounds of nationality should be able to make use of appropriate administrative and/or judicial procedures to challenge the discriminatory behaviour;

- further protect workers by ensuring that associations, organisations or other legal entities with a legitimate interest in the promotion of the rights to free movement of workers may

[20] Technical Committee foreseen by Regulation 492/2011 is composed by representatives of Member States.

engage in any administrative or judicial procedure on behalf or in support of EU migrant workers where there has been a violation of their rights;

- set up structures or bodies at a national level which will promote the exercise of the right to free movement by providing information and supporting and assisting EU migrant workers who suffer from nationality based -discrimination;

- raise awareness by providing employers, workers, and any other interested parties with easily accessible relevant information;

- promote dialogue with appropriate non-governmental organisations and the social partners.

3.2. Legal basis

This proposal is based on Article 46 TFEU, the same legal base as Regulation (EU) No 492/2011, which allows for the adoption of Regulations or Directives under the ordinary legislative procedure.

3.3. Subsidiarity and proportionality principles

The problems identified with respect to the application and enforcement of EU Law on the free movement of workers, and in particular of Regulation (EU) No 492/2011, are linked to the objectives set out in Article 3(3) TEU, under which the European Union established an internal market based on a highly competitive social market economy, aimed at full employment and social progress, and in Articles 45 (freedom of movement and non-discrimination on the grounds of nationality for EU workers) and 18 TFEU (non-discrimination on the grounds of nationality for EU citizens).

The applicable EU rules need to be applied appropriately and effectively. Differences and disparities in the way Regulation (EU) No 492/2011 is applied and enforced in the different Member States are detrimental to the proper functioning of free movement as a fundamental freedom. There is evidence to suggest it is very difficult to create the required level playing field for workers exercising their right to free movement throughout the EU. Under these circumstances, the necessary legal clarity and certainty can only be achieved at EU level.

The objectives of the proposal cannot be sufficiently achieved by Member States and action at EU level is therefore required.

In line with the principle of proportionality, this Directive does not go beyond what is necessary in order to achieve the objectives. In order to improve the application and enforcement of Regulation (EU) No 492/2011 in practice, it proposes preventive measures, such as the guarantee of appropriate means of redress and the provision of information support and advice in accordance with national traditions and practices.

Bearing in mind the nature of the proposed measures, it will give Members States the freedom to choose the implementing measures best suited to their national judicial systems and procedures.

3.4. Detailed explanation of the proposal

3.4.1. CHAPTER I GENERAL PROVISIONS

3.4.1.1. Article 1 - Subject matter

Article 45 TFEU is a provision of EU law which is directly applicable in the national judicial order of Member States and which directly confers on European citizens the right to move to another Member State for work purposes and to accept offers of employment, to work there without needing a work permit, to reside there for that purpose and to stay there even after employment has finished. It also confers the right to enjoy equal treatment with nationals as regards access to employment, remuneration and other conditions of work and employment. Thus it implies the abolition of any discrimination (direct or indirect) based on nationality in the exercise of these rights as well as of any unjustified obstacle which impedes the exercise of the right to free movement[21].

Regulation (EU) No 492/2011 is also a legal instrument which by its nature is directly applicable and Member States do not have to take implementing measures in order for their citizens to be able to rely on the rights conferred by that Regulation.

The rights conferred by that Regulation on individuals, which will be easier to enforce under the present proposal, are those contained in Chapter I "Employment, Equal treatment and Workers' families, in Articles 1 to 10. They concern in particular access to employment (Section 1, Eligibility to employment, Articles 1 to 6), equal treatment in relation to employment and working conditions (Section 2, Employment and equality of treatment, Articles 7 to 9) and the family members of the worker (Section 3, Workers' families, article 10).

The present proposal for a Directive does not concern Chapter II of Regulation (EU) No 492/2011, *Clearance of vacancies and applications for employment* (Articles 11 to 20), Chapter III, *Committees for ensuring close cooperation between the Member States in matters concerning the freedom of movement of workers and their employment* (Articles 20 to 34) or Chapter IV, *Final provisions* (Articles 35 to 42).

3.4.1.2. Article 2-Scope

The proposal does not modify the scope of application of the Regulation (EU) No 492/2011. It only applies in cases of discrimination on the grounds of nationality in relation to the matters covered by that Regulation, by introducing the provisions of protection, information and support, in accordance with Articles 3 to 7 of the present proposal for a Directive. It underpins the guarantee of equal treatment and reinforces remedies in cases of unjustified obstacles in relation to eligibility and access to employment for workers exercising their right to free movement within the European Union.

In this context the proposal for a Directive covers the following matters:

- access to employment;
- conditions of employment and work in particular as regards remuneration and dismissal

[21] See in particular in Case C-325/08: Judgment of the Court of 16 March 2010, Olympique Lyonnais SASP v Olivier Bernard, Newcastle United FC, ECR 2010, p.I-2177.

- access to social and tax advantages;
- membership of trade unions;
- access to training;
- access to housing;
- access to education for workers' children.

3.4.2. CHAPTER II - ENFORCEMENT

3.4.2.1. Article 3- Defence of rights - Means of redress - Time limits

This Article imposes a legal obligation on Member States to provide EU migrant workers with appropriate means of redress at national level. It also relates to the enforcement and defence of rights, which in itself concerns a fundamental right. The Charter of Fundamental Rights of the European Union confirms the right to an effective remedy for everyone whose rights and freedoms guaranteed by the law of the European Union are violated or not respected. The proposal covers both judicial and extra-judicial means of redress, including alternative dispute settlement mechanisms such as conciliation and mediation. Ombudsmen and equality bodies or other similar structures may also provide an alternative to the general courts. In accordance with Article 47 of the Charter of Fundamental Rights of the European Union this Article provides that, in case where Member States only provide for administrative procedures, they shall ensure that any administrative decision may be challenged before a tribunal.

In conformity with the case-law of the CJ[22], paragraph 2 of this Article specifies that the previous paragraph is without prejudice to national rules relating to time limits for bringing actions as regards the principle of equal treatment, provided that these time limits are such that they cannot be regarded as capable of rendering virtually impossible or excessively difficult the exercise of rights conferred by Union law on free movement of workers.

3.4.2.2. Article 4 - Action of associations, organisations or other legal entities

This Article introduces an obligation for Member States to ensure that associations, organisations or legal entities (such as trade unions, NGOs or other organisations) may engage in any administrative or judicial procedure on behalf or in support of EU migrant workers in the event of violations of their rights under either the Directive or under Regulation (EU) No 492/2011. It would be left to Member States' discretion to define the way this provision should be implemented in practice, according to the national judicial systems and procedures.

Associations, organisations or other legal entities can play a significant role in the defence of rights on behalf of or in support of a worker and members of his/her family[23]. The assistance could be different from one Member State to another according to their judicial system, procedures, traditions and practices (e.g. the trade unions could intervene, or bear the costs or assisting victims of discrimination).

Mirroring Article 3 the second paragraph of Article 4 specifies that the first paragraph is without prejudice to national rules relating to time limits for bringing actions.

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22 Judgement of 16th May 2000 in case C-78/98 Preston ECR 2000 p. I-03201.

23 At present, this right under different forms exist in the majority of Member States except Germany, Estonia and Malta.

3.4.3. CHAPTER III - PROMOTION OF EQUAL TREATMENT - CONTACT POINTS, STRUCTURES OR BODIES - DIALOGUE

3.4.3.1. Article 5 – Contact points, structures or bodies.

This Article provides for structures on information, promotion and support or for bodies to be established at national level to support EU migrant workers and promote, analyse and monitor the rights conferred on them and the members of their families by EU law. These functions may, however, also be exercised by existing bodies already established by Member States to fight discrimination on other grounds in the context of the implementation of EU legislation, or agencies with responsibility at national level for the defence of human rights or the safeguard of individuals' rights. In this case Member State must ensure allocation of sufficient resources to the existing body for the performance of additional tasks. To this end the training of experts could be eligible under the European Social Fund.

The tasks of these structures or bodies should include:

(a) Providing information to all relevant stakeholders and increasing support for EU migrant workers; providing advice and assistance to alleged victims of discrimination pursuing their complaints, without prejudice to the rights of the legal entities referred to in Article 4. Whilst in some countries equality bodies established under EU Directives fighting discrimination on other grounds have legal standing and can bring a case to court, in others, they can only provide assistance to the claimant, or provide observations to the court.

(b) Conducting independent surveys concerning discrimination on the basis of nationality;

(c) Publishing independent reports and making recommendations in relation to equality of treatment and the fight against nationality based discrimination.

(d) Publishing information on any issue relating to the application at national level of EU rules on free movement of workers.

It would be left to each Member State to decide whether creating a completely new structure is necessary, or whether existing bodies can be assigned the tasks described above for the promotion of non-discrimination exist in all Member States. At present 'nationality' could be covered by the competence of existing Equality bodies in 19 Member States[24].

Moreover, this Article provides for synergies between existing or new structures or bodies with other information, promotion and support tools at EU level, such as Your Europe, SOLVIT, EURES, Enterprise Europe Network and the Points of Single Contact.

Building on existing structures has the advantage of benefiting of the existing knowledge and experience. It also increases simplicity and accessibility since it avoids the risk of creating confusion and uncertainty as to where to turn in case of problems.

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[24] AT, BE, BG, EE, FI, FR, HU, IE, IT, LT, LV, NL, PL, PT, RO, SE, SL, SK, UK. For more information please refer to the Commission Staff working document annexed to this proposal "Initiative to support EU migrant workers in the exercise of their rights to free movement", point 3.1.3.

3.4.3.2. Article 6 - Dialogue

This Article requires Member States, in accordance with national traditions and practices, to take adequate measures to encourage and promote dialogue with social partners and non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of nationality.

3.4.4. CHAPTER IV - ACCESS TO INFORMATION

3.4.4.1. Article 7 - Dissemination of information

This Article provides for the appropriate dissemination of information about the rights of workers and members of their families in relation to equal treatment arising from the Directive and from Articles 1 to 10 of Regulations (EU) No 492/2011. The more effective the system of public information and prevention is, the less need there should be for individual remedies. The proposal for a Directive leaves the choice of information tools to the Member States, but on line or digital information with links to the existing information tools at EU level, Your Europe and EURES websites should be made compulsory.
However, this can be complemented by any other public information activities reflecting the best practices noted by the national experts and stakeholders such as awareness-raising campaigns or specific information. The active role of social partners, equality bodies, NGOs and other associations could also be very important in the dissemination of the information.

3.4.5. CHAPTER V - FINAL PROVISIONS

3.4.5.1. Article 8 - Minimum requirements

The first paragraph is a standard 'non-regression' provision which specifies that Member States may have, or may wish to adopt, legislation providing for a higher level of protection than that guaranteed by the proposed Directive.

The second paragraph expressly indicates that Member States have the discretion to extend the competencies of the bodies referred to in Article 5 to encompass also non-discrimination on grounds of nationality for all EU citizens and their family members exercising their right to free movement, as enshrined in Article 21 TFEU and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[25].

The third paragraph provides that Member States should not lower any existing level of protection against discrimination when implementing this Directive.

3.4.5.2. Article 9 - Transposition

Member States are required to adopt the necessary implementing measures within a period of 2 years after the entry into force of the Directive, and to fulfil certain information requirements, such as communicating to the Commission how the Directive is transposed into national law and making reference to the Directive in any implementing measures.

In this context in accordance with the Joint Political Declaration of Member States and the Commission on explanatory documents of 28 September 2011, it would be appropriate that Member States accompany the notification of their transposition measures with one or more

[25] OJ L 158, 30.4.2004

documents explaining the relationship between the components of the present Directive and the corresponding parts of national transposition instruments. Bearing in mind that for some provisions of this Directive, such as those on structures or bodies foreseen in Article 5 several Member States dispose already legislation to fight discrimination on other grounds in the context of the implementation of EU legislation, or agencies with responsibility at national level for the defence of human rights or the safeguard of individuals' rights, the explanatory documents would permit to better identify the specific measures adopted or already in place in order to fight discrimination on the basis of nationality.

3.4.5.3. Article 10 - Report

The Commission has to present a report to the European Parliament, the Council and the European Economic and Social Committee on the implementation of this Directive no later than two years after the expiry of the deadline for its transposition. It can also make appropriate proposals for further measures where necessary. Therefore, in the context of its implementation report and experience gained on the ground, the Commission will also monitor the way Member States opted to extend the competencies of the structures and bodies referred to in Article 5 to the right to equal treatment without discrimination on grounds of nationality of all Union citizens and their family members exercising their right to free movement under Union law.

3.4.5.4. Article 11 - Entry into force

This is a standard clause specifying that this Directive will enter into force on the day following that of its publication in the Official Journal of the European Union.

3.4.5.5. Article 12 - Addresses

This is a standard provision specifying that the Directive is addressed to the Member States.

4. BUDGETARY IMPLICATIONS

This proposal is expected to have limited implications on the Union budget. Expenses for an evaluation study in 2015 are estimated to not exceed 0,300 million EUR and will be covered by funds available from the budget line financing the free movement of workers, coordination of social security systems and measures for migrants, including migrants from third countries. Costs for human resources (0,131 million EUR p.a.) will be covered under heading 5 of the Multiannual Financial Framework. Details are given in the financial statement annexed to this proposal.

2013/0124 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 46 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee[26],

Having regard to the opinion of the Committee of the Regions[27],

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) The free movement of workers is a fundamental freedom of EU citizens and one of the pillars of the internal market in the Union enshrined in Article 45 of the Treaty on the Functioning of the European Union. Its implementation is further developed by Union law aimed at guaranteeing the full exercise of rights conferred on Union citizens and the members of their families.

(2) The free movement of workers is also a key element to the development of a genuine Union labour market, allowing workers to move from high unemployment areas to areas where there are labour shortages, helping more people find posts better suited to their skills and overcoming bottlenecks in the labour market.

(3) The free movement of workers gives every citizen the right to move freely to another Member State to work and reside there for that purpose. It protects them against discrimination on the grounds of nationality as regards employment, remuneration and other working conditions by ensuring their equal treatment in comparison to nationals

[26] OJ C , , p. .
[27] OJ C , , p. .

of that Member State. It needs to be distinguished from the freedom to provide services, which includes the right of undertakings to provide services in another Member State, for which they may send (‘post’) their own workers to another Member State temporarily to carry out the work necessary to provide these services there.

(4) With respect to workers and workers' families exercising their right to free movement, Article 45 of the Treaty confers substantial rights for the exercise of this fundamental freedom, specified in Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union[28].

(5) However, the effective exercise of the freedom of movement of workers is still a major challenge and many workers are very often unaware of their rights to free movement. They still suffer from discrimination on the grounds of nationality when moving across European Union borders of the Member States. There is, therefore, a gap between the legislation and its application in practice that needs to be addressed.

(6) In July 2010**,** in its Communication **o**n " Reaffirming the free movement of workers: rights and major developments**"**[29] the Commission pointed out that it will explore ways of tackling the new needs and challenges (in particular in the light of new patterns of mobility) facing EU migrant workers and their family members, and in the context of the new strategy for the single market will consider how to promote and enhance mechanisms for the effective implementation of the principle of equal treatment for EU workers and members of their families exercising their right to free movement.

(7) In the 2010 EU Citizenship Report "Dismantling the obstacles to EU citizens rights" of 27 October 2010[30], the Commission identified the divergent and incorrect application of Union law on the right to free movement as one of the main obstacles that Union citizens are confronted with in the effective exercise of their rights under Union law. Accordingly, the Commission announced its intention to take action to "facilitate free movement of EU citizens and their third-country national family members by enforcing EU rules strictly, including on non-discrimination, by promoting good practices and increased knowledge or EU rules on the ground and by stepping up the dissemination of information to EU citizens about their free movement rights"(action 15 of the 2010 EU Citizenship Report).

(8) In its Employment package of 18 April 2012 (Communication from the Commission "Towards a job-rich recovery")[31], the Commission announced its intention to "present a legislative proposal (information and advice) in order to support mobile workers in the exercise of rights derived from the Treaty and Regulation 492/2011 on freedom of movement for workers within the Union".

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28 OJ L 141, 27.5.2011, p. 1.
29 COM(2010) 373 final of 13 July 2010
30 COM(2010)603
31 COM(2012) 173 final of 18 April 2012

(9) Adequate and effective application and enforcement are key elements in protecting the rights of workers, whereas poor enforcement undermines the effectiveness of the Union rules applicable in this area.

(10) A more effective and uniform application of rights conferred by Union rules on free movement of workers is also necessary for the proper functioning of the internal market.

(11) The application and monitoring of the Union rules on free movement should be improved to ensure workers are better informed about their rights, to assist and to protect them in the exercise of those rights, and to combat circumvention of these rules by public authorities and public or private employers.

(12) In order to ensure the correct application of, and to monitor compliance with, the substantive rules concerning workers' rights to free movement for work purposes, Member States should take the appropriate measures to protect them against both discrimination on grounds of nationality and any unjustified obstacle to the exercise of that right.

(13) To that end it is appropriate to provide specific rules for effective enforcement of the substantive rules governing the freedom of movement of workers, and to facilitate better and more uniform application of Article 45 of the Treaty and of Regulation (EU) No 492/2011.

(14) In this context, workers who have been subject to discrimination on the grounds of nationality, or to any unjustified restriction in exercising their right to free movement, should have adequate and effective means of legal protection and redress. When Member States only provide for administrative procedures they shall ensure that any administrative decision may be challenged before a tribunal in the sense of Article 47 of the Charter.

(15) To provide more effective levels of protection, associations and legal entities should also be empowered to engage, as the Member States determine, on behalf of or in support of any victim in proceedings, without prejudice to national rules of procedure concerning representation and defense before the courts.

(16) In relation to time limits foreseen in Articles 3(2) and 4(2) and in accordance with the case law of the European Court of Justice[32] these time limits should be such that they cannot be regarded as capable of rendering virtually impossible or excessively difficult the exercise of rights conferred by Union law,

(17) Protection against discrimination based on the grounds of nationality would itself be strengthened by the existence of organisations in each Member State with competence to promote equal treatment, to analyse the problems involved in citizen's cases, to study possible solutions and to provide specific assistance to Union workers exercising their right to free movement.

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[32] Judgement of 16th May 2000 in case C-78/98 Preston ECR 2000 p. I-03201.

(18) It is up to each Member State to decide whether the tasks referred to in Article 5 of this Directive are attributed to an already existing body covering a wider range of discrimination grounds. In the case the tasks under Article 5 will be covered by expanding the mandate of an already existing body or structure, the Member State should ensure allocation of sufficient resources to the existing body for the performance of additional tasks in order to ensure that the performance of already existing tasks of these bodies will not suffer.

(19) Member States should ensure the promotion of synergies with existing information and support tools at the Union level and to this end they should ensure that existing or newly created bodies are aware, make use of and co-operate with the existing information and assistance services, such as Your Europe, SOLVIT, EURES, Enterprise Europe Network and the Points of Single Contact.

(20) Member States should promote dialogue with non-governmental organisations and between social partners to address and combat different forms of discrimination on the grounds of nationality.

(21) Member States should make information about employment terms and conditions more widely available to workers from other Member States, to employers and to other interested parties.

(22) Member States should establish how employers, workers and other people can be provided with easily accessible, relevant information on the provisions of this Directive and the relevant provisions of Regulation (EU) No 492/2011. This information should also be easily accessible through Your Europe and EURES.

(23) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. Member States also have the possibility to extend the competencies of the organisations entrusted with tasks related to the protection of Union migrant workers against discrimination on grounds of nationality so as to cover the right to equal treatment without discrimination on grounds of nationality of all Union citizens and their family members exercising their right to free movement, as enshrined in Article 21 TFEU and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[33]. The implementation of the present Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State.

(24) The effective implementation of the provisions of this Directive implies that Member States, when adopting the appropriate measures to comply with their obligations under this Directive, should provide a reference to this Directive or accompanied by such a reference on the occasion of the official publication of implementing measures.

(25) In accordance with the Joint Political Declaration of Member States and the Commission on explanatory documents of 28 September 2011, Member States have undertaken to accompany, in justified cases, the notification of their transposition

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[33] OJ L 158, 30.4.2004

measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

(26) After a sufficient time of implementation of the Directive has elapsed, the Commission should prepare a report on its implementation, evaluating in particular the opportunity to present any necessary proposal aiming to guarantee a better enforcement of the Union law on free movement.

(27) This Directive respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, notably the freedom to choose an occupation and the right to engage in work (Article 15), the right to non-discrimination (Article 21 and in particular Paragraph 2 concerning non-discrimination on the grounds of nationality), the right to collective bargaining and action (Article 28), fair and just working conditions (Article 31), the right to freedom of movement and residence (Article 45) and the right to an effective remedy and a fair trial (Article 47). It has to be implemented in accordance with those rights and principles.

(28) Since the objective of this Directive, namely to establish a general common framework of appropriate provisions, measures and mechanisms necessary for the better and more uniform application and enforcement in practice of rights conferred by the Treaty and Regulation (EU) No 492/2011, cannot be sufficiently achieved by the Member States, and can therefore, by reason of the scale and effect of the action, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty of the European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I
GENERAL PROVISIONS

Article 1
Subject matter

This Directive lays down provisions facilitating uniform application and enforcement in practice of rights conferred by Article 45 of the Treaty on the Functioning of the European Union (TFEU) and by provisions of Articles 1 to 10 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.

Article 2
Scope

This Directive applies to the following matters in the area of freedom of movement for workers:

(a) access to employment;

(b) conditions of employment and work, in particular as regards remuneration and dismissal;

(c) access to social and tax advantages;

(d) membership of trade unions;

(e) access to training;

(f) access to housing;

(g) access to education for workers' children.

CHAPTER II
ENFORCEMENT

Article 3
Defence of rights - Means of redress - Time limits

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate, conciliation procedures, for the enforcement of the obligations under Article 45 of the Treaty and Articles 1 to 10 of Regulation (EU) No 492/2011, are available to all workers and members of their families who consider they have suffered or are suffering from unjustified restrictions to their right to free movement or consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

2. Paragraph 1 shall apply without prejudice to national rules on time limits for enforcement of those rights. These time limits shall be such that they cannot be regarded as capable of rendering virtually impossible or excessively difficult the exercise of rights conferred by Union law.

Article 4
Action of associations, organisations or other legal entities

1. Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf of or in support of the worker and members of his/her family, with his/her approval, in any judicial and/or administrative procedure provided for the enforcement of rights under Article 45 of the Treaty and Articles 1 to 10 of Regulation (EU) No 492/2011.

2. Paragraph 1 shall apply without prejudice to national rules on time limits for enforcement of those rights. These time limits shall be such that they cannot be regarded as capable of rendering virtually impossible or excessively difficult the exercise of rights conferred by Union law.

CHAPTER III

PROMOTION OF EQUAL TREATMENT-STRUCTURES, BODIES-DIALOGUE

Article 5
Structures - bodies

1. Member States shall designate a structure, a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all workers or members of their families without discrimination on grounds of nationality and make the necessary arrangements for functioning of such bodies. These bodies may form part of agencies at a national level with similar objectives but covering a wider range of discrimination grounds. In that case, the Member State shall ensure allocation of sufficient resources to the existing body for the performance of additional tasks in order to ensure that the performance of already existing tasks of these bodies will not suffer.

2. Member States shall ensure that the competences of these bodies include:

(a) without prejudice to the right of workers or the members of their family and associations and organisations or other legal entities referred to in Article 4, the provision of independent legal and/or other assistance to workers or the members of their family in pursuing their complaints;

(b) conducting independent surveys concerning discrimination on the basis of nationality;

(c) publishing independent reports and making recommendations on any issue relating to such discrimination;

(d) publishing information on any issue relating to the application at national level of EU rules on free movement of workers.

3. Member States shall ensure that existing or newly created bodies are aware, make use of and co-operate with the existing information and assistance services at Union level, such as Your Europe, SOLVIT, EURES, Enterprise Europe Network and the Points of Single Contact.

Article 6
Dialogue

Member States shall encourage dialogue with appropriate non-governmental organisations and the social partners which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of nationality with a view to promoting the principle of equal treatment.

CHAPTER IV
ACCESS TO INFORMATION

Article 7
Dissemination of information

1. Member States shall ensure that the provisions adopted pursuant to this Directive together with the relevant provisions already in force in Articles 1 to 10 of Regulation (EU) No 492/2011, are brought to the attention of the persons concerned by all appropriate means throughout their territory.

2. Member States shall provide clear, easily accessible, comprehensive and up-to-date information on the rights conferred by the Union law on free movement of workers. . This information should also be easily accessible through Your Europe and EURES.

CHAPTER V
FINAL PROVISIONS

Article 8
Minimum requirements

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.

2. Member States may provide that the competencies of the structures and bodies referred to in Article 5 for the promotion, analysis, monitoring and support of equal treatment of all workers or members of their families without discrimination on grounds of nationality, also cover the right to equal treatment without discrimination on grounds of nationality of all EU citizens and their family members exercising their right to free movement, as enshrined in Article 21 TFEU and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

3. Implementation of this Directive shall under no circumstances be sufficient grounds for a reduction in the level of protection of workers in the areas to which it applies, without prejudice to the Member States' right to respond to changes in the situation by introducing laws, regulations and administrative provisions which differ from those in force on the notification of this Directive, provided that the provisions of this Directive are complied with.

Article 9
Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [2 years after its entry into force-specific date to be inserted by the OPOCE] at the latest. They shall forthwith communicate to the Commission the text of those provisions.

2. When Member States adopt those provisions they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

3. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 10
Report

No later than two years after the expiry of the deadline for transposition, the Commission shall report to the European Parliament, the Council and the European Economic and Social Committee on the implementation of this Directive, with a view to proposing where appropriate, the necessary amendments.

Article 11
Entry into force

This Directive shall enter into force on the day following that of its publication in the Official Journal of the European Union.

Article 12
Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*

LEGISLATIVE FINANCIAL STATEMENT

1. FRAMEWORK OF THE PROPOSAL/INITIATIVE

1.1. Title of the proposal/initiative

1.2. Policy area(s) concerned in the ABM/ABB structure

1.3. Nature of the proposal/initiative

1.4. Objective(s)

1.5. Grounds for the proposal/initiative

1.6. Duration and financial impact

1.7. Management method(s) envisaged

2. MANAGEMENT MEASURES

2.1. Monitoring and reporting rules

2.2. Management and control systems

2.3. Measures to prevent fraud and irregularities

3. ESTIMATED FINANCIAL IMPACT OF THE PROPOSAL/INITIATIVE

3.1. Heading(s) of the multiannual financial framework and expenditure budget line(s) affected

3.2. Estimated impact on expenditure

3.2.1. Summary of estimated impact on expenditure

3.2.2. Estimated impact on operational appropriations

3.2.3. Estimated impact on appropriations of an administrative nature

3.2.4. Compatibility with the current multiannual financial framework

3.2.5. Third-party participation in financing

3.3. Estimated impact on revenue

LEGISLATIVE FINANCIAL STATEMENT

1. FRAMEWORK OF THE PROPOSAL/INITIATIVE

1.1. Title of the proposal/initiative

1.2. Proposal for a Directive of the European Parliament and of the Council on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers
Policy area(s) concerned in the ABM/ABB structure[34]

Employment, Social Dialogue

1.3. Nature of the proposal/initiative

☐ The proposal/initiative relates to **a new action**

☐ The proposal/initiative relates to **a new action following a pilot project/preparatory action**[35]

☒ The proposal/initiative relates to **the extension of an existing action**

☐ The proposal/initiative relates to **an action redirected towards a new action**

1.4. Objectives

1.4.1. The Commission's multiannual strategic objective(s) targeted by the proposal/initiative

Contributing to the European 2020 targets: - Promote increased participation in the labour market - Develop a safe, flexible and mobile European labour market - Promote social and economic cohesion

1.4.2. Specific objective(s) and ABM/ABB activity(ies) concerned

Specific objective No.2 (EMPL): Promote geographic and professional mobility of workers in Europe in order to overcome the obstacles of free movement and to contribute to the establishment of a real labour market at European level.

1.4.3. Expected result(s) and impact

Specify the effects which the proposal/initiative should have on the beneficiaries/groups targeted.

[34] ABM: Activity-Based Management – ABB: Activity-Based Budgeting.
[35] As referred to in Article 49(6)(a) or (b) of the Financial Regulation.

The proposal aims at a better application and enforcement in practice of free movement rights, combating discrimination on the basis of nationality and reducing the obstacles migrant workers still face.

1.4.4. Indicators of results and impact

Specify the indicators for monitoring implementation of the proposal/initiative.

Several indicators, both quantitative (e.g.; the number of complaints or the degree of raise awareness) and qualitative (the reports on the application of the Directive and of free movement legislation) will be used for monitoring purposes. The supporting bodies set up according to this proposal for a Directive will also have a monitoring role and will be able to provide more qualitative data on discrimination on the grounds of nationality.

Moreover the Commission intends to evaluate the impact of this Directive with:

-a systematic evaluation by the Commission services with the involvement of the Advisory Committee on free movement of workers;
-the presentation of a report 2 years after the deadline of transposition;
-assess the activities developed by the supporting bodies and associations;
-assess whether the Directive has led to positive changes
-identify the difficulties faced by equality supporting bodies, associations and organisations.

1.5. Grounds for the proposal/initiative

1.5.1. Requirement(s) to be met in the short or long term

The proposal will aim at improving and reinforcing the, application and enforcement in practice of the EU rules on free movement of workers (Article 45TFEU and Regulation (EU) No 492/2011 Articles 1 to 10 relating to access to employment and employment and working conditions). By providing specific tools and mechanisms of information and advice, it ensures at the same time guarantees for a more effective exercise in practice of these rights in order to reduce discriminations on the grounds of nationality and to contribute to the removal of unjustified obstacles to the freedom of movement of workers which is one of the principal components for the realisation of the Internal Market.

1.5.2. Added value of EU involvement

The problems identified are linked to the objectives set out by Article 3(3) TEU and Articles 45 TFEU. The existing legal framework, application and enforcement in practice as well as previous attempts to address existing problems by the way of non-binding measures have not been sufficient to solve the identified problems. Therefore, it is necessary to address the existing problems at EU level in order to better achieve the objectives of the Treaty.

1.5.3. Lessons learned from similar experiences in the past

Previous attempts to solve problems of implementation and enforcement in practice of the EU law on free movement of workers and in particular of Regulation (EU) No 492/2011 by non-legislative means have not reached their objectives. The issues have been addressed by interpretative Legal Commission's Communications in 2002 and in 2010. The respective Communications provided, in the light of the case law of the CJ further clarifications for Member States. However, the monitoring

exercise of application of EU law on free movement showed that there were always a number of deficiencies; Since October 2010, the Commission launched several ex-post evaluation studies of the problems faced by EU workers when exercising their right to free movement: (two independent reports of the Network of experts on free movement of workers discussed within the Advisory committee on free movement of workers which concluded that the right for an equal treatment on the basis of nationality is rarely offered the same level of protection and guarantees as the right on equal treatment on other grounds (race, sex…) in the Member States. EU workers are still considered in most Member states as holding a status closer to that of third country national and not to that of a national. Moreover, if sometimes they benefit, in cases of nationality based discrimination, from these guarantees and protection is due to a broader interpretation of national law which assimilates nationality to ethnic origin. Therefore there is a need for a stronger protection of nationality based discrimination.

In order to prepare the Impact Assessment an ex-ante evaluation study has been carried out by an external consultant in 2012.

1.5.4. Coherence and possible synergy with other relevant instruments

Fundamental rights: The proposal is consistent with the EU's fundamental rights strategy, COM(2010) 573 final.

Europe 2020 strategy: The initiative will contribute to the creation of employment within the strategy for smart, sustainable and socially inclusive growth (Europe 2020).

Single Market Act: The proposal will in particular facilitate the free movement of work force and will contribute to a better functioning of the Internal market. It will contribute to better match workers with jobs, allowing more persons to find jobs corresponding to their skills and overcoming bottlenecks in the European labour market.

1.6. Duration and financial impact

☒ Proposal/initiative of **limited duration**

☐ Proposal/initiative in effect from [DD/MM]YYYY to [DD/MM]YYYY

☒ Financial impact from 2013 to 2020

The implementation of the directive is of unlimited duration but will be reassessed after two years after the deadline for transposition has expired.

☐ Proposal/initiative of **unlimited duration**

– Implementation with a start-up period from 2013 to 2014,

– followed by full-scale operation

1.7. Management mode(s) envisaged[36]

☒ **Centralised direct management** by the Commission

☐ **Centralised indirect management** with the delegation of implementation tasks to:

- ☐ executive agencies
- ☐ bodies set up by the Communities[37]
- ☐ national public-sector bodies/bodies with public-service mission
- ☐ persons entrusted with the implementation of specific actions pursuant to Title V of the Treaty on European Union and identified in the relevant basic act within the meaning of Article 49 of the Financial Regulation

☐ **Shared management** with the Member States

☐ **Decentralised management** with third countries

☐ **Joint management** with international organisations ***(to be specified)***

If more than one management mode is indicated, please provide details in the "Comments" section.

Comments

2. MANAGEMENT MEASURES

2.1. Monitoring and reporting rules

Specify frequency and conditions.

Two years after the deadline for transposition there will be an on-going evaluation. The main focus of this evaluation will be to assess the initial effectiveness of the Directive. Emphasis will be placed on the improvement of enforcement and effectiveness of EU rules on free movement of workers after the adoption of implementing measures on information and advice provided by this Directive, This evaluation will be carried out by the Commission with the assistance of external experts. Terms of reference will be developed by Commission services. Stakeholders will be informed of and asked to comment on the draft evaluation through the Advisory Committee on free movement of workers and they will also be regularly informed of the progress of the evaluation and its findings. The findings will be made public.

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[36] Details of management modes and references to the Financial Regulation may be found on the BudgWeb site: http://www.cc.cec/budg/man/budgmanag/budgmanag_en.html

[37] As referred to in Article 185 of the Financial Regulation.

2.2. Management and control system

2.2.1. Risk(s) identified

Limited risks due to low financial impact.

2.2.2. Control method(s) envisaged

Standard risk-mitigating measures will be applied.

2.3. Measures to prevent fraud and irregularities

Specify existing or envisaged prevention and protection measures.

Standard risk-mitigating measures will be applied.

3. ESTIMATED FINANCIAL IMPACT OF THE PROPOSAL/INITIATIVE

3.1. Heading(s) of the multiannual financial framework and expenditure budget line(s) affected

Existing expenditure budget lines

In order of multiannual financial framework headings and budget lines.

Heading of multiannual financial framework	Budget line	Type of expenditure	Contribution			
	Number [Description……..……]	Diff./non-diff. (38)	from EFTA[39] countries	from candidate countries[40]	from third countries	within the meaning of Article 18(1)(aa) of the Financial Regulation
1	– Free Movement of Workers, coordination of social security schemes	Diff	YES	No	No	NO

New budget lines requested

In order of multiannual financial framework headings and budget lines.

Heading of multiannual financial framework	Budget line	Type of expenditure	Contribution			
	Number [Heading……..]	Diff./non-diff.	from EFTA countries	from candidate countries	from third countries	within the meaning of Article 18(1)(aa) of the Financial Regulation
	[XX.YY.YY.YY]		YES/NO	YES/NO	YES/NO	YES/NO

38 Diff. = Differentiated appropriations / Non-diff. = Non-Differentiated Appropriations

39 EFTA: European Free Trade Association.

40 Candidate countries and, where applicable, potential candidate countries from the Western Balkans.

3.2. Estimated impact on expenditure

3.2.1. Summary of estimated impact on expenditure

EUR million (to 3 decimal places)

Heading of multiannual financial framework:	1	**Sustainable growth (from 2014 onwards: Smart and Inclusive Growth)**

DG: EMPL[41]			Year 2013[42]	Year 2014	Year 2015	Year 2016	Year 2017	Year 2018	Year 2019	Year 2020	**TOTAL**
• Operational appropriations											
04.030500	Commitments	(1)	0	0	0,300	0	0	0	0	0	**0,300**
	Payments	(2)	0	0	0,150	0,150	0	0	0	0	**0,300**
Appropriations of an administrative nature financed from the envelope for specific programmes[43]											
TOTAL appropriations for DG EMPL	Commitments	=1+1a +3	0	0	0,300	0	0	0	0	**0**	**0,300**
	Payments	=2+2a+ 3	0	0	0,150	0,150	0	0	0	**0**	**0,300**

41 For details on the general IMI funding see COM(2011) 522 final (proposal on the IMI Regulation).

42 Year N is the year in which implementation of the proposal/initiative starts.

43 Technical and/or administrative assistance and expenditure in support of the implementation of EU programmes and/or actions (former "BA" lines), indirect research, direct research.

40

• TOTAL operational appropriations	Commitments	(4)	0	0	0,300	0	0	0	0	0	**0,300**
	Payments	(5)	0	0	0,150	0,150	0	0	0	0	**0,300**
• TOTAL appropriations of an administrative nature financed from the envelope for specific programmes		(6)									
TOTAL appropriations under HEADING 1 of the multiannual financial framework	Commitments	=4+ 6	0	0	0,300	0	0	0	0	0	**0,300**
	Payments	=5+ 6	0	0	0,150	0,150	0	0	0	0	**0,300**

Heading of multiannual financial framework:	5	" Administrative expenditure "

EUR million (to 3 decimal places)

		Year 2013	Year 2014	Year 2015	Year 2016	Year 2017	Year 2018	Year 2019	Year 2020	TOTAL
DG: EMPL										
• Human resources		0,131	0,131	0,131	0,131	0,131	0,131	0,131	0,131	**1,048**
• Other administrative expenditure										
TOTAL DG EMPL	Appropriations	0,131	0,131	0,131	0,131	0,131	0,131	0,131	0,131	**1,048**

TOTAL appropriations under HEADING 5 of the multiannual financial framework	(Total commitments = Total payments)	0,131	0,131	0,131	0,131	0,131	0,131	0,131	0,131	**1,048**

EUR million (to 3 decimal places)

		Year 2013	Year 2014	Year 2015	Year 2016	Year 2017	Year 2018	Year 2019	Year 2020	TOTAL
TOTAL appropriations under HEADINGS 1 to 5 of the multiannual financial framework	Commitments	0,131	0,131	0,131	0,131	0,131	0,131	0,131	0,131	**1,048**
	Payments	0,131	0,131	0,131	0,131	0,131	0,131	0,131	0,131	**1,048**

42

3.2.2. Estimated impact on operational appropriations

☐ The proposal/initiative does not require the use of operational appropriations

☒ The proposal/initiative requires the use of operational appropriations, as explained below:

Commitment appropriations in EUR million (to 3 decimal places)

Indicate objectives and outputs ⇩			Year 2013		Year **2014**		Year **2015**		Year **2016**		Year **2017**		Year **2018**		Year **2019**		Year **2020**		**TOTAL**	
	OUTPUTS																			
	Type of output[44]	Average cost of the output	Number of outputs	Cost	Number of outputs	Cost	Number of outputs	Cost	Number of outputs	Cost	Number of outputs	Cost	Number of outputs	Cost	Number of outputs	Cost	Number	Cost	Number	Cost
SPECIFIC OBJECTIVE No 2[45]: promote geographic and professional mobility																				
Evaluation by the Commission with support from experts	Assessment of positive impact and identified challenges	0, 300											1	0,300						

[44] Outputs are products and services to be supplied (e.g.: number of student exchanges financed, number of km of roads built, etc.).

[45] As described in Section 1.4.2. "Specific objective(s)…"

Sub-total for specific objective N°1												1	0,300						
TOTAL COST												1	0,300						

3.2.3. Estimated impact on appropriations of an administrative nature

3.2.3.1. Summary

☐ The proposal/initiative does not require the use of administrative appropriations

☒ The proposal/initiative requires the use of administrative appropriations, as explained below:

EUR million (to 3 decimal places)

	Year 2013 [46]	Year **2014**	Year **2015**	Year **2016**	Year **2017**	Year **2018**	Year **2019**	Year **2020**	**TOTAL**
HEADING 5 of the multiannual financial framework									
Human resources	0,131	0,131	0,131	0,131	0,131	0,131	0,131	0,131	**1,048**
Other administrative expenditure									
Subtotal HEADING 5 of the multiannual financial framework	0,131	0,131	0,131	0,131	0,131	0,131	0,131	0,131	**1,048**
Outside HEADING 5 [47] of the multiannual financial framework									
Human resources									
Other expenditure of an administrative nature									
Subtotal outside HEADING 5 of the multiannual financial framework									
TOTAL	0,131	0,131	0,131	0,131	0,131	0,131	0,131	0,131	**1,048**

[46] Year N is the year in which implementation of the proposal/initiative starts.

[47] Technical and/or administrative assistance and expenditure in support of the implementation of EU programmes and/or actions (former "BA" lines), indirect research, direct research.

3.2.3.2. Estimated requirements of human resources

☐ The proposal/initiative does not require the use of human resources

☒ The proposal/initiative requires the use of human resources, as explained below:

Estimate to be expressed in full amounts (or at most to one decimal place)

	Year 2013	Year 2014	Year 2015	Year 2016	Year 2017	Year 2018	Year 2019	Year 2020
• Establishment plan posts (officials and temporary agents)								
XX 01 01 01 (Headquarters and Commission's Representation Offices) (1 AD)	131000	131000	131000	131000	131000	131000	131000	131000
XX 01 01 02 (Delegations)								
XX 01 05 01 (Indirect research)								
10 01 05 01 (Direct research)								
• External personnel (in Full Time Equivalent unit: FTE)[48]								
XX 01 02 01 (CA, INT, SNE from the "global envelope") (1 SNE)								
XX 01 02 01 (CA, INT, SNE from the "global envelope") (0,5 CA)								
XX 01 02 02 (CA, INT, JED, LA and SNE in the delegations)								
XX 01 04 ***yy*** [49] - at Headquarters [50]								
XX 01 04 ***yy*** [49] - in delegations								
XX 01 05 02 (CA, INT, SNE - Indirect research)								
10 01 05 02 (CA, INT, SNE - Direct research)								
Other budget lines (specify)								
TOTAL	131000	131000	131000	131000	131000	131000	131000	131000

XX is the policy area or budget title concerned.

[48] CA= Contract Agent; INT= agency staff ("Intérimaire"); JED= "Jeune Expert en Délégation" (Young Experts in Delegations); LA= Local Agent; SNE= Seconded National Expert;

[49] Under the ceiling for external personnel from operational appropriations (former "BA" lines).

[50] Essentially for Structural Funds, European Agricultural Fund for Rural Development (EAFRD) and European Fisheries Fund (EFF).

The human resources required will be met by staff from the DG who are already assigned to management of the action and/or have been redeployed within the DG, together if necessary with any additional allocation which may be granted to the managing DG under the annual allocation procedure and in the light of budgetary constraints.

Description of tasks to be carried out:

Officials and temporary agents (1 AD)	monitoring transposition, infringement procedures, coordination call for proposals/tenders, coordination administrative cooperation

3.2.4. Compatibility with the current multiannual financial framework

☒ Proposal/initiative is compatible with both MFF 2007-2013 and 2014-2020.

☐ Proposal/initiative will entail reprogramming of the relevant heading in the multiannual financial framework.

Explain what reprogramming is required, specifying the budget lines concerned and the corresponding amounts.

☐ Proposal/initiative requires application of the flexibility instrument or revision of the multiannual financial framework[51].

Explain what is required, specifying the headings and budget lines concerned and the corresponding amounts.

3.2.5. Third-party contributions

☒ The proposal/initiative does not provide for co-financing by third parties

☐ The proposal/initiative provides for the co-financing estimated below:

Appropriations in EUR million (to 3 decimal places)

	Year **N**	Year **N+1**	Year **N+2**	Year **N+3**	… enter as many years as necessary to show the duration of the impact (see point 1.6)			Total
Specify the co-financing body								
TOTAL appropriations cofinanced								

[51] See points 19 and 24 of the Inter-institutional Agreement.

3.3. Estimated impact on revenue

☒ Proposal/initiative has no financial impact on revenue.

☐ Proposal/initiative has the following financial impact:

- ☐ on own resources
- ☐ on miscellaneous revenue

EUR million (to 3 decimal places)

Budget revenue line:	Appropriations available for the on-going budget year	Impact of the proposal/initiative[52]						
		Year **N**	Year **N+1**	Year **N+2**	Year **N+3**	… insert as many columns as necessary in order to reflect the duration of the impact (see point 1.6)		
Article ……								

For miscellaneous assigned revenue, specify the budget expenditure line(s) affected.

Specify the method for calculating the impact on revenue.

[52] As regards traditional own resources (customs duties, sugar levies), the amounts indicated must be net amounts, i.e. gross amounts after deduction of 25% for collection costs.

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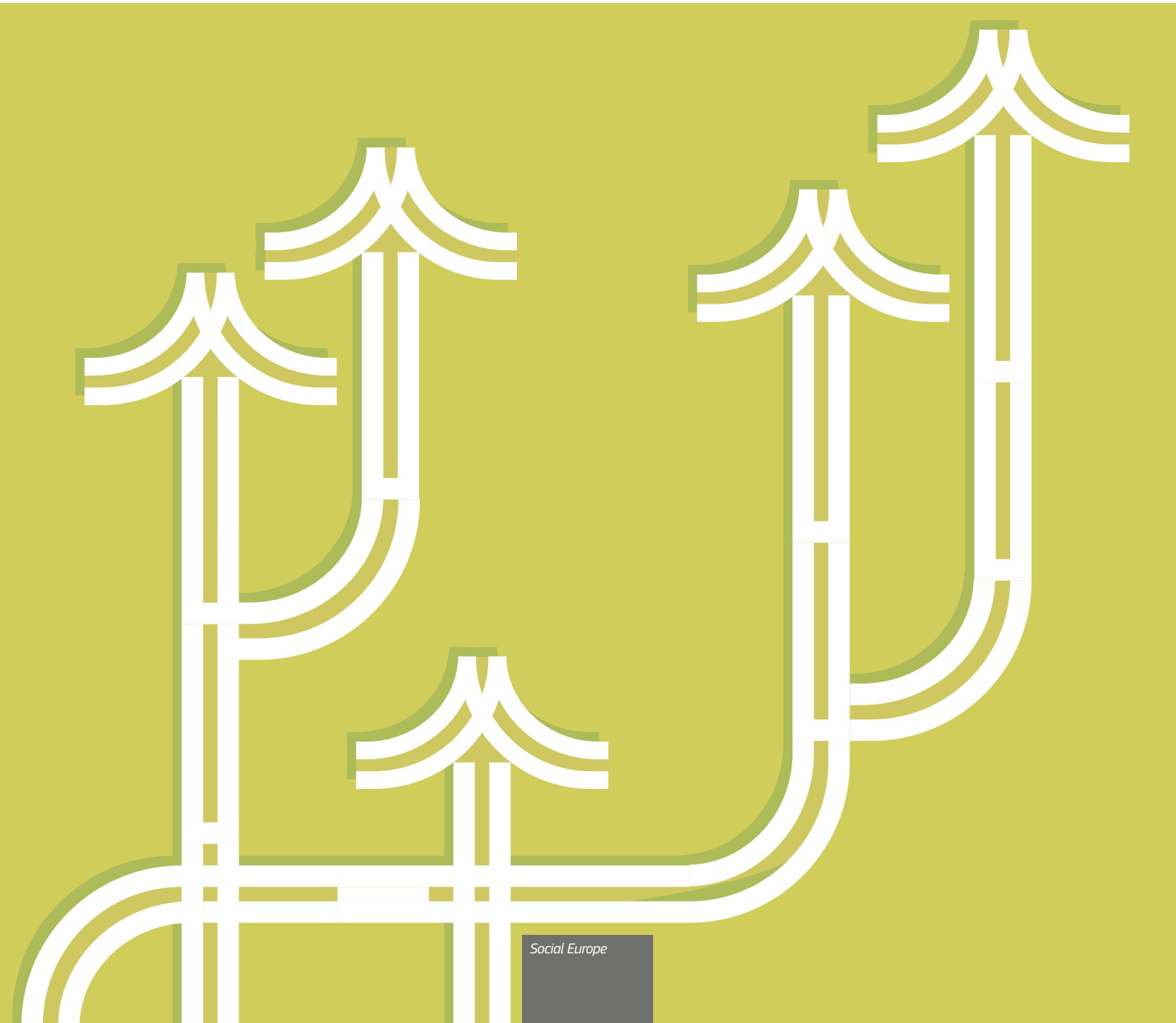

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Luxembourg: Publications Office of the European Union, 2013

Foreword

Improving the application of worker's rights

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

On 26th of April the European Commission adopted a proposal for a Directive on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers (COM (2013)236).

The proposal takes into account a number of concerns and policy recommendations aiming at the reduction in practice of discrimination based on nationality, and proposes measures which will help to remove unjustified obstacles to the free movement of workers.

The proposal is aimed at increasing the effectiveness of existing EU provisions on free movement of workers and to give full effect to the application of Article 45 TFEU and Regulation (EU) No 492/2011.

In this context, the proposed measures aim to ensure the better application of EU law on people's right to work in another Member State and so make it easier for people to exercise their rights in practice.

In this sixth edition of the Online Journal we have three contributions. In the first contribution Louise Ackers describes the dynamics of contemporary forms of intra-EU mobility exercised by a particular group of European citizens – namely academic researchers. She outlines some of the challenges these increasingly complex but commonplace types of mobility present for European citizenship and national employment and welfare systems. The second contribution by Calliope Spanou, the Greek Ombudsman, is a revised version of her final address held at the Conference on Free Movement of Workers, 15 and 16 November 2012 in Valletta, Malta. She stresses that it is important that the academic community upholds the ideals and principles of free movement and European citizenship while Ombudsman institutions can play the role of watchdog for the conformity to European legislation, defending corresponding rights.

The third contribution by Paul Minderhoud discusses the ambiguity in the rules on access to social assistance benefits for EU citizens in another Member State. This article was just finished before the Opinion of the Advocate-General was published in case C-140/12 (Brey), in which social assistance is more clearly defined and just before the Commission announced to start an infringement procedure against the UK for incorrect application of EU social security safeguards. Both events show the importance of the topic addressed in the article.

Contents

About the authors

Professor Louise Ackers, School of Law and Social Justice, University of Liverpool

Professor Louise Ackers' research focuses on highly skilled mobility and knowledge transfer processes. Much of her work has explored mobility in the context of science careers and the internationalisation of research. In addition to academic outputs she has worked closely with the research councils in the UK and with the European Commission in the development of policy on internationalisation, impact and research careers. She is currently coordinating an FP7 project on the careers, mobilities and impacts of doctoral graduates in the social sciences and humanities (Pocarim). She is also applying her expertise in this area to the specific context of mobile professional voluntarism in Uganda.

This article describes the dynamics of contemporary forms of intra-EU mobility exercised by a particular group of European citizens — namely academic researchers. It outlines some of the challenges these increasingly complex but commonplace types of mobility present for European citizenship and national employment and welfare systems.

Calliope Spanou — the Greek Ombudsman

Athens University Professor Calliope Spanou was appointed Ombudsman in Greece on 19 May 2011 following a decision by the special electoral body of the Greek parliament. Prior to that, she was Deputy Ombudsman from 2003.

Calliope Spanou has taught administrative sciences and public administration at the Faculty of Political Science and Public Administration at the University of Athens since 1989. She also taught at the universities of Amiens, Paris II and Versailles–Saint Quentin en Yvelines and at the National School of Public Administration. In addition, she was advisor at the National Centre of Public Administration and the OECD, a member of the Steering Committee of the European Group of Public Administration and former president of the Hellenic Political Sciences Association.

Legal harmonisation is an important and necessary but not sufficient condition for the exercise of free movement rights within the EU. Various obstacles remain, either as remnants of a domestically centred past, or as a result of resistance of domestic structures. The complexity of realities on the ground requires continuous monitoring and intervention in order to ensure that free movement is actually implemented. The current crisis may enhance protectionist reflexes. In such a context, it is important that the academic community uphold the ideals and principles of free movement and European citizenship while ombudsman institutions can play the role of watchdog for the conformity to European legislation, defending corresponding rights.

Paul Minderhoud, Coordinator, European Network on Free Movement of Workers

Dr Paul Minderhoud is an associate professor at the Centre for Migration Law of the Radboud University Nijmegen, the Netherlands. His dissertation is a socio-legal study into the differences between immigrants and native citizens in the implementation of the child benefits and disability insurance legislation in the Netherlands: 'Voor mij zijn ze allemaal gelijk', (Thesis Publishers, Amsterdam, 1993).

His main research interests are the legal and socio-legal aspects of immigration and social security. He is coordinator of the European Network on Free Movement of Workers and co-editor of the *European Journal of Migration and Law*.

This article examines the access to social assistance benefits under Directive 2004/38/EC by focusing on the issues concerning the implementation of Directive 2004/38/EC in the light of access to social assistance benefits for EU citizens in other Member States. A problem with the implementation of Directive 2004/38/EC is that it is not clearly defined when a EU citizen becomes an 'unreasonable burden' to the social assistance system. Leeway is given to Member States to examine whether financial difficulties may be temporary. As a result, Member States have developed their own definitions. Some legal experts hold the opinion that even before EU citizens have received a permanent residence right, it will be very difficult to deny them access to social assistance benefits. The policy and practice in the UK, however, show a different picture. By using a habitual residence test and a right to reside test, the social benefits system of this country seems to exclude inactive EU citizens effectively from entitlement during a certain period of time.

From 'partial migrations' to mundane transnationalism: socio-legal (re)conceptualisations of contemporary intra-EU migration

Professor Louise Ackers, School of Law and Social Justice, University of Liverpool ([1])

Recent years have witnessed various endeavours to 're-conceptualise' migration theory ([2]). The growing body of evidence on the empirical reality of contemporary migration behaviour together with the emphasis on the movements of the highly skilled in the 'knowledge economy' has challenged traditional migration theories. The fact that these rather narrow and historically specified conceptualisations of migration no longer capture the dynamics of intra-EU mobility and will no longer serve the stated purposes of the European Union in the context of the 'knowledge economy' has not gone unnoticed by legal scholars. Golynker (2006a) coins the concept of 'partial migration' to describe the kinds of mobilities many highly skilled intra-EU migrants ([3]) are engaging in and need to engage in if the 'grand societal challenges' facing the European Union are to be realised.

This paper presents a case study, drawn from a project concerned with the mobilities of researchers in the disciplines of social science and humanities ([4]), which provides an empirical illustration of the complex dynamics of what Golynker has called 'partial migrations'. Specific aspects of the case study are then analysed in the context of recent cases put before the Court of Justice.

From a legal perspective a significant shift has taken place from a situation where the rights and obligations associated with European citizenship were triggered by simple acts of intra-EU mobility (labour migrations) to encompass increasingly diverse and complex forms of transnationalism. Golynker suggests that the act of physical geographical relocation is no longer the sole or even primary 'trigger'. The question may be framed far more broadly in terms of how a person's activity 'confronts the legal systems' of more than one Member State. Certainly this approach captures the empirical reality of contemporary mobility and citizenship relationships. While the concept of 'partial' migration has taken the debate forward significantly and presents real challenges to migration theory, it suggests an incomplete process or 'glass-half-empty' approach. The term 'mundane transnationalism' captures the multi-faceted quality of contemporary, researcher, mobility conveying the transnational dynamics but also the routine and often punishing labour market processes that generate these forms of mobility, compromise the citizenship status and experience of 'migrants' and, ultimately, shape the evolution of national and European citizenship.

1. Introduction

The process of 're-conceptualising migration theory' has involved researchers from a range of disciplinary perspectives but most notably within human geography and sociology. The emergence of new theoretical approaches firmly grounded in empirical research not only makes for 'better theory', it also presents important opportunities for 'better policy'. Migration theory has an important role to play in supporting evidence-based approaches to research policy that both stimulate future initiatives and mitigate the unintended consequences of policy.

The potential for this is evident in recent changes in policies on researcher mobility. At both EU and UK level policymakers are beginning to take more nuanced approaches to incentivise diverse forms of mobility and international networking processes. The 'mobility imperative' is slowly evolving from its traditional preoccupation with longer term, bi-lateral, 'settlement-style' stays (labour migrations) to encompass fluidity and complexity, and nurture relationship-building. But research policy/funding is only one dimension of the critical resource framework shaping mobility motivations and experiences. As European citizens, moving within the territory of the European Union, researchers also have important legal and social rights. A historical exploration of the source of these citizenship rights reveals the importance of particular conceptions of mobility to the law-making process. As long ago as the 1960s the rights to free movement were described as an 'incipient form of European citizenship' (Bohning, W.R., 1972, cited in Ackers, 1998, p. 91). In the early days of European integration, the perceived

([1]) The author would like to thank Dr Stalford for her insightful comments.

([2]) The author participated in the conference 'Remaking migration theory: intersections and cross-fertilisations', University of Brighton and University of Sussex, May 2009.

([3]) The paper focuses on EU nationals.

([4]) http://www.liv.ac.uk/law-and-social-justice/research/pocarim

importance of increasing the ability of workers to move from their home country to reside in another for the purposes of work, usually on a permanent basis (to 'emigrate') resulted in the evolution of important social rights for those individuals and their families.

The fact that this rather narrow and historically specified conceptualisation of migration no longer captures the dynamics of intra-EU mobility and will no longer serve the stated purposes of the European Union in the context of the 'knowledge economy' has not gone unnoticed by legal scholars. Oxana Golynker (2006) develops the concept of 'partial migration' to describe the kinds of mobility many highly skilled intra-EU migrants are engaging in and need to engage in if the 'grand societal challenges' facing the Union are to be realised. A European Commission communication illustrates the perceived importance attached to mobility in the 'innovation union':

> 'Increased mobility is strongly associated with the creation of knowledge networks, improved scientific performance, improved knowledge and technology transfer, improved productivity and ultimately enhanced economic and social welfare.' (EC, 2010, p. 21)

The European Commission's communication 'Better careers and more mobility: a European partnership for researchers' (EC, 2008) suggests that 'the rules adopted several decades ago may not cover as efficiently newer forms of mobility of workers who frequently work on short-term contracts in different Member States' (p. 7). More specifically, it argues that, 'young researchers are also frequently supplied with atypical forms of remuneration which give limited access to social security and supplementary pension benefits under the applicable social security scheme' (p. 8). The EU charter and code ([5]) urges Member States to identify and remove legal obstacles to mobility for researchers requesting them to, 'continue their efforts to overcome the persisting legal and administrative obstacles to mobility' (paragraph 6) (Ackers et al, 2012).

Similar messages are evident in UK research policy. Universities UK suggests ways in which the university sector should organise itself to remain competitive in a time of 'unprecedented economic challenges' (2010, p. 3). Mobility is high on the agenda, 'UK researchers must become more mobile between sectors and between countries' (p. 4).

Informed by the theoretical literature emerging from a range of social science disciplines, Golynker presents a forceful argument in favour of extending the status of European citizenship as the legal basis for the extension of valuable free movement rights to those categories of migrants who would fail to qualify under the traditional classifications as 'migrant EU workers.' These are not hypothetical matters. They impact significantly on the employment and social status of knowledge workers affecting access to sick leave, maternity leave, healthcare and pensions, and a host of family-related rights. Extending full citizenship rights to 'partial migrants' could remove elements of discrimination that have left them vulnerable in comparison to traditional worker-citizens and incentivise forms of mobility fundamental to the economic ambitions of the EU. There is no doubt that the pressure on early-career researchers to move repeatedly in the current legal context seriously compromises their pension status and projected retirement income (Ackers and Oliver, 2008).

Cresswell reflects on the implications of 'sedentarist' thinking (evident in the legal provisions) that continues to reaffirm the 'commonsense segmentation of the world into things like nations, states and places … and actively territorialise[s] identities in property, region, nation and place.' He suggests that, 'the consequences for mobile people are severe' (2006, p. 27) and notes the impact on 'the weak' who are left, 'using and manipulating places produced by others' (p. 47). This statement certainly holds true for many researchers struggling to achieve some degree of employment security whilst negotiating international career trajectories.

For Golynker the starting point is to address the status of those employees for whom place of residence is no longer coterminous with the place of employment — in other words they do not live where they work. These may be 'frontier workers' who regularly 'commute' between bordering countries. In other cases individuals might remain in their home (or a member country) and work 'virtually' in another country using communication mechanisms to replace or substitute for physical presence. Or, a worker may take up residence in one Member State and continue to work in their home country or another country, perhaps engaging in various forms of virtual and physical mobility. For Golynker, a potential 'legal' solution to this jeopardy lies in the status of European citizenship. In its 'pure' or symbolic form, European citizenship derives directly from membership of one of the partner Member States and is based on nationality. Article 20 of the Treaty on the Functioning of the European Union (TFEU) makes it clear that, 'Every person holding the nationality of a Member State shall be a citizen of the Union'.

In practice this status does not convey an equality of social rights as the geography and temporality of residence and employment (length of residence in place)

([5]) The European Charter for Researchers describes the rights and duties of researchers and research institutions.

continues to shape entitlement. Golynker contends that basing entitlement more directly on citizenship helps to overcome the risks ([6]) associated with the kinds of fluid transnationalism that the EU is seeking to promote.

This paper draws on recent empirical work to show how 'newer forms of mobility' challenge existing concepts of Union citizenship and residence, placing mobile knowledge workers (researchers) in a vulnerable and contingent position. The empirical cases are drawn primarily from a study on the careers, mobilities and impacts of doctoral graduates in the social sciences and humanities (Pocarim) funded under the European Commission's framework programme. It complements this with examples taken from research with life scientists and physicists (Ackers and Gill, 2008; Ackers et al, 2010).

The paper opens with a case study drawn from the Pocarim study to illustrate the complexity and fluid quality of relationships and their legal implications.

2. Laura and Dave: a case study

Laura is British and did her first degree and master's at the same British university. After her master's she spent a year in Germany to learn German. She had a British partner (Dave) at that time who accompanied her. They supported themselves with some casual English teaching and work for a family member's business. They then returned to the UK to start doctorates as 'students'. One year before she submitted her PhD and whilst still registered as a student in the UK, Laura moved to Germany to take up a fixed-term research fellowship. In the 1st year of her fellowship she got married and had a baby. At this point Dave 'returned' (alone) to the UK to take up a lectureship. Laura continued to work in Germany for 4 years and then left to take up a lectureship in a British city some 300 miles distant from where Dave is living and working. Since starting the new position Laura has become pregnant with her second child. The couple have maintained several properties in Germany and the UK:

> 'We always kept 2 places going, one in the UK and one in Germany ... First of all it was a flat in [British city] which my parents had helped us buy. Then we paid rent for a place in [Germany]. Then we bought a place in [Germany] ... When Billy was born we sold the place in England and rented a small one-bedroom flat in [another British city] and moved to a bigger flat in [Germany] that we were renting which we've still got ... We did own the other flat in [Germany] which we've now sold. It is quite complicated. So now we've got the flat in [Germany]. We will rent it out or we'll give it up — we haven't quite decided yet. The rent is so low that you could actually keep it but the cost of childcare in the UK will probably make that impossible when the second baby is here.'

Laura now lives in her father's house with Billy and is planning to buy a house locally. Until the baby was born Dave travelled to Germany to meet Laura every 2 or 3 weeks. Once Billy was born they met every weekend. This commuting mobility ('living apart together') has continued shifting from an international (intra-EU) to an intra-UK quality. In practice the distance, time and costs associated with this travel will not have changed substantially.

Since returning to the UK she has been preparing to submit a thesis for the higher German doctorate (*habilitation*). There is no requirement/possibility to formally register for a *habilitation*. Laura explains the informal nature of the links/relationships involved:

> '[You have to have] a connection with a professor. You don't have to sign anything, it is informally agreed to present it to which ever faculty you are applying to have a *habilitation* in.'

Without this qualification Laura is unlikely to progress to secure employment in Germany. Asked why she is preparing for the *habilitation* Laura replies:

> 'So I've got the option if I want to. This is the thing with mobility — you think people move for permanent [positions] and if you move into a permanent job in the UK that's where you're going to end up. But actually I've got a plan B which is in some ways my plan A because I really miss Germany [but] it's hard to get a professorship there.'

This lead to a discussion around the normalisation of 'double' or what we have called in previous research 'retained' positions (Ackers and Gill, 2008):

> 'The people I know who've been professors in Germany and have left to come over here have generally kept some kind of position in their old university because they often want to go back. Sometimes it's paid depending if it's like an external examiner or something like that so that they've got a kind of foot-hold and all you need is someone with a nominal position at the university. The majority are probably unpaid.'

Laura gives an example of how retained positions work in the other direction. Her husband has applied for a fellowship in Germany — a full-time employment position — which would enable him to 'buy out' from

([6]) Williams (2012) applies the concept of risk to contemporary mobility.

his permanent position in England but without the risk of losing his job or indeed his social security/pensions status. He is also preparing a thesis for submission for the *habilitation* degree in Germany:

> 'He's working with Professor X at [German University]. There's an agreement that he can submit it there. You just need some sort of connection.'

Laura's case is not unusual and it shows how these kinds of complex and fluid living/working arrangements can extend deeply into career trajectories and the life-course. Previous research on the mobility of Polish and Bulgarian scientists revealed the prevalence of 'retained positions' in these migratory flows. Nearly all of our sample of 'returnee' Polish and Bulgarian scientists in this study could be labelled 'partial migrants' — as a consequence of simultaneous 'employment' and residency across multiple locations (Ackers and Gill, 2008).

The following sections identify particular aspects of Laura's status examining the legal implications. The discussion starts with a topic that has generated some controversy in research policy, namely the concept of early-career researcher and the implications of 'student' status.

3. The concept of 'worker' and its implications for mobile researchers

We noted (above) that both Laura and Dave did their doctorates in the UK as 'students' and not as employees or 'workers'. As Laura was moving directly into full time employment in Germany she would have acquired the status of a 'Community worker'. For the period until they were married, however, Dave's migration would not have triggered full European citizenship rights.

It is important to point out that this situation is not limited to doctoral stipends but, in many countries and contexts, extends to postdoctoral positions, particularly where these involve foreign recruitment. Andrea, a German researcher interviewed in a study on researcher mobility and pensions (Ackers and Oliver, 2008; 2009), did her PhD in the UK, completing at the age of 29. During this time she had student status and did not pay taxes or contribute to a supplementary pension scheme. She then moved to Belgium to take up a 2-year postdoc. This post was attributed a 'student' status and she received a tax and contribution-free stipend:

> 'I was registered as a student. They managed to make it a stipend so they didn't have to pay [employer contributions] … That's how they do international postdocs.'

A study on mobility in the social sciences (Ackers et al, 2008) identified similar situations in Portugal with a growth in the use of stipendiary schemes for postdoctoral positions (for both nationals and non-nationals). The Portuguese research bodies have also introduced a UK-style PhD system based on stipends and 'student status' rather than employment ([7]).

Despite the introduction of the status of 'citizenship of the Union', in reality the distinction between those citizens who are considered to be 'economically active' and those who are not remains of critical importance to free movement rights and social entitlement. The 'economically active' category includes 'workers' and the 'self-employed' ([8]) and this group are afforded superior rights. The question here is who qualifies as a 'worker'?

The Court of Justice has played a highly influential 'interpretive' role over the years ensuring that the concept of 'worker' is defined at European level. The leading case (Lawrie Blum ([9])) defines the essential features of an 'employment relationship' as requiring that, for a certain period of time, a person provide services of some economic value for and under the direction of another person, in return for which he receives remuneration in the broadest sense and regardless of the nature of the legal relationship between the employee and the employer, the duration or work or the amount of remuneration.

This definition has been found to apply in a whole range of situations involving part-time work, work with levels of remuneration falling below national subsistence levels (enabling claims against local social security systems) and cases where remuneration takes the form of 'in-kind' payments. The question for discussion here is how early-career research falls within this broadly construed category of 'work'. If it does, then mobile doctoral researchers will be entitled to full citizenship and social rights (and will be required to make relevant social and employment contributions) in the host state. If, on the other hand, they fall within the category of 'mobile students', they are treated as a particular category of 'economically inactive' migrants with more contingent rights. In particular, they will have to satisfy the 'resources requirement' demonstrating (in theory at least) that they have sufficient resources to support themselves in the host state (Dougan, 2005; 2008; Golynker, 2006b).

([7]) Research Fellows Statute, Portuguese Foundation for Science and Technology.

([8]) For the purposes of this paper we do not discuss the rights of the self-employed.

([9]) Judgment of 3 July 1986 in Case 66/85, *Lawrie-Blum* v *Land Baden-Württemberg* (ECR 1986, p. 2121).

The Frascati manual defines a researcher as someone who undertakes 'basic research', defining the latter as, 'experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundation of phenomena and observable facts, without any particular application or use in view' (OECD, 2002).

This kind of activity can be performed in a variety of different contexts and the context within which it takes place has major implications in terms of mobility rights. Mariana is a Polish woman who moved to the UK to do a PhD. She met her French partner in the same laboratory and later married and had a baby. Mariana benefited from a 3-year Marie Curie fellowship ([10]). In the past this scheme permitted employing institutions to decide whether to set fellows up as students or employees, leading to huge variations in employment status between employing institutions (Ackers, 2001). The scheme has since adopted the 'structuring' position of requiring institutions to set fellows up as employees, irrespective of national or institutional practice. Mariana is a clear beneficiary of this policy change. As an employee of the university she was entitled to full maternity leave under the occupational scheme. Asked whether she would have contemplated having a baby if she had been ascribed the same student status as her peers she replied, 'That would be much more difficult because I would like to have a baby and I knew that putting it later and later — there is never a really proper moment for that' ([11]). Mariana is very fortunate to have achieved employment status during her PhD and clearly qualified as a worker under EU law. This also immediately raised the status of her husband from that of a mobile EU student to the spouse of an EU migrant worker giving him full access to residency and social rights in the UK.

However, the majority of full-time doctoral researchers on research grants in the UK will not be afforded the status of employees in their university ([12]). The most recent Court of Justice case, Raccanelli ([13]), raised the issue of the concept of worker in two doctoral schemes operating at the Max-Planck Institute in Germany. The institute operated parallel schemes, one for nationals and involving an employment relationship and the second for foreign nationals and providing 'grants'. Raccanelli, an Italian national on the grant-based scheme, sought a declaration that, despite being 'foreign', he carried out the same duties as doctoral researchers on the employment-based scheme ([14]). In its judgment the Court of Justice stated that the comparison of activities (as stated in the Frascati definition) was not relevant, 'merely whether or not there were necessary elements for an employment relationship to exist, which was for the national authorities to ascertain'.

The Court of Justice reiterated the definition of work set out in Lawrie Blum (activities performed for a certain duration, under the direction of an institute in return for remuneration) and emphasised that this 'must not be interpreted narrowly'. Furthermore, it emphasised that under the relevant implementing secondary legislation ([15]) a worker should not be discriminated against in comparison with other EU nationals and 'shall enjoy the same social and tax advantages as national workers'. However, the Court of Justice identified a key distinction in sources of support:

> 'The recipient of a grant is under no obligation to work for the institute in question and instead may devote himself entirely to work relating to the thesis, whereas the holder of a BAT IIa half-time contract is under an obligation to work for the institute which employs him and may use the facilities for the purposes of his thesis only outside his working hours.'

The grant acceptance letter also included the phrase, 'The grant is paid as a contribution to living costs but not as consideration for your scientific work.' A subsequent supplementary agreement went further stating that, 'his stay as a guest does not establish any employment relationship'.

The German half-time contract scheme indisputably gave rise to an employment relationship. The terminology suggests a complete separation of the paid component and the unpaid (doctoral research) component. This is not dissimilar to doctoral schemes used in the UK such as graduate teaching assistantships where researchers are contracted to undertake a set amount of teaching within their doctoral funding 'package'. However, where the teaching is not paid additionally and is an integral part of the 'package' they do not make contributions or derive employment rights. Hourly paid part-time teachers using this funding to support themselves during their doctoral research are in a completely different situation as this activity will immediately generate an employment relationship. In practice there is a huge diversity in methods of funding PhDs. The 'knowledge economy' is a largely

([10]) This scheme is the European Commission's flagship programme providing research fellowships. Eligibility requirements include an international move (Van de Sande and Ackers, 2007).

([11]) The relationship between mobility and fertility is a topic of wide debate, with firm evidence emerging of a decline in female fertility in academic careers (Buber et al, 2011).

([12]) In 2008/9, 14% of UK PhD students were 'EU domiciled' (HESA, 2010).

([13]) Judgment of 17 July 2008 in Case C-94/07, *Raccanelli* (ECR 2008, p. I-5939).

([14]) It is common in German universities for doctoral researchers to be given a 0.5 (50% FTE) employment contract even though they are expected to work on a full-time basis. This is known as the BAT IIa half-time contract.

([15]) Article 7 of Regulation (EEC) No 1612/68.

rhetorical concept masking the messiness and poverty of research.

Perhaps the more interesting aspect of this case is not the comparison with the German scheme (which is often described by early-career researchers as a form of institutionalised 'slavery' ([16]) but whether the activity that Raccanelli was engaged in (and doctoral research in general) satisfies the constituent elements of a paid employment relationship.

It seems clear that the activity took place over a duration (at least 3 years), was under the direction of an institution/supervisor and also that there was a strong element of remuneration. The fact that the remuneration is designed to cover living costs seems irrelevant, not least given the outcome of a strong line of previous case-law — that remuneration may be in kind, may be very low and specifically, in the Bettray case ([17]), may take the form of 'board and lodgings'.

There is a much bigger question here that lies at the heart of the 'knowledge economy'. This concerns the role of the individual researcher in the generation of research capacity. The phrase used to describe Raccanelli's contract ('the recipient is under no obligation to work for the institute in question and instead may devote himself entirely to work relating to the thesis') fails to capture the role of researcher and their contribution to knowledge both within the institution and to the national and European knowledge economy. The degree of autonomy varies enormously, in practice, between disciplines and projects. That said, the vast majority of funded doctorates, clustering in the natural sciences, work in large collaborative teams and doctoral and postdoctoral researchers contribute enormously to the development of knowledge within these teams. Their knowledge is shared and exploited ([18]) within composite structures. Furthermore the push towards research excellence indicators and their critical importance in determining the income and status of research institutions (both universities and private-law establishments such as Max Planck Institutes) has required institutions to assess the aggregate contribution of its entire staff, very much including doctoral researchers. Doctoral researchers, irrespective of their nationality or funding source, are critical knowledge producers. The UK 'Concordat to support the career development of researchers' (RCUK, 2010) describes early-career researchers as, 'an essential part of their organisation's human resources and a key component of their overall strategy to develop and deliver world-class research' ([19]).

Unfortunately the Court of Justice did not take this opportunity to rule on a matter of key significance to many mobile researchers and to the development of the European research area (ERA) but chose to refer the matter back to national courts, 'to undertake the necessary verification of the facts'. It is interesting to note that authorities in the Netherlands have concluded that the European ruling, 'is completely in accordance with the judgment of the Dutch supreme court (Hoge Raad) in the case of a Dutch doctoral student working on a grant rather than an employment contract as his co-workers. In consequence they caution that, 'foreign doctoral students working on a grant may go to court in order to be compensated for damage caused by the discrimination, even if they accepted the grant contract' ([20]).

The issue of remuneration (as opposed to activity) was central to the Raccanelli case. Laura, Dave and Andrea were all receiving stipends during their doctorates so the question here was whether that form of remuneration qualified as 'pay'. The *habilitation* raises rather different issues. Both Laura and Dave would qualify as researchers in Germany under the Frascati definition but the relationships involved are unpaid and informal. Laura refers to the common practices amongst German researchers in the UK (for example) of engaging in unpaid work in Germany. The dominant motivation here is to retain relationships that may facilitate future mobility (returns).

In reality it is increasingly common for people seeking to gain progression in academic careers to accept/tolerate periods of 'employment' without pay ([21]). It is not at all unusual for individuals at early career stage to move to another country to take up positions that are not paid — or to remain at an institution once a contract has ended in the hopes of securing future funding, contracts and 'social capital'.

([16]) The phrase 'master–slave relationship' is frequently coined to describe this method of funding doctorates in Germany as it leaves researchers very much in the hands of their supervisors. Musselin refers to it more politely as a 'disciple to master relationship', emphasising the lack of autonomy afforded to many 'disciples' (2005, p. 139).

([17]) Judgment of 31 May 1989 in Case 344/87, *Bettray* v *Staatssecretaris van Justitie* (ECR 1989, p. 1621).

([18]) In the true sense of the word and also, unfortunately, quite often in the more commonly understood usage.

([19]) The revised UK concordat is designed to align the UK with the EU charter and code.

([20]) Cited at http://www.vawo.nl/en/scholarship-phds-are-not-employees

([21]) The growth in importance of internships and electives which play an increasingly critical role in building networks and gaining employment experience raises serious and largely 'hidden' questions in this regard.

4. Case study 2 — remuneration

The following example illustrates the role that 'unpaid work' plays in early-career research trajectories, often linked to mobility. Sonia engaged in unpaid work as a strategy to help her to access employment in her home country (Italy). In many other empirical cases individuals travelled to another country or stayed on on an unpaid basis. Sonia did her undergraduate degree at a British university spending 4 months each summer back home, 'it's not that I was present in the UK. I wanted the British education but not to live here'. Her degree included a placement year which she chose to spend in Italy 'because my plans were to go back after the degree'. Despite the fact that, 'throughout that placement [in an Italian research institute] I was unpaid' she describes herself as 'very lucky'. After completing her final year in the UK she returned to Italy to seek employment as a researcher. Her immediate problem was that the authorities did not recognise her degree and required her to do a whole series of examinations ([22]). Eventually Sonia met an English boyfriend and returned to the UK commencing a doctorate initially for the 1st year with no funding (apart from a fees-only scholarship). She then secured a 2-year Marie Curie fellowship but in this case was attributed student status. Her doctorate involved fieldwork in Italy so she split her time equally between the two countries.

Building on contacts made during her placement year, Sonia returned to Italy still hoping to develop a career there. She was given a position working on a project with a well-established researcher. However, she was not paid and had to cover her own research expenses commuting to the institute over 250 km away and undertaking fieldwork in remote locations; 'I would be there a few days a week in hotels basically as a consultant. I was expected to work with no payment in the hope that something would happen. I spent a whole year waiting for the promise of a 1-year job'. This situation proved costly and stressful and she eventually returned to the UK taking a 3-year fixed-term research position. After leaving that position she returned to the university of her PhD and at the time of interview was on a 1-year, part-time contract which had just been extended for 3 months. This is the institution and the city that she now really wishes to live and work in along with her new partner. On that basis she was prepared to take very temporary insecure part-time appointments effectively 'waiting' or 'queuing' for a position. She currently works half of the week on an unpaid basis. Since completing her degree in 1995, Sonia has never held a permanent employment position.

Bernadette has also engaged in unpaid work in order to retain links and build social capital whilst she 'waits' for a position. Bernadette is an Austrian researcher who came to the UK for 3 years immediately after her PhD on a fixed-term postdoctoral fellowship (with an employment contract). Due to the length of degrees in Austria she is now aged 40. Her husband is British, in exactly the same area of research but resident in Austria and also in an insecure position.

At the time of interview Bernadette's contract had expired and she was 'staying on' at the British university and continuing to work on a full-time but unpaid basis building her CV and waiting for a position either in the UK, Austria or a third country. Although she and her partner regularly visit each other and meet at other research locations on projects they have been 'living apart together' for over 4 years sharing two residences; the British employee residing in Austria and the Austrian employee (now unpaid) living in the UK.

That this issue of unpaid work should pose a problem for highly qualified 'knowledge workers' may come as something of a surprise. In reality it is an increasingly common yet 'hidden' phenomenon as early-career researchers clamour to gain the necessary know-how and know-who to progress into paid and hopefully secure positions. Many researchers accept/tolerate periods of 'employment' without pay.

There are many doctoral researchers in the situation faced by Sonia at the start of her doctorate, who are prepared to move abroad to commence a doctorate with no funding at all or fees-only funding (O'Brien, 2009). These researchers will be classified as 'students' rather than employees ([23]).

The examples above focused on the issue of 'remuneration' and the significance of this in defining doctoral research as a qualifying form of 'work'. We noted the Court of Justice's insistence that the concept of work is a Community concept defined by functional/objective criteria and not open to the divergent interpretation of individual Member States. Recent case-law indicates some 'slippage' in this respect with important implications for mobile researchers working in very flexible and insecure ('competitive') global labour markets. Golynker contends that, despite this functional definition, achieving the status of 'Community worker' is dependent not only on economic activity but on the 'correlation between residence and economic activity in another Member State' (2006a, p. 50). Put simply, location matters, and to qualify as a 'Community worker' you have to be economically active in a specific territory.

([22]) Despite clear laws and policies in the area of mutual recognition of qualifications, researchers continue to face serious obstacles.

([23]) Until the Bidar judgement UK research councils made 'fees-only' awards to EU nationals (see below).

5. Distinguishing places of residence from places of employment

The Court of Justice ruling in Baumbast ([24]) is of critical importance here to the status of individuals working in 'liquid' professions at the heart of the knowledge economy. In many of these cases, places of work are no longer coterminous with places of residence. It is quite usual for mobile researchers to have more than one position and more than one residence across international space. The complex temporal and spatial dynamics of this are exacerbated when individuals form international partnerships and start families.

Mr Baumbast was a German national, who, after pursuing an economic activity in the UK, was employed by German companies in work outside of the EU. Mr Baumbast continued to reside in the UK along with his Colombian wife and their children. However, the UK authorities refused to renew Mr Baumbast's residence permit on the grounds that he no longer qualified as a mobile Community worker and did not satisfy the conditions for a general right of residence. So, he lost his residency (and associated rights) and his partner lost her derived entitlement (as the spouse of a Community migrant worker). Baumbast argued that he should enjoy a more universal right of residence by virtue of the direct application of Article 20 TFEU (as a European citizen) irrespective of place of residence. In effect, Mr Baumbast was trying to achieve a reconciliation of the demands of his job (in terms of virtual communication and ongoing business travel to multiple locations) with the need for stability for his family. Golynker contends that:

> 'Community law should accommodate the situation where a Community worker or self-employed person would like to maintain the stability of residence in a Member State other than his own while exercising his right to carry out economic activity elsewhere.' (2006a, p. 49)

Much of the discussion concerned the derived rights his spouse gained as a mother of EU migrant children ([25]). The case raised another set of issues of more direct relevance to the current paper. Namely whether the benefits of European citizenship should remain so firmly attached to [long-term] residency given major shifts in employment processes requiring individuals to work beyond national and coterminous boundaries, potentially outside of the EU, in more flexible and mobile ways.

([24]) Judgment of 17 September 2002 in Case C-413/99, *Baumbast and R* (ECR 2002, p. I-7091).

([25]) Her children held EU nationality and as children of an EU national gained important social rights. For further discussion see Ackers and Stalford (2004; 2007).

Golynker argues that achieving the broader social and economic objectives of European Union, 'presupposes an ever more integrated economy with diversification of migration patterns as well as increasing complexity and dynamics of circulation of the workforce' (2006a, p. 49). For Golynker, the Baumbast case 'provides a perfect test of the universal quality of Union citizenship ... The universal right to move should encompass all possible forms of intra-Community movement as a trigger of Community protection. This would disengage the right of residence in another Member State from economic activity in that Member State' (2006a, p. 45).

The Court of Justice ruled that Mr Baumbast was entitled to remain in the UK on the basis of his Union citizenship ([26]), in common with other economically inactive migrants. This right is subject to a range of conditions including the requirement that he 'must not become an unreasonable burden on the public finances of the host state' (paragraph 90). In other words he has no claims against the UK welfare system. This places Mr Baumbast in an inferior position in comparison to his economically active peers whose work is physically rooted in the UK.

It would be interesting to see a researcher, such as Bernadette, bring this type of case. Due to the pressure to move in order to secure employment in his field Bernadette's British husband now lives in Austria. On that basis if the UK decided that she was no longer a worker (once her contract ended and she began unpaid work) she could not rely on her marriage to a British citizen as the basis for her citizenship/residency entitlement. Golynker's conceptualisation of 'partial migration' (living in one country and working in another) does not begin to capture the complexity of international partnering in the context of dual or same career, 'living apart together' or long-distance commuting relationships. However empirical research suggests that international careers both spawn and reflect the management of complex relationships (Ackers, 2010; Cox, 2008).

6. The right to permanent residence

Mr Baumbast (and Laura) would have been in a much stronger situation if they completed a period of 5 years' continuous employment and residence in the EU at some stage. The 'citizenship directive' ([27]) which came into force in 2006 sought to strengthen migrant citizens' rights. Article 16 introduced a 'permanent right of residence' for 'Union citizens who have resided legally for a continuous period of 5 years in the host Member State'. Furthermore, 'continuity of

([26]) Article 20 TFEU.

([27]) Directive 2004/38/EC.

residence shall not be affected by temporary absences not exceeding a total of 6 months in a year or by absences of longer duration for military service, or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or third country' (paragraph 3). Once acquired, the right to permanent residence shall be lost only through absence from the host Member State for a period exceeding 2 consecutive years (paragraph 4).

As O'Brien explains, 'The permanent residence provision … is incapable of conveying a nuanced approach; quite simply, at 5 years' residence, the negative, residence-threatening effects of claiming solidarity benefits must cease' (2008, p. 4). It conveys an 'all-or-nothing' right that may be undermined by periods of employment/residence outside of the qualifying country of more than 6 months per year or, once the status is achieved, periods of continuous residence of over 2 years. These kinds of residency 'interruption' are highly usual, highly valued and, unfortunately in some cases, obligatory in research careers (Ackers, 2010). This is particularly so at early-career stage making it very difficult for many mobile early-career researchers to 'hit' the 5 year residency target.

Laura would not satisfy the conditions attached to permanent residency (in Germany). In reality the fixed-term contract directive ([28]), specifically designed to prevent abuse arising from the use of successive fixed-term contracts, may have unwittingly further disadvantaged researchers. Under the fixed-term contract directive employing institutions are required to justify the continued use of temporary contracts once an employee has been in continuous employment for a period of 4 years. At this point a further contract renewal should lead to a permanent contract. In practice universities have exercised 'creativity' to avoid the implications of permanency, either reducing the length of positions, splitting longer term positions or attempting to 'justify' subsequent temporary contracts on grounds of reliance on external funding (Oliver and Hooley, 2010).

7. Mobility and 'flexicurity'

The question remains as to how accommodating these new legal developments are to the diverse population of highly skilled 'partial migrant' researchers. My own work on research careers and mobility has placed significant emphasis on understanding the relationship between contemporary mobility, particularly in the research sector, and contractual insecurity, throwing fresh critiques on the traditional dichotomy distinguishing 'voluntary' from 'involuntary' migration (King, 2003; Ackers and Gill, 2008). One of the major drivers of research mobility is contractual insecurity and the dominance of fixed-term employment in early-career research positions (Ackers and Oliver, 2007). The vast majority of early-career researchers are moving for work rather than with work. And most positions are of quite short duration (1 to 3 years). On that basis, achieving 5 years' continuous residence and taking care not to jeopardise this by taking a position in another Member State for more than 2 years adds another complex dynamic to an already constrained decision-making process.

Analysis of UK data on academic employment (from the Higher Education Statistics Agency (HESA), 2010) reveals the important role that EU nationals play (Figure 1).

Figure 1. Academic employment function by nationality marker (%) — all English HEIs 2008–09

Employment function	UK nationals	EU nationals	Non-EU nationals	Not known	
Teaching only	71.8%	8.8%	7.5%	11.9%	100%
Research only	55.4%	21.1%	20.9%	2.6%	100%
Teaching and research	76.3%	9.5%	8.9%	5.3%	100%
Other	87%	4.8%	4.4%	3.8%	100%

Source: HESA 2010 (n = 170 504).

([28]) Directive 1999/70/EC.

The concentration of EU nationals in research-only positions maps directly onto contractual status. Nearly all (84%) of the EU nationals holding positions at the University of Cambridge, by way of example (Figure 2), are on fixed-term contracts. Put another way, temporary employment is the norm for non-nationals in UK research labour markets. In this context, job-to-job mobility becomes essential.

Figure 2. University of Cambridge: contract type by nationality marker (2008/9)

Nationality	Open-ended/permanent	Fixed-term contract	Total
UK	1 164 (41%)	1 710 (59%)	2 874
EU	179 (16%)	957 (84%)	1 137
TCN	210 (19%)	890 (81%)	1 100
Total	1 588	3 885	5 472

Source: HESA data, 2010.

The use of fixed-term contracts, typically involving periods of 1 to 3 years (but with many much shorter and some longer appointments) makes it very difficult for early-career researchers to benefit from the more generous rights attached to permanent residence. It is important to emphasise that in most cases researchers do not face one period of fixed-term employment. The 'usual' expectation is for at least two or three successive fixed-term postdoctoral positions, often involving international moves. This varies enormously between disciplines, with social scientists generally moving into permanent positions earlier and natural/life scientists spending many more years in temporary employment (Ackers et al, 2005; 2006). These researchers, engaging in exactly the kinds of intra-EU, interinstitutional and intersectoral mobility promoted as critical to the development of the EU as a 'knowledge economy' are seriously jeopardising their citizenship and social rights, leaving them highly vulnerable to personal 'risk'. And perceptions of this risk are closely associated with the leakage of women (and to a lesser extent men) from science careers (Ackers, 2010; Buber, 2001; Cox, 2008).

8. Frontier working (international commuting)

The concept of 'frontier working' has a long history in European law, designed to capture those situations, mainly in continental Europe, where a worker may live in one country and hop across the border regularly (perhaps daily) to go to their workplace in a neighbouring country. Reflecting this, the definition of frontier working is quite rigid and confined to cases in which the worker returns to their country of residence on at least a weekly basis to a bordering country (Golynker, 2006a, p. 67) ([29]). Many researchers engage in frontier-style mobility but typically with more variable frequency and spatiality. Golynker recognises these shifts in practices, arguing that, 'in the contemporary globalised context a frontier worker does not necessarily carry out his activity within the frontier region of two bordering Member States' (p. 67). Dave (Laura's husband) engaged in a pattern of frontier-style mobility for over 3 years when Laura lived in Germany. Unfortunately the spatial dimensions of his mobility (between the UK and Germany) would render him ineligible.

Stretching the concept of partial migration still further, Golynker argues that it should encompass forms of work that do not necessarily involve any form of physical mobility or co-presence. The 'IT revolution', she suggests, 'affects not only intellectual property but also human capital as the teleworker confronts both the legal system of the country of his/her residence and the legal system of the country where his/her employer is located … The growing importance of this new type of migration can hardly be overestimated and demands an innovative approach to protect social and economic rights' (2006a, p. 4).

9. European citizenship: the necessity of physical mobility?

Increasing attention has been paid in recent years to the growing importance of information technology and its impact on the ways in which people communicate and conduct their business/work ([30]). Golynker boldly contends that, because such technological advances enable people to work in one location without the necessity of physical presence in the traditional workplace, 'the concept of virtual labour mobility should be accommodated into the concept of free movement of persons in Community law' (2006a, p. 80). Although virtual migrants may not move physically the activities they engage in nevertheless imply that they 'confront the legal systems' of the countries they are living and working in.

([29]) Regulation (EEC) No 1251/70. For further discussion see Arnull et al (2000).

([30]) Larsen, Urry and Axhausen (2006); Kaufmann, Bergman and Joye (2004); and Flamm and Kaufmann (2006).

Both Dave and Laura are heavily involved in various forms of virtual mobility or 'teleworking'. Completing her UK-registered doctorate whilst living in Germany or completing *habilitations* in Germany whilst resident in the UK provide excellent examples. The following case illustrates some of the ways in which the territorial dimensions of knowledge work (or the relationship between what you do and where you do it) have evolved.

10. Virtual mobility

Yue is a physicist who lives in the UK and travels to CERN (a large scale experimental facility based in Geneva) every 4 months to spend a 'solid week' in meetings with around 200 researchers working on collaborative projects. For Yue, location (place) is not important; infrastructure is, and the international composition of the team: 'In particle physics, it [place] doesn't make that much difference. We always joke at conferences that we bump into the same people and they say, "I've changed jobs but all that's changed is my e-mail address". You're still working with the same people.'

Asked whether people in these situations relocate she replies: 'Some do, some don't. One of the students who finished his PhD (in the UK) moved to a different experiment. It is still based at CERN so he was going to move soon. His home institute was actually a Canadian institute but he never goes there. He works at CERN so it didn't really make much of a difference to him … It doesn't matter where your home institute is. You have to be prepared to travel all the time but the pressure to live abroad is declining as the opportunities for remote access and shorter meeting-related trips increase.'

Yue's situation (and that of her colleague) illustrates the declining importance of place, at least in terms of employment location and the ease with which an individual can 'work remotely' in a way not too distinct from teleworkers. In this more highly skilled type of work, a degree of co-presence is important to networking and communication, but it is not the place that matters but the people gathered in that place.

The Court of Justice discussed the legal implications of this kind of scenario, in the context of self-employment, in Carpenter ([31]). Mr Carpenter, a UK national, operated as the sole owner of a business selling advertising space. The business was established in the UK but a substantial part of the work involved customers established in other Member States. Mr Carpenter 'attended meetings for business purposes in other Member States.' He was married to a Filipino national who was granted temporary leave to remain as a visitor in the UK (for 6 months). Mrs Carpenter cared for her husband's children from a previous marriage. Her application for leave to remain in the UK was turned down and a decision taken to make a deportation order against her.

Mr Carpenter argued that his ability to exercise his treaty-based right (to provide services in another Member State) was dependent on his wife's right to reside in the UK. The court supported Mr Carpenter ([32]). As Golynker notes, 'this decision effectively explains that the element of physical movement within the Community is not a necessary requirement for the establishment of a link between the economic activity in question and Community law' (2006a, p. 83).

The question remains as to whether this view, taken in the context of a self-employed person, could be extended to an 'employed person'. Golynker cites Mlinek's perspective on this, that only work involving 'an explicit element of commuting' should be covered (2006a, p. 80).

Yue's description of working practices in particle physics illustrate the ways in which virtual forms of communication have come to at least partially substitute for physical mobility. These new forms of partial migration enable individuals to conduct their work and home life across a range of places; place, from an employment perspective at least, becomes less or even insignificant. That this remains the case has lead Bulterman to conclude that, 'it is not Union citizenship as such that brings a person within the scope of the EC Treaty, but the exercise of a Union citizenship right to free movement' (cited in Golynker 2006a at p. 79). Golynker contends that the Court of Justice ruling in Carpenter has changed this situation removing the requirement for 'an explicit element of physical movement across frontiers' (2006a, p. 81). If this is the case, then this potentially brings a whole new cadre of employees within the protection of European citizenship, embracing those engaged in forms of virtual labour mobility without the necessity of physical presence at a traditional workplace in another Member State.

In practice most researchers engaged in these forms of commuting are combining it with virtual working. Certainly this is the case in Yue's example. It is interesting to note that the European Commission's charter and code on the employment of researchers specifically identifies teleworking as a potential tool in its 'work–life balance' mechanism and urges Member States and institutions to consider using teleworking

([31]) Judgment of 17 September 2002 in Case C-60/00, *Carpenter* (ECR 2002, p. I-6279).

([32]) Referring to Article 56 TFEU (the freedom to provide services in another Member State), interpreted in the light of the fundamental right to respect for family life (Article 8, European Convention on Human Rights).

and sabbaticals to promote work–life balance (and gender equality).

11. Conclusions

This paper has addressed some critical socio-legal questions deriving from the attempts to re-theorise contemporary migration. The first section addressed some of the issues facing doctoral researchers working for no pay and researchers struggling with temporary and insecure contracts. Mobility, in these contexts, may pose a high risk, especially if they are classified as 'economically inactive' or if they are 'forced' to move as a result of employment insecurity.

The challenge here is to foster (not force) a diversity of mobilities and encourage those that genuinely contribute to the creation and transfer of knowledge and enhanced economic and social welfare whilst protecting as far as possible the status and quality of life of the individuals involved. In the context of research careers at least, ensuring that doctoral researchers are given the status of employees with all the rights and responsibilities that such status involves is one step forward. Taking steps to ensure that research institutions and professional organisations prevent the practice of allowing the employment of researchers without remuneration would remove some serious elements of both exploitation and elitism. Implementing the letter and spirit of the fixed-term contract provisions would also remove a source of insecurity that 'forces' high levels of often undesired mobility. These changes together ensure that mobile early-career researchers are afforded all the rights and responsibilities of other 'employees'. The second cluster of cases identified in the paper present more complex legal challenges beyond the scope of employment law. Indeed a researcher may have a perfectly effective employment contract or contracts but these may not relate directly to his or her residency status either at the time of contribution or the time(s) of claim. The result is a spatial disconnect in the location of contributions and claims.

The concept of 'partial migration' provides a useful mechanism to capture the complexity and fluidity of contemporary migration behaviour, particularly involving highly skilled 'knowledge workers' moving within the EU. The word 'partial' can be used to describe both the temporal quality of moves and/or their spatial dimension. Most importantly it forces us to reconsider the traditional characterisation of 'migration' as semi-permanent labour migration involving the leaving of one residential and employment space to occupy another in another country. Whilst some branches of migration theory have long recognised the limitations of this caricature, the sedentarist tendencies of legal systems have remained more resistant to change. And for good reason. Golykner's enthusiastic encouragement of the EU as a supranational body, to adopt an imaginative and reflexive response to the reality of contemporary mobilities, brings with it certain risks. Whilst grounding individual social rights in a membership (nationality-based) conceptualisation of citizenship de-territorialises claims, for the present time at least, contributions remain largely bounded. Extending supranational legal rights to 'partial migrants' challenges the fiscal basis of national welfare systems where territories/borders are fundamental to revenue (fiscal contributions). Put simply, individuals may claim against systems they have never and may never contribute to, threatening the sustainability of welfare systems and potentially leading to a scaling down of social protection (a 'race to the bottom') ([33]). This applies both to occupational (contributory)-based rights such as maternity leave and supplementary pensions, and also to claims against national welfare systems (for social security, healthcare and housing, and a whole platform of family rights including childcare and children's education). In theory, mobility represents less of a challenge to contribution-based rights providing that systems exist to support the effective transferability and aggregation of contributions and that individuals understand and trust these processes (which they do not at the present time). Social security rights funded through national taxation and often organised, funded and delivered at local level pose a much more serious problem in a European Union characterised by massive and increasing levels of welfare diversity. The fiscal challenge for systems is clear. Nevertheless it is important that this group of highly skilled but generally poorly remunerated workers (who lack the kind of corporate mobility packages afforded to many industrial employees, insulating them from the risks associated with international mobility) are properly protected and compensated ([34]).

If the mobility of knowledge workers is seen as fundamental to the enhanced economic and social welfare of the European Union as a whole then mechanisms need to be found to ensure that individuals do not carry a disproportionate burden of risk and have access to the wider panoply of benefits derived from European citizenship.

([33]) These issues were discussed in the rather different context of retirement migration in Ackers and Dwyer, 2002 and Ackers and Coldron, 2009.

([34]) The term 'compensation' is widely used in corporate relocation packages (Ackers and Oliver, 2009).

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Direct and indirect barriers to free movement of workers: the experience of a national ombudsman

Calliope Spanou ([1]), the Greek Ombudsman

The position of EU national migrant workers and their treatment in their host states has been at the centre of discussions during the Annual Conference on Free Movement of Workers in Malta on 15 and 16 November 2012. The focus has been primarily on legal issues. My work as the Greek Ombudsman is a source of experience regarding the implementation of this legislation, i.e. the problems which EU migrant workers encounter on the ground.

Free movement of nationals of Member States has been one of the main objectives of the European Economic Community since its foundation in 1957. Non-discrimination of workers on the basis of nationality and the development of corresponding policies to remove administrative obstacles and formalities have been stimulated by the pro-European momentum despite phases of slowing down. Starting from the movement of financially active persons, this principle gradually extended to various policy areas, leading to the harmonisation of the conditions in the various Member States, in order to ensure that the rights stemming from the treaty could be realised. Corollary rights further derived from these, such as rights of residence for jobseekers following a period of employment, but also for students and pensioners and generally persons able to financially support themselves. A basic rule was set, namely that beneficiaries may not become a burden on the social assistance system of the host Member State. These developments led to the introduction of European Union citizenship in the Treaty of Maastricht in 1992, and the definition, in the present treaty, of EU citizenship and the rights and obligations stemming from it (Articles 18 to 21 TFEU). For the Court of Justice of the European Union (CJEU), EU citizenship is a fundamental status of Member States' nationals. A large body of secondary EU legislation has been produced to make this happen.

For individual persons, professional or personal motives, climatologic considerations, etc. constitute the wider framework of decisions concerning free movement. This has been seen as an enriching process, a process of mixing talents, and cultures, towards a common European identity and the collective welfare. The idea and reality of national borders tended to take a back seat, strengthening the common European identity beyond the limited market logic as the driving force of the EU.

However, times are changing. The widening north–south divide, starting from economic disparities — partly due to inherent weaknesses of the European construction — seems to lead to a deeper fragmentation of the EU, to a backward process, to the awakening of old stereotypes and defensive attitudes. At the same time, policy responses to the problems not only fail to treat the economic aspects but are surrounded by discourse — and possibly actions — contrary to the ideals that have guided the European integration process. The EU is becoming less a common framework than an object of dispute, torn between countries and populations 'deserving' or 'non-deserving' to be part of it in a strict economic sense.

Up to recent times, internal migration in the EU has not been very significant, despite variations in living standards. As economic conditions are deteriorating this might change. Severe economic or political disadvantages may outweigh kinship bonds, domestic investment and cultural familiarity as counterincentives to migration. It may be interesting to assess in some time the impact of the new conditions. It seems that young educated people seek professional opportunities in some other Member States, even more so when they have already benefited from the united European space as students. This generation has not known anything else than free movement within the EU. This generation thinks in terms of a unified space. But what lies ahead? Borders may acquire a different meaning in times of economic difficulties and rising levels of unemployment. Has the EU been a 'fair weather' project?

What happens to the idea of free movement when the Prime Minister of the UK, for instance, declares that he would close the border to Greek nationals? How about EU citizens living and working in the crisis-hit countries, either by free choice or by economic necessity? What is at stake is clearly more than the exercise of free movement rights. It is the perception of Europe, the common European space, the major success story of the post-war era. The common European space has been the great ideal of our time. Protectionism as a result of the insecurity stemming from the economic crisis revives past attitudes. Stereotypes are on the rise as a means to protect more and more fragile living standards.

([1]) This contribution is a revised version of the final address, held at the Conference on Free Movement of Workers, 15 and 16 November 2012, Valletta, Malta.

I shall not improvise a premature answer to these questions. I just wish to draw attention to recent developments that potentially compromise the idea and practice of free movement rights.

As an Ombudsman, I insist on relying on facts, on actual experience. And experience shows that there is resistance to free movement rights beyond what legal rules prescribe. And therefore, free movement rights remain an unfinished business. I shall refer to aspects of this resistance from my experience and show what the Ombudsman can do in counterweight. It is however important to underline that the number of complaints to the Ombudsman regarding these issues remains limited.

Working in a different country means that a person needs to be integrated into a different and often complicated world of regulations directly or indirectly linked to the labour market and the organised professions. Apart from the legal complexities, which may be visible at first and often second sight, this experience brings migrants in touch with deeper structures of this society and polity. These include the structure and importance of interests and interest groups, informal processes and the knowledge of how to work the system.

In many cases regulations have been shaped for nationals and indirectly or even accidentally exclude other EU citizens; furthermore, bureaucratic procedures and barriers, perceptions of what to expect from the domestic administrative system, in terms of output but also in terms of length of time, accountability and rights of appeal, constitute factors affecting the reality of free movement rights. The issue therefore is not the implementation of European regulations, strictly speaking. It is rather the adjustment capacity, the responsiveness and flexibility of a national administrative system, its readiness to identify problems and barriers to labour mobility and even more to remedy the situation.

At a first level this has to do with the awareness and capacity of street-level bureaucrats and services; public employees may not be familiar with procedures that involve other national systems and there is no pattern of procedures to follow. However, beyond that, it involves on the one hand the adjustment capacity of a whole lot of established social and economic interests that the legal system may tend to protect and which try to obstruct the opening of professional opportunities to other EU citizens. On the other hand, the domestic system may also bear the secondary effects of general EU regulations and react in a spasmodic way, or at least with a short-term view, by raising further obstacles to the enjoyment of rights, especially when financial resources are primarily the issue. In both cases competition for scarce (employment) resources is the common feature. The economic crisis renders resources even scarcer; the resistance is expected to grow.

Factors affecting administrative responsiveness can be grouped in the following categories.

1. Administrative capacity.

   Lack of knowledge and experience with these — still rather exceptional — issues may explain the lack of adjustment capacity. Further, there might be reluctance of public employees to take the initiative and responsibility to solve the issue in conformity with European legislation. They thus create a bigger issue than the initial one by requesting the position of higher level authorities (e.g. Legal Council of State) or a court decision.

2. Vested interests. Preservation of prerogatives or more generally of the status quo.

   Vested interests are often involved either in shaping the general criteria or in the individual decisions concerning the recognition of professional qualifications. These interests may be protected by the existing legislative framework while inertia works in their favour. Delay or administrative incapacity may just hide what is really at stake. The obstructive power of vested interests might be the explanation.

3. Attempt to avoid secondary negative effects of EU legislation.

   This might be an intentional but inappropriate reaction to a real problem, caused by diversity of situations in which uniform rules come to be implemented.

In what follows, I shall highlight some examples of these explanatory factors, drawing on the experience of the Ombudsman.

1. Status of municipal citizen

Recruitment for part-time employment in municipalities was linked to the status of citizen of a certain municipality. This worked against EU citizens who could not be registered as such. In the past, the Greek Ombudsman had intervened and presented his arguments, encouraging the administration to request the opinion of the Legal Council of State

(2007) ([2]). It was then clarified that for EU citizens this registration should be replaced by the status of resident in the area of the municipality. However, the problem reappeared on another occasion, because the independent authority that supervises the competitive recruitment procedure was not aware of this solution ([3]).

In this case, it was also clear that the public employees handling the issue were reluctant to take any initiative and responsibility to solve it in conformity with European legislation.

2. Regulating professions

Administrative recognition of diplomas and qualifications is an important precondition for exercising certain professional activities. The meaning of 'regulated profession' needs clarification at the national level, in order to provide transparent rules concerning these activities.

Within the legal framework of the internal market of the European Union, all Member States are responsible for regulating access to specific professions by requiring possession of certain professional qualifications, which can be obtained within the national territory. This process however may constitute a hindrance to the free circulation of professionals within the European Union. As a solution to this problem, Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications was adopted, by setting out the rules under which mutual recognition of regulated professional qualifications can be facilitated. The relevant legislation (as later amended) was transposed into national law by Presidential Decree 38/2010. According to the aforementioned directive, 'regulated profession' is the professional activity the access to which is subject directly or indirectly, by virtue of legislative, regulatory or administrative provisions, to the procession of specific professional qualifications attested by evidence of formal qualifications, such as diplomas, certificates and other evidence issued by an authority in a Member state.

The Court of Justice, in Case C-164/1994, has decided that a profession cannot be described as regulated when there are in the host Member State no laws, regulations or administrative provisions governing the taking up or pursuit of that profession even though the only education and training leading to it consists of at least 4½ years of higher-education studies on completion of which a diploma is awarded and, consequently, only persons possessing that higher-education diploma as a rule seek employment in, and pursue, that profession.

As is obvious, the recognition of foreign professional qualifications is a complex procedure which requires examination case by case. The competent authority in Greece for the recognition of professional qualifications is the Council for the Recognition of Professional Qualifications (SAEP), a multi-faceted administrative body with its seat at the Ministry of Education. It should be noted that the Ombudsman's investigation undertaken after interested persons' claims has concluded that concerning the foundation and operation of SAEP there are instances of maladministration.

The Ombudsman's opinion has been founded on the fact that there are delays in designating the members of the aforementioned council as well as substantial disagreements between the members of the council, due to uncertainty as to the adequacy of education that had been delivered in other Member States and the pressure put on the administration by the representatives of corresponding professional organisations participating as members in the council.

The aforementioned reasons as well as the lack of the legal framework regulating some health sector professions are the main obstacles faced by those who request the recognition of their diplomas or qualifications.

The paradox is that the cases brought to the Ombudsman mainly concern Greeks who are holders of foreign qualifications and return to their country. It seems that the system of administrative recognition of professional qualifications tends to protect the rights of nationals not only at the expense of EU citizens but also at the expense of Greek nationals having studied and/or worked abroad.

([2]) The Greek Legal Council of State has stated (50/2007) that if it is required that the status of citizen of a certain municipality is a condition for the access to some work positions, this status concerning citizens of EU states should be substituted by the status of residence in the area of the municipality. Law 4057/2012, Article 9, paragraphs 26 to 29 replaced the condition of status of citizen of a certain municipality with the condition of permanent resident status in the area of the municipality in order to be awarded points for recruiting advantage to municipalities. The Greek legislator followed the jurisprudence in this point.

([3]) 'Special report 2009' (http://www.synigoros.gr/resources/docs/188554.pdf) (in Greek).

Thereby, it is of importance that the competent national authority be limited to the genuine implementation of Union law. Any other practice not only is negative for the state involved, without corresponding to any intrinsic gain, but it entails an important moral and financial burden for the persons involved.

3. Recognition of prior professional experience

EU citizens wishing to work as language teachers in public high schools may apply to be included on the priority list for recruitment on a yearly contract. The right to exercise the profession needs to be recognised by the relevant agency (Council for the Recognition of Professional Equivalence of University Degrees). In one case brought to the Ombudsman however, the Ministry of Education refused to take into account the years of prior service (teaching) in the education system of other EU countries, arguing that this service extended before the year of recognition of professional qualifications. This position stemmed from confusion between the years of prior service and the recognition of diplomas from other countries, which in the Greek system is assimilated to the granting of the diploma and produces legal effects only *ex nunc*. Thus EU citizens would lose all benefit from their prior professional activity.

What is particularly interesting in this case is that a rule which applies to Greek nationals (most of whom have never exercised their right to professional mobility) produces indirect discriminating effects with regard to EU law (now Article 45 TFEU). The underlying confusion between recognition of diplomas and time of prior professional experience is problematic because the latter cannot be nullified by a formal element, i.e. the date of the official recognition of professional qualifications.

Having argued along these lines, the Ombudsman's recommendation was shared by the Legal Council of State, which changed its former opinion and agreed with the Ombudsman that 'if the Greek state takes into account prior time of service for candidates, it cannot exclude EU citizens just because this service has been acquired prior to the date of recognition of the relevant diploma or professional qualification by the competent Greek authorities (National Academic Recognition Information Centre or Council for the Recognition of Professional Equivalence of University Degrees).' There has also been similar jurisprudence of administrative courts and the Supreme Administrative Court and against the Independent Authority for the Selection of Personnel ([4]).

([4]) http://www.synigoros.gr/resources/docs/180862.pdf and http://www.synigoros.gr/resources/epistolh-stp-prouphresia-ekpaideytikwn--3.pdf (in Greek).

A similar issue was raised when a Greek national returning to Greece requested the recognition of his time of service in Switzerland prior to the date of the agreement between the EU and the Swiss Confederation in 1999 (in force since 2002). The Directorate-General of Salaries and Pensions of the Ministry of Finance refused the recognition based on a negative opinion of the Legal Council of State that recommended to wait until a similar case pending before the CJEU was decided. The CJEU ruled that no time restriction could apply in this matter. Following the decision of the CJEU the Ombudsman came back to the ministry and asked for a change in its position on this issue. Indeed, the Legal Council of State reconsidered its former position.

4. Conditions to operate a language school

In a different case, a UK citizen was required to have a diploma in English as a foreign language in order to operate a language school. However, this diploma, by definition, is not awarded to British citizens. The requirement was clearly geared towards Greek citizens and indirectly excluded him as an EU national from this professional activity. The administration did not appear willing to adjust when the Ombudsman pointed out that the criteria used did not conform to the jurisprudence of the CJEU.

One may see that the Ombudsman has a role in pushing for the implementation of free-movement EU legislation, but also for the clarification of a series of specific questions arising in concrete cases. The Ombudsman represents an institutional means to defend one's rights in this area, avoiding the time- and money-consuming judiciary procedures, unless as a means of last resort.

5. Permanent residence as a condition for pension supplement

Coordination of social security systems aims at facilitating the free movement of citizens in the EU. Most social allowances do not depend on residence, but on employment. According to Regulation (EC) No 883/2004 on the coordination of social security systems (Article 58):

1. A recipient of benefits to whom this chapter applies may not, in the Member State of residence and under whose legislation a benefit is payable to him, be provided with a benefit which is less than the minimum benefit fixed by that legislation for a period of insurance or residence equal to all

the periods taken into account for the payment in accordance with this chapter.

2. The competent institution of that Member State shall pay him throughout the period of his residence in its territory a supplement equal to the difference between the total of the benefits due under this chapter and the amount of the minimum benefit.'

The pension supplement is a non-contributory benefit to complement the pension under certain conditions. In order to prevent the possibility of abusive take-up, the Greek social security services required that potential beneficiaries from neighbouring countries (especially Bulgaria) not only prove residence but hold a permanent residence card; the latter is subject to a minimum condition of 5 years of residence (or less in some categories of beneficiaries). They also requested a number of documents proving that they actually reside in the country continuously and even proceeded to carry out checks to verify the place of residence. Permanent residence is not a condition for access to social security benefits according to the regulation. In the view of the administration, the legal basis for this practice was the rule that (according to Directive 2004/38/EC as opposed to Regulation (EC) No 883/2004) the right of permanent residence should not impose a burden on the welfare system of the country of residence. This administrative practice, which was included in administrative circulars, raises obstacles to beneficiaries, contrary to the provisions of the European regulation and beyond the competence assigned to social security services.

The Ombudsman formulated these objections and requested that the administration follow the rules set by the regulation. It proposed that in order to prevent the possibility of abusive take-up of the pension supplement, the administration should use the tools provided for by the regulation and raise the issue before the Administrative Committee for the Coordination of Social Security Systems, instead of breaching the letter as well the spirit of European legislation. It is understandable that the issue has gained in importance now that the country is going through difficult times, since it potentially leads to a waste of resources, increases deficits and leads to further cuts for those who are in real need. The Greek police — competent for European residents and for certifying residence — agreed with the recommendation of the Ombudsman and drew the attention of police authorities to check the possibility of falsified documents provided by potential beneficiaries in order to prove residence in the country. A recent law (Law 3996/2011, Article 34) provided for a residence clause, even for the EKAS ([5]). This benefit is not paid to pensioners of Greek social insurance organisms who do not reside permanently in Greece. This provision could be considered contrary to the principle of free movement of persons. The Greek Ombudsman has already signalled to the Ministry of Labour the need to harmonise its provisions with EU law ([6]).

6. Conclusion

These are examples of the issues the Greek Ombudsman faces. They confirm that legal harmonisation is an important and necessary but not sufficient condition for the exercise of free movement rights within the EU. Various obstacles remain, either as remnants of a domestically centred past, or as a result of resistance of domestic structures. The complexity of realities on the ground requires continuous monitoring and intervention in order to ensure that free movement is actually implemented. The current crisis may enhance protectionist reflexes. In such a context, it is important that the academic community uphold the ideals and principles of free movement and European citizenship while Ombudsman institutions can play the role of watchdog for the conformity to European legislation, defending corresponding rights.

([5]) This allowance forms a mixed social security benefit, due to the application of both social insurance (coverage of pensioners) and social assistance principles (entitlement conditions include lack of resources). It is paid to pensioners faced with subsistence problems not met through personal or family sources. Its objective is to supplement the income resources of low-income pensioners through income-tested benefits. It constitutes therefore a supplementary 'targeting' measure that was adopted instead of the direct increase of the minimum amount of the pension.

([6]) 'Annual report 2012', pp. 47–48.

Access to social assistance benefits for EU citizens in another Member State

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1. Introduction

This article focuses on the issues which have been raised regarding the implementation of Directive 2004/38/EC ([1]) in the light of access to social assistance benefits for EU citizens in other Member States. This directive regulates the entry and residence of EU citizens and their family members in another Member State.

Directive 2004/38/EC makes a distinction between residence up to 3 months, residence from 3 months to 5 years and residence for longer than 5 years. Different preconditions for residence apply in each of these three categories. Furthermore, the treatment of economically inactive persons differs from the treatment of economically active persons. For each category there are different rules regarding access to social assistance benefits.

The directive gives all EU citizens a right to entry to any EU state without any conditions or formalities, other than the requirement to hold a valid identity card or passport, for 3 months (Article 6). It is, however, explicitly stated in Article 24(2) that the host Member State shall not be obliged to confer any entitlement to social assistance during these first 3 months of residence.

According to Article 7(1) of Directive 2004/38/EC Union citizens only have the right of residence on the territory of another Member State for a period of longer than 3 months if they (as far as relevant for this chapter):

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 ([2]).

Union citizens who have resided legally for a continuous period of 5 years in the host Member State shall have the right of permanent residence there ([3]). This means that after 5 years, a right of permanent residence is given to Union citizens (and their family members), without any further conditions, even if these persons do not have sufficient resources or comprehensive sickness insurance cover.

2. Entitlement to social assistance benefits?

A big problem is the ambiguity of the wording of Directive 2004/38/EC regarding entitlement to social assistance benefits. On the one hand the directive only allows inactive persons to use their free movement rights if they have the necessary resources. On the other hand it includes all kinds of signals that when these inactive persons apply for a social assistance benefit, this should be granted and this will not mean automatic expulsion of these inactive EU citizens.

Lenaerts and Heremans have spoken in this context of a balancing act between the interest of awarding social rights as a consequence of the right of free movement against the interest of safeguarding the national welfare systems ([4]).

Articles 14(1) and (2) of Directive 2004/38/EC regulate the retention of the right of residence.

On the basis of Article 14(1):

> 'Union citizens and their family members shall have the right of residence provided for in Article 6 [right of residence up to 3 months], as long as they do not become an unreasonable burden on the social assistance system of the host Member State.'

Article 14(2) reads:

> '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.'

This wording seems to imply that an appeal to social assistance will lead to an ending of the right of residence for those inactive persons who stay in another Member State for less than 5 years. But this is not the case, because according to Article 14(3):

([1]) Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. OJ L 158, 30.4.2004, p. /77. The transposition period of the directive ended on 30 April 2006.

([2]) There is a section (c) regarding students I will not deal with here.

([3]) See Article 16(1) of Directive 2004/38/EC.

([4]) Lenaerts, K. and Heremans, T., 'Contours of a European social union in the case-law of the European Court of Justice', *European Constitutional Law Review*, 2006, pp. 101–115.

> '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'.

'Unreasonable burden' is not further defined in Article 14, but is described in recital 16 of the preamble:

> 'As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or jobseekers as defined by the Court of Justice save on grounds of public policy or public security.'

The abovementioned ambiguity of Directive 2004/38/EC can also be found in Article 24. On the one hand, Article 24(1) provides for equal treatment for all Union citizens (and their family members) residing on the basis of this directive in the territory of the host Member State. But, on the other hand, according to paragraph 2 of this article the host Member State shall not be obliged to confer entitlement to social assistance during the first 3 months of residence or for jobseekers looking for employment, nor to grant maintenance aid for students, who have no right of permanent residence yet.

In an attempt to clarify several aspects of Directive 2004/38/EC the former Directorate-General for Justice, Freedom and Security published in 2007 a 'Guide on how to get the best out of Directive 2004/38/EC' ([5]). This guide states that:

> 'If your right to reside is conditional upon having sufficient resources not to become a burden on the social assistance system of the host Member State during the period of residence (i.e. when you study or are an inactive person there), it might be terminated once you become an unreasonable burden on the social assistance system.
>
> This does not mean that you cannot apply for social assistance there when you are in need. However, in this case the host Member State is entitled to examine whether it is a case of temporary difficulties and after taking into account the duration of your residence, the personal circumstances and the amount of aid granted, it may consider that you have become an unreasonable burden on its social assistance system and proceed to your expulsion. An expulsion measure can in no case be the automatic consequence of recourse to the social assistance system.
>
> Should you be expelled on these grounds, the host Member State cannot impose a ban on the entry and you can return back at any time and enjoy the right to reside if you meet the conditions described above.
>
> This limitation does not apply to categories where the right to reside is not subject to the condition of sufficient resources, such as workers or self-employed persons.'

In July 2009 the Commission published a communication on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ([6]). It repeated that in assessing whether an individual whose resources can no longer be regarded as sufficient and who was granted the minimum subsistence benefit is or has become an unreasonable burden, the authorities of the Member States must carry out a proportionality test. To this end, Member States may develop for example a points-based scheme as an indicator. Recital 16 of Directive 2004/38/EC provides three sets of criteria for this purpose.

1. Duration — For how long is the benefit being granted? Is it likely that the EU citizen will get out of the safety net soon? How long has the residence lasted in the host Member State?

2. Personal situation — What is the level of connection of the EU citizen and his/her family members with the society of the host Member State? Are there any considerations pertaining to age, state of health, family and economic situation that need to be taken into account?

3. Amount — Total amount of aid granted? Does the EU citizen have a history of relying heavily on social assistance? Does the EU citizen have a history of contributing to the financing of social assistance in the host Member State?

([5]) See: http://ec.europa.eu/justice/citizen/files/guide_2004_38_ec_en.pdf

([6]) COM(2009) 313.

The communication emphasises that as long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member States, they cannot be expelled for this reason.

Although this guide and communication were meant for clarification, it still leaves discretion for the Member States to define the concept of unreasonable burden. Unsolved questions seem to be: when is it a case of temporary difficulties, how long should the duration of residence have been, which personal circumstances should be relevant and how much aid granted is too much?

3. Transposition issues of the directive

Directive 2004/38/EC has had a somewhat paradoxical career in this field. As I will discuss below, it has been claimed as the catalyst for reduction of EU citizens' social rights as well as a clarification of entitlements. An important issue is that in some Member States the implementation of Directive 2004/38/EC has also been used to limit the access of jobseekers to job-seeking allowances. Another issue of interest is the determination of when a Union citizen becomes 'an unreasonable burden' in various Member States ([7]).

3.1. Social assistance during the first 3 months of residence

In many Member States the transposition of Directive 2004/38/EC was used as an occasion to introduce clauses in their social law explicitly excluding EU nationals and their family members from entitlement to public assistance during the first 3 months of residence in another Member State, referring to Article 24(2) of the directive. A good example in this respect is the Netherlands. On the occasion of the transposition of Directive 2004/38/EC the Dutch government changed the Social Assistance Act and introduced legislation excluding all EU citizens explicitly from social assistance benefits during the first 3 months of their stay. Under the old legislation these EU citizens were formally entitled to social assistance from the moment they entered the Netherlands. However, an appeal on social assistance would lead immediately to a termination of their residence status and consequently to a loss of social assistance entitlement ([8]).

To prevent discrimination the Dutch government took the opportunity of this change of legislation to introduce in the Social Assistance Act the condition of habitual residence for the entitlement of social assistance for all claimants (Dutch or non-Dutch). Also, Dutch citizens who came from abroad would not be entitled any more to social assistance for at least the first 3 months of their residence because they would not be seen as habitual residents immediately. This introduction was challenged in the First Chamber because it was seen as being in breach of the Dutch constitution, which in Article 20(3) entitles every Dutch citizen to social assistance, being an habitual resident or not. After the Secretary of State for Social Affairs had assured the First Chamber that this change of legislation did not mean that there was a waiting period of 3 months for Dutch citizens who came from abroad to the Netherlands, the bill was approved ([9]). This solution raises the question of whether it is possible in the light of Article 18 of the Treaty on the Functioning of the European Union (TFEU) to impose this 3-month waiting period on EU citizens or not.

To complicate matters even further, according to the directive it is not forbidden for Member States to provide social assistance in these first 3 months of residence. Recital 21 of the preamble states that:

> 'It should be left to the host Member State to decide whether it will grant social assistance during the first 3 months of residence, or for a longer period in the case of jobseekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons.'

This recital has led to discussion in Sweden on how to apply the derogation of Article 24(2) of Directive 2004/38/EC. Sweden has used this discretion in the end to give EU citizens during the first 3 months of residence access to essential healthcare and working allowances in strictly regulated cases.

([7]) This information is for a large part based on the national reports which have been written for the European Network on Free Movement of Workers, which is coordinated by the Centre for Migration Law in Nijmegen. The reports are available on the websites of the European Commission (http://ec.europa.eu/social/main.jsp?catId=475&langId=en) and of the Centre for Migration Law (http://www.ru.nl/law/cmr/projects/fmow-2/national-reports-fmw).

([8]) Job-seekers do not have access to social assistance benefits during the time they are looking for a job in the Netherlands.

([9]) *Handelingen EK* 2005–06, No 36, pp. 1747–53, *Staatsblad* 2006, 373 and 456.

3.2. No access to social assistance benefits for jobseekers?

In some other Member States the implementation of Directive 2004/38/EC has been used to limit the access of jobseekers to job-seeking allowances. A good example is Germany, where an amendment of the Social Code II ([10]) (the second book of the Social Code) changed the rules on entitlement to social benefits as a jobseeker by making use of the restrictions of Directive 2004/38/EC under Article 24(2).

According to this amendment no foreigners, including EU citizens whose right of residence derives exclusively from the purpose of looking for employment, are entitled to jobseeker's allowance ([11]).

According to the drafting history of this new provision ([12]), the legislator wanted deliberately to exclude access to social benefits for foreigners entering Germany for the purpose of seeking employment. Contrary to the previous, less restrictive provisions, which granted an entitlement to every foreigner on the basis of ordinary residence in Germany, access to social benefits under the Social Code II (*Arbeitslosengeld II:* jobseekers' allowances) is excluded explicitly even beyond the time period of 3 months in accordance with Article 24(2) of Directive 2004/38/EC.

This change of legislation has been challenged before several German social courts with different results. In early 2008 the social court of Nürnberg held the opinion that EU citizens, whose right of residence in Germany derives only from the fact that they are jobseekers, should have no entitlement to any social assistance at all. To get more clarity on this issue the court referred to the Court of Justice for a preliminary ruling. The answer of the Court of Justice came in the Vatsouras and Koupatantze judgment ([13]) in which the Court of Justice examines the possibility of refusing a social assistance benefit to jobseekers who do not have the status of workers. In that regard it noted that, in view of the establishment of citizenship of the Union, jobseekers enjoy the right to equal treatment for the purpose of claiming a benefit of a financial nature intended to facilitate access to the labour market. A Member State may, however, legitimately grant such an allowance only to jobseekers who have a real link with the labour market of that Member State. The existence of such a link can be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question. It follows that citizens of the Union who have established real links with the labour market of another Member State can enjoy a benefit of a financial nature which is, independent of its status under national law, intended to facilitate access to the labour market. It is for the competent national authorities and, where appropriate, the national courts not only to establish the existence of a real link with the labour market, but also to assess the constituent elements of the benefit in question. The objective of that benefit must be analysed according to its results and not according to its formal structure. The Court of Justice points out that a condition such as that provided for in Germany for basic benefits in favour of jobseekers, 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.

Benefits of a financial nature which, independent of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of Article 24(2) of Directive 2004/38/EC. But the Court of Justice also adds that examination of this question has not disclosed any factor capable of affecting the validity of Article 24(2) of Directive 2004/38/EC.

The German federal authorities have argued that the exclusion clause under Section 7(1) of the Social Code II continues to be applicable with respect to foreigners who are staying in Germany exclusively for the purpose of seeking labour since the social benefits under this clause can be attributed to social assistance in the sense of Article 24(2) of Directive 2004/38/EC. It is to be expected that the question will again come up for the social courts since it is argued that the view taken by the Federal Ministry for Labour and Social Affairs is not in line with the jurisprudence of the Court of Justice ([14]).

An interesting other approach was followed in a recent judgment from the *Bundessozialgericht* (the highest court in social security cases in Germany) delivered on 19 October 2010 (B 14 AS 23/10 R) ([15]).

This case concerned a French citizen who moved to Berlin in 2007. As he had a small job for a little while, he first had a right to stay in Germany as a worker. After he was made unemployed, he retained his right

([10]) Law of 24 March 2006, BGBl. I, p. 558.

([11]) Section 7(1) of Social Code II.

([12]) Cf. Bundesratsdrucksache 550/05; Bundestagsdrucksache 16/11, p. 80.

([13]) Judgment of 4 June 2009 in Joined Cases C-22/08 and C-23/08, *Vatsouras* and *Koupatantze* (ECR 2009, p. I-4585).

([14]) See 'Report on the free movement of workers in Germany in 2009-2010' (http://www.ru.nl/law/cmr/projects/fmow-2/national-reports-fmw).

([15]) http://juris.bundessozialgericht.de/cgi-bin/rechtsprechung/list.py?Gericht=bsg&Art=en

as a worker for 6 months on the basis of Article 7(3)(c) of Directive 2004/38/EC ([16]).

During this period he was entitled to the Social Code II jobseeker's allowance, which was the same benefit that was disputed in the Vatsouras case. After these 6 months his residence right was based on the fact that he was still looking for work and therefore was a jobseeker ([17]). The German authorities however stopped his Social Code II benefit, which excludes foreign jobseekers from entitlement, as we have also seen above in the Vatsouras case.

However, according to the German court this refusal is in breach of Article 1 of the European Convention on Social and Medical Assistance, which is a treaty concluded in 1953 under the auspices of the Council of Europe ([18]). Article 1 of this convention reads:

> 'Each of the contracting parties undertakes to ensure that nationals of the other contracting parties who are lawfully present in any part of its territory to which this convention applies, and who are without sufficient resources, shall be entitled equally with its own nationals and on the same conditions to social and medical assistance provided by the legislation in force from time to time in that part of its territory.'

According to Article 2, for the purposes of this convention the term 'assistance' means in relation to each contracting party all assistance granted under the laws and regulations in force in any part of its territory under which persons without sufficient resources are granted means of subsistence and the care necessitated by their condition, other than non-contributory pensions and benefits paid in respect of war injuries due to foreign occupation.

The German court ruled that although the personal scope of this Social Code II jobseeker's allowance is different from the personal scope of the German social assistance benefit (*Sozialhilfe*), both have the character of a general social assistance law (*Fürsorgegesetz*) and therefore both fall under the definition of Article 2 of the convention. This is in contrast with the decision of the Court of Justice in the Vatsouras case, which stated that the Social Code II jobseeker's allowance was not a social assistance benefit in the sense of Directive 2004/38/EC.

As the Frenchman in this case was lawfully residing as a jobseeker in Germany based on Article 14(4)(b) of Directive 2004/38/EC, and as German citizens who were in the same position did receive this jobseeker's allowance, the German court decided the Frenchman had to be treated equally.

The Frenchman had also made the argument that the Vatsouras judgment was applicable in his situation, but the court said it was not necessary to deal with this argument, given the fact he was already entitled under the European Convention on Social and Medical Assistance.

The meaning of this decision of the German court does not apply to all EU citizens, but is only applicable to nationals of the contracting parties. The contracting parties as far as relevant here are: Belgium, Denmark, Germany, Estonia, Ireland, Greece, Spain, France, Italy, Luxembourg, Malta, the Netherlands, Portugal, Sweden and the United Kingdom.

Turkey is also a contracting party, but Turkish citizens cannot derive a right of residence as a jobseeker in EU law as EU citizens can. Iceland and Norway are also contracting parties and have the right of residence as a jobseeker because Directive 2004/38/EC has been integrated into the EEA agreement.

An interesting aspect of this case is the influence of an 'old' Council of Europe convention in relation to European citizenship. This relation occurred before, albeit in the opposite direction, in the Martínez Sala judgment of the Court of Justice ([19]). Ms Martínez Sala was a Spanish citizen in Germany who had a very weak residence status but who could claim a lawful residence position on the basis of Article 6(a) of this same convention. This lawful residence position gave her the same entitlement to child allowances as German citizens according to the equal treatment provisions of the Treaty establishing the European Community (TEC). In the abovementioned case of the *Bundessozialgericht* it is the other way around. Here the right of residence is based on EU law, but the entitlement to the benefit is derived from the European Convention on Social and Medical Assistance.

In reaction to the decision of the German court, the government of Germany on 19 December 2011 registered this provision to the annex of this convention, which lists provisions excluded from the scope of

([16]) Article 7(3)(c) reads: '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:
[...]
(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 12 months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than 6 months'.

([17]) See Article 14(4)(b) of Directive 2004/38/EC.

([18]) http://conventions.coe.int/Treaty/EN/Treaties/Html/014.htm

([19]) Judgment of 12 May 1998 in Case C-85/96, *Martínez Sala v Freistaat Bayern* (ECR 1998, p. I-2691).

the convention ([20]). Implementing rules explain that the convention now no longer applies Section 7 of the Social Code II (SGB II) ([21]). The judgment of the German court has effectively been reversed by the executive. However, there are court challenges to this position based on public international law but not EU law ([22]).

3.3. When does a Union citizen become an unreasonable burden?

Another issue that raises problems is the determination of when a Union citizen becomes 'an unreasonable burden'. In the Netherlands, the government has developed a kind of sliding scale to answer this question. This scale was made tighter in 2012. According to those new rules, during the first 2 years of residence an appeal by an EU national on social assistance or on social care in a hostel for more than 8 nights will cause an expulsion order. In the 3rd year the criteria for an expulsion decision are: social assistance for more than 2 months or complementary social assistance for more than 3 months or social care for 16 nights or more. In the 4th year, 4 to 6 months' social assistance or social care for more than 32 nights; and in the 5th year, 6 or 9 months' social assistance or social care for more than 64 nights ([23]). Similar to the Dutch sliding scale, the authorities in the Czech Republic use a 'system of points'. If a non-active EU citizen (who had registered for a stay longer than 3 months) claims a social assistance benefit, the competent authority examines whether a person concerned could become an 'unreasonable burden on the social assistance scheme'. For non-active persons there is a system of points attributed to certain facts or characteristics of the person concerned. The facts that are taken into account are mainly the previous length of residence, previous length of employment or self-employment in the Czech Republic, previous periods of study in the Czech Republic and the possibilities of finding a job. There is a discretionary power to take into account whether the person concerned has only temporary difficulties, his/her personal circumstances, family commitments and the potential amount of benefit. The fewer points one gets, the sooner he/she will be seen as an unreasonable burden. This information will be given to the Aliens and Border Police, who can initiate an expulsion procedure. In Finland the Aliens Act laying down the grounds for refusing EU citizens' and their family members' entry was amended in the light of transposing Directive 2004/38/EC as follows:

> 'An EU citizen's and her family member's entry to Finland may be refused if her right of residence has not been registered or she has not been issued with a residence card and if she:
> [...]
> (2) by resorting repeatedly to social assistance as provided in the Act on Social Assistance, or to other comparable benefits, or by other comparable means, during her short stay in the country burdens unreasonably the Finnish social assistance system.' ([24])

Those who burden unreasonably the national system of social assistance shall not be regarded as having a right of residence, and if a person does not have a right of residence, his/her entry may be refused. What constitutes an unreasonable burden to the social assistance system shall be decided case by case in Finland. Refusing entry is not an automatic consequence of burdening the social assistance system. Referring to the Court of Justice judgments on Trojani ([25]) and Grzelczyk ([26]), it was stated in the proposal for the act that refusing an EU citizen entry on the ground of lack of resources comes into question only in very rare cases.

Belgium, however, withdrew in 2012 the residence permits of over 2 000 EU citizens who had received social assistance for more than 3 months. They were not actually expelled, but were invited to leave the country. It concerns mostly citizens from Romania ([27]).

4. United Kingdom: the right to reside test

In 2004 the UK used the accession of the 10 new Member States to restrict substantially the access to social benefits for all EU migrants. In order to access benefits following the change of regulation, applicants must now show they have a right to reside in the UK. These regulations were intended to deal primarily with those who are not economically

([20]) It may be found online on the Council of Europe website (http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=014&CM=8&DF=9/17/2006&CL=GER&VL=1).

([21]) See Geschäftsanweisung SGB II No 8 v. 23.2.2012 — Vorbehalt gegen das Europäische Fürsorgeabkommen (EFA), Geschäftszeichen SP II 21 / SP II 23 – II-1101.1, available online (http://www.arbeitsagentur.de/nn_166486/zentraler-Content/HEGA-Internet/A07-Geldleistung/Dokument/GA-SGB-2-NR-08-2012-02-23.html).

([22]) See the 'Report on the free movement of workers in Germany in 2011-2012' (http://www.ru.nl/law/cmr/projects/fmow-2/national-reports-fmw).

([23]) Paragraph B10/4.3 of the Dutch aliens circular 2000.

([24]) Section 167(2) of the Finnish Aliens Act.

([25]) Judgment of 7 September 2004 in Case C-456/02, *Trojani* (ECR 2004, p. I-7573).

([26]) Judgment of 20 September 2001 in Case C-184/99, *Grzelczyk* (ECR 2001, p. I-6193).

([27]) http://www.deredactie.be/cm/vrtnieuws.english/news/1.1388657 (last visited 24 April 2013).

active. The regulations are intended to prevent those EU migrants who have no right of residence in the UK — because they are neither EU workers, relevant dependents, nor self-sufficient and entitled to residence in their own right — from claiming a range of benefits. The British government claimed that there was no systematic way under UK law and practice to identify and refuse these benefits to those who were not entitled under Union law. The habitual residence test which was introduced in the mid 1990s did not perform this role, focusing on the fact of residence rather than its legality or legal basis. The solution to this problem was to add a new requirement for eligibility for the relevant benefits. Applicants have to show that they have a right to reside in the UK and no one without such a legal basis for residence will be regarded as habitually resident ([28]).

The changes in 2004 mean that there are now two stages to the habitual residence test:

- an initial test to determine whether the person has a 'right to reside'; and
- the original habitual residence test.

Any person who does not have a right to reside automatically fails the habitual residence test. A person with a right to reside must also satisfy the main habitual residence test to be entitled to benefit. The term 'habitual residence' is not defined in regulations, so in order to determine whether a person is habitually resident, a decision-making officer considers a variety of factors about the person's circumstances. European case law has established that factors to be considered include:

- the length, continuity and general nature of actual residence;
- the reasons for coming to the UK;
- the claimant's future intentions.

EEA nationals who are lawfully employed or are self-employed have a right to reside as an employed or self-employed person. Those who are economically inactive — such as students, pensioners or lone parents — only have a right to reside provided they have sufficient resources to avoid becoming a 'burden' on the social assistance system. The right of EEA nationals to reside in the common travel area is set out in the Immigration (European Economic Area) Regulations 2006, which implement Directive 2004/38/EC ([29]).

The right to reside test applies to benefits that are social security benefits and fall within the scope of Regulation (EC) No 883/04 on the coordination of social security systems (income support, state pension credit, income-based jobseeker's allowance, income-related employment and support allowance, child benefit, child tax credit and health in pregnancy grant) and benefits that are not covered by Regulation (EC) No 883/04 but are social advantages under Regulation (EU) No 492/2011 (housing benefit, council tax benefit, social fund crisis loans and housing assistance from local authorities).

The bottom line of the right to reside test is that an EU citizen who has no permanent residence in the UK and who is without means or work will not be treated under UK law as eligible for these benefits.

A leading case concerning a Swedish national and a Norwegian national (both born in Somalia) shows the effect of the right to reside test for all European citizens. In a ruling in 2007 by a British court of appeal both were refused social benefits on the basis that they did not fulfil the terms of the right to reside test ([30]). Neither claimant was, at the relevant time, a worker or otherwise economically self-sufficient, and each claimed social benefits, having their claim initially rejected on the basis that they did not have the right to reside in the UK, as a result of the test introduced as from 1 May 2004. The court concluded that the right to reside is only conferred upon British citizens, certain Commonwealth citizens, 'qualified persons' as defined by the UK Immigration (European Economic Area) Regulations 2000 and others protected by national law. The court considered that as the claimants did not fulfil the requirements for 'qualified persons' status, they had no right to reside, and subsequently no right to the benefits sought, which are now dependent on fulfilment of the terms of the new test. In particular, this means that those EU citizens who are neither workers nor in possession or receipt of funds from other sources to qualify as self-sufficient will be excluded from receipt of these benefits.

In this *Abdirahman* ruling, the secretary of state presented the argument to the court of appeal that the cases did not fall within the scope of the Treaty on

([28]) Toner, H., 'New legislative and judicial developments in EU citizenship', in Shah, P. and Menski, W. (eds), *Migration, diasporas and legal systems in Europe*, Routledge-Cavendish, London, 2006. See also White, R., 'Residence, benefit entitlement and Community law', *Journal of Social Security Law*, 2005.

([29]) http://www.legislation.gov.uk/uksi/2006/1003/contents/made

([30]) Joined Cases ss [2007] EWCA Civ 657 *Nadifa Dalmar Abdirahman* v *Secretary of State for Work and Pensions* (2006/1639) and *Ali Addow Ullusow* v *Secretary of State for Work and Pensions* (2006/1668), 5 July 2007.

European Union (TEU) because EU law did not extend to cases where no right of residence exists under either the TEU or the relevant domestic law and that therefore the question of indirect discrimination contrary to Article 12 TEC (now Article 18 TFEU) does not arise. The court of appeal accepted this argument and added that if there was indirect discrimination against non-UK nationals, this was justified as a legitimate response to the manifest problem of 'benefit tourism'. This same line of reasoning was used in the judgment of the Supreme Court of 16 March 2011 in the Patmalniece case, which dealt with the compatibility of the right to reside requirement for social security benefits which fall within Regulation (EEC) No 1408/71 (now Regulation (EC) No 883/04) ([31]).

4.1. Special problems for A8 and A2 nationals

As already mentioned, the right to reside regulations came into effect on the same date of the accession to the EU as the 10 new Member States (1 May 2004). At the same time a worker registration scheme was introduced to control access to the labour market for workers from the so called A8 countries (Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia and Slovakia) ([32]). Nationals of these states were able to take up employment in the UK, providing they were authorised, under the scheme. If they did not have a job but came to the UK to seek employment, they would need to be self-sufficient in order to have a right to reside. According to this UK worker registration scheme, A8 nationals who stopped working before completing 1 year with an authorised employer did not have the right to reside as a worker as well. Without this right to reside they were excluded from receiving social benefits ([33]). This obligation to register under this scheme ended on 1 May 2011, when the transitional arrangements on the free movement of workers from the A8 countries came to an end. Before that time, the European Commission already considered the scheme contrary to the transitional arrangements because it allowed the UK not only to restrict the right of nationals from the abovementioned Member States to move to the UK to work, but also to discriminate when paying benefits. On 28 October 2010 the Commission officially requested that the UK end these discriminatory conditions, which was a bit late perhaps ([34]). With the end of the worker registration scheme from 1 May 2011, the infringement procedure on this issue has ended as well.

But A2 nationals (Bulgarians and Romanians) still must have authorisation (in the form of a work permit) to work in the UK. They cannot retain worker status or reside as jobseekers unless they have completed 12 months of authorised work. The transitional arrangements for these two countries will come to an end on 1 January 2014. Croatians, who will join the EU on 1 July 2013, will encounter the same problems as Bulgarians and Romanians have now.

5. Conclusion

The 2004 directive on free movement has made immigration of inactive EU citizens (and their family members) easier. Every EU citizen now has a right of residence for up to 5 years in any Member State, although it is conditional. After that, he or she will receive the right to permanent residence, with full social protection.

A problem with the implementation of Directive 2004/38/EC is that it leaves room for different interpretations in situations where an inactive EU citizen without a permanent residence right applies for a social assistance benefit. It is not clearly defined when an EU citizen becomes an 'unreasonable burden' on the social assistance system. Leeway is given to states to examine whether financial difficulties may be temporary. As a result, states have developed their own definitions and ways of implementing the directive on this point.

Is it possible to deny EU citizens access to social assistance benefits before they have a permanent residence? And is it possible to prove that any one person has become an 'unreasonable' burden on a country? Hailbronner has argued that 'in any individual case it will hardly ever be possible to show the unreasonableness of a burden. The social system as such cannot be substantially affected by an additional beneficiary' ([35]). And according to Martinsen it may be difficult for a Member

([31]) *Patmalniece* v *Secretary of State for Work and Pensions* [2011] UKSC 11. See the extensive analysis of this judgment by Mel Cousins in 18 *Journal of Social Security Law*, pp. 136–142, 2011.

([32]) Until 1 May 2011 A8 nationals were obliged to apply to register under the 'worker registration scheme' (WRS) within 1 month of starting a job. The registered A8 national would then receive a 'registration certificate' and a 'registration card'. The worker registration card was only issued the first time that the worker applied to register, and would continue to be valid even where an A8 national changed employment. The worker registration certificate, on the other hand, was specific to an employer and therefore had to be changed every time the A8 national changed employment during the registration period.

([33]) An important judgment which directly addressed A8 nationals was given by the UK House of Lords on 12 November 2008, in a case concerning a claim for social benefits by a Polish national which was refused. See *Zalewska* v *Department of Social Development* (Northern Ireland), [2008] UKHL 67. See http://www.bailii.org/uk/cases/UKHL/2008/67.html

([34]) http://ec.europa.eu/social/main.jsp?langId=en&catId=457&newsId=917&furtherNews=yes

([35]) Hailbronner, K., 'Union citizenship and social rights', in Carlier, J.-Y. and Guild, E. (eds), *The future of free movement of persons in the EU*, Bruylant, Antwerp, 2006, pp. 65–79.

State to prove that an EU citizen is an 'unreasonable burden' on the social system when, as has been demonstrated in the case-law of the Court of Justice, recourse to social assistance in itself is not sufficient reason ([36]).

So far, the Court of Justice, however, has not allowed unconditional access to social assistance benefits of the host state. A first condition is always that the applicant has to have legal residence in the host state. In several cases the Court of Justice has formulated additional conditions that the applicant should 'have a genuine link with the employment market of the state concerned' (Collins, paragraphs 67–69) ([37]), or 'need to demonstrate a certain degree of integration into the society of the host state' (Bidar, paragraph 57) ([38]). And the Court of Justice also recognises the right of the host Member State to stop the right of residence of the person concerned, even if it may not become 'the automatic consequence of relying on the social assistance system' (Grzelczyk, paragraph 43 ([39]) and Trojani, paragraph 36) ([40]).

Lenaerts and Heremans indicate that on the one hand the Court of Justice has made it clear that Article 18 TEC (now Article 21 TFEU) cannot be a 'letter of safe conduct' for social tourism, but on the other hand shows that a society can no longer limit its solidarity to its nationals and should include all persons who demonstrate a sufficient degree of integration in that society. A request for a minimum subsistence allowance can by itself be considered as an unreasonable burden, but when, as in the Grzelczyk case, a student will clearly only require this support for the duration of 1 year, the pressure on the system is reduced and the balancing act changes ([41]).

However, the policy and practice in the UK show a different picture. By using a habitual residence test and a right to reside test, the social benefits system of this country seems to exclude inactive EU citizens effectively from entitlement during a certain period of time. But what is the validity of the right of residence test?

The judgments in the British cases could be challenged. They stress that the right to reside in the UK is linked to domestic law and not to Union law, which is odd, given that the domestic law is designed to implement Union law ([42]).

In my opinion there is a right of residence under EU law for inactive EU citizens without a permanent residence status even if they apply for social assistance benefits. This application can lead to the withdrawal of their residence right, but this right cannot be withdrawn automatically on the basis of temporary reliance on social assistance. After the introduction of Directive 2004/38/EC the reasoning of the *Trojani* case that there is no right of residence under EU law because Mr Trojani did not satisfy the condition of having sufficient resources has to be modified.

Although a non-national citizen of the Union, applying for a benefit because of lack of resources, does not derive a right of residence directly from Article 18 TFEU, this citizen derives a right of residence from Directive 2004/38/EC until the moment this right is withdrawn, when he or she has become an unreasonable burden to the social assistance system.

In March 2013 the UK, together with Germany, the Netherlands and Austria, sent a letter to the European Commission asking for measures to allow EU Member States to limit access to basic social benefits to other EU nationals ([43]). The European Commission is opposed to changing the rules and stresses that there are already measures to expel EU citizens who abuse a country's welfare system.

([36]) Martinsen, D. S., 'The social policy clash: EU cross-border welfare, Union citizenship and national residence clauses', paper prepared for the EUSA 10th Biennial International Conference, Montreal, 17–19 May 2007.

([37]) Judgment of 23 March 2004 in Case C-138/02, *Collins* (ECR 2005, p. I-2119).

([38]) Judgment of 15 March 2005 in Case C-209/03, *Bidar* (ECR 2004, p. I-2703).

([39]) Judgment of 20 September 2001 in Case C-184/99, *Grzelczyk* (ECR 2001, p. I-6193).

([40]) 7 September 2004, C-456/02. See also Verschueren, H., 'European (internal) migration law as an instrument for defining the boundaries of national solidarity systems', *European Journal of Migration and Law*, 2007, pp. 307–346.

([41]) Lenaerts, K. and Heremans, T., 'Contours of a European social union in the case-law of the European Court of Justice', *European Constitutional Law Review*, 2006, pp. 101–115.

([42]) Mitsilegas, V., 'Free movement of workers, EU citizenship and enlargement', *Immigration, Asylum and Nationality Law*, Vol. 21, No 3, 2007.

([43]) http://docs.dpaq.de/3604-130415_letter_to_presidency_final_1_2.pdf

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