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JACQUES DELORS INSTITUTE

FREE MOVEMENT OF EUROPEANS
TAKING STOCK OF A MISUNDERSTOOD RIGHT

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Foreword by António Vitorino

STUDIES & REPORTS 112 NOVEMBER 2016

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FOREWORD

FREEDOM OF MOVEMENT: REALITY OR FANTASY?

by António Vitorino

I am delighted that the Jacques Delors Institute is publishing a Study on the free movement of people within the European Union, as it is a human, political and symbolic issue that is regularly the focus of public debate.

This Study provides an overview of the situation and begins with a useful reminder that the free movement of workers, and people, is an integral part of the EU's founding principles and concerns all its citizens, whether or not their country is part of the Schengen Area. It also clearly sets out the rules according to which this freedom of movement may be exercised by Europeans who so wish.

I am particularly in favour of a reminder of these rules as during my time as the European Commissioner in charge of the area of freedom, security and justice, I was called upon to propose and negotiate Directive 2004/38, which codified and complemented Community law on freedom of movement. The Directive entered into force a few days before the enlargement of the EU to include ten Member States from Central, Eastern and Mediterranean Europe.

As Martina Menghi and Jérôme Quéré have highlighted, some of these rules have been refined and specified since 2004, notably through rulings of the Court of Justice of the European Union, cited extensively in this Study. While this is true, they also remind us that the main elements of European law on freedom of movement have remained unchanged: this right makes it possible for European citizens to try their luck in another EU Member State, an opportunity which is not open to non-European citizens. It is not a right to settle freely in another EU country, as the exercise of freedom of movement requires sufficient resources for a long-term stay in the host country. It refers to rules

adapted to the status of mobile European citizens, whether they wish to stay in another country, work there or access welfare and benefits there. Finally Europe's legal framework permits the fight against abuses of the freedom of movement, which have neither the rate nor impact that populists claim in their efforts to demonise this fundamental freedom

It is just as important that such a Study outlines the details of the rules governing the exercise of free movement, as perceptions of this right can be relatively far from reality in many EU Member States. The controversy surrounding the British referendum on EU membership held on 23 June 2016 also proved, if proof were necessary, the need to keep setting the record straight with regard to this issue!

This Study plays a doubly important role in this regard as it not only presents the law in force for each type of freedom of movement exercised by Europeans, but it also provides statistics attesting to the reality of European freedom of movement. These figures remind of a few facts that are often ignored: freedom of movement is showing a slight increase in the EU but remains highly restricted, including in terms of immigration from outside the EU hosted by Member States. For the most part, freedom of movement concerns people of working age, who most often want to live in another country for professional reasons. In total, mobile European citizens represent much more in revenue that they cost the countries in which they settle.

Many young Europeans believe that freedom of movement, a relatively recent and novel achievement, is as obvious a right as the air we breathe. This is not the case, both because it is strictly governed by European and national legislation, and above all because it will ultimately be challenged if nothing is done to contradict the popularity-seeking and sometimes xenophobic statements made about it.

This is the backdrop against which I strongly recommend that you read this Study by Martina Menghi and Jérôme Quéré, this "stock of a misunderstood right" for which we must do our utmost to keep it tethered to reality.

António Vitorino
Member of the Board of trustees of the Jacques Delors Institute

SUMMARY

The free movement of persons within the European Union is the subject of many erroneous assumptions. This fundamental freedom often falls under debate, pulled between its enthusiastic defenders and its sworn opponents. Preconceived ideas are deeply rooted in the collective imagination, such as the Polish plumber exploiting the directive on posted workers, or poor citizens who exercise their right to free movement solely in order to obtain another Member State's social benefits, commonly referred to as "social tourism".

It is necessary to moderate the debate and to analyse EU law to determine what is truth and what is fiction.

1. Historic and contextual elements of a freedom currently under scrutiny

The free movement of workers, established by the Treaty of Rome (signed in 1957), has progressively evolved and now applies to all citizens. We no longer speak of intra-European migration, but of mobility, as this involves rights that are very different from those for third State nationals. This mobility takes place between the EU Member States, independently of their belonging to the Schengen Area.

2. Broad access to the territory but a conditional right of residence

EU citizens and their families benefit from the right to move and reside freely within the territories of the Member States. This right however is not without conditions, and differentiates between workers and other European citizens. Job seekers receive specialised treatment that allows them to try to find employment, but without becoming an unreasonable burden for the host country. This right is also limited in order to ensure the security of Member States' territories and the sustainability of their social welfare systems.

3. Access to employment

EU citizens should not be discriminated against when it comes to employment in a Member State other than their own. Their family members, even if they are third country nationals, may have the right to work in the State where the EU citizen is working. However, there are some exceptions for certain types of employment in the public sector, and for citizens of new Member States going through transitional periods. The case of posted workers, who are often criticized in the debate, will receive particular attention.

4. Access to social advantages

Equal treatment is not guaranteed for citizens using their freedom of movement. It is conditional upon acquiring the right of residence and limited to the fact that it does not lead to the citizen becoming an unreasonable burden for the host State. Access to benefits and social welfare varies greatly depending on the citizen's situation, i.e. whether (s)he is considered to be a worker or an economically inactive person. The allocation of unemployment benefits has been adapted so that it does not penalise a worker having used his or her freedom of movement.

INTRODUCTION

The free movement of persons, goods and services within the European Union is considered by its citizens to be **one of the EU's most positive features**[1] and the "freedom to travel, study and work anywhere in the EU" continues to be **the number one item associated with the EU**[2]. However, free movement has also raised **fears concerning its supposed influence on employment or the social security systems** of the host States. **Social tourism** is also a frequently-cited concern. This consists of the movement of a person for the sole purpose of benefiting from the social security system of a Member State other than his or her country of origin.

These fears, **exploited by demagogues**, can cause widespread opposition to the EU, in a climate that is already detrimental for European integration.

It is important to shed light on European Union law, in order to determine whether or not it is adapted to preventing these fears from becoming a reality.

In 2014, the *Dano* judgment of the Court of Justice of the European Union (hereafter "the Court" or the "ECJ")[3], was followed by heated reactions and intense debates[4] concerning the freedom of movement. It therefore seems appropriate to clarify the content, the issues and the implications of free movement of persons in the EU. In its judgment, the Court affirmed the **fundamental**

1. Standard Eurobarometer 84, *European citizenship*, Autumn 2015, November 2015, p. 15.
2. Standard Eurobarometer 84, *Public Opinion in the European Union*, Autumn 2015, November 2015, p. 94.
3. ECJ, 11 November 2014, *Elisabeta Dano, Florin Dano v Jobcenter Leipzig*, case C333/13, not yet published. This judgment shows the gap between rule of law on the one hand and application and enforcement on the other. The States are sufficiently "protected" if they correctly apply Union law: in the *Dano* case, the national authority had already applied it properly, so that an economically inactive EU citizen not seeking employment would not represent an unreasonable burden for the social welfare system of the host State. From the outset it is vital to highlight the fact that in this case non-contributory benefits were concerned.
4. Jean-Baptiste François and Marianne Meunier, "La justice européenne contre le « tourisme social »", *La Croix*, electronic version, published 12 November 2014; Cécile Barbière, "La justice européenne se positionne contre le « tourisme social »", EurActiv.fr, published 12 November 2014; Anne-Aël Durand, "Que change la décision de la cour de Luxembourg sur les aides sociales en Europe?", *Le Monde*, electronic version, published 12 November 2014.

significance of free movement as corollary to European citizenship[5]. However, "fundamental nature" does **not** mean that this freedom is **unconditional** and **without limits**.

It is important to answer a certain number of questions raised in the debate: **what are the rights of a European citizen who arrives in another Member State?** What are his or her **duties** (in particular concerning the obligation to register with the local authorities)? Are there any limitations and if so, what are they? What can we demand/expect from the host State?

When we speak of the legal regimes of European citizens, it is necessary to consider not only European legislation but also national legislation. Firstly, European legislation will be analysed. This is a matter of understanding first of all what are **the major principles set out by Union law** in terms of free movement that the Member States must respect.

Secondly, the **application** of these principles will be studied. What is happening *in concreto*? We must not forget that the Member States have some leeway, even concerning European legislation; furthermore, they are free to leave the club (or possibly negotiate amendments to treaties).

Even so, from the moment a State decides to become part of the European Union, it must accept the principle of free movement. Member States nevertheless remain free to exercise some flexibility. Some of these current accommodations warrant consideration.

After recalling the historic evolution of the freedom of movement, and underlining its primary elements (§1), we will first analyse EU rules governing access to territories (§2), then those concerning access to work posts (§3) and lastly those relating to access to social benefits (§4).

5. ECJ, *Dano*, cited above, points 58-59.

1. Historic and contextual elements of a freedom currently under scrutiny

The internal market is defined by Article 26 TFEU as *"an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties"*.

One of the constituent elements on which the single market[6] is based, the free movement of workers, has existed **since the Treaty of Rome** of 1957. The single market could not be conceivable without one of its pillars[7]. The freedom of movement and the right of residence of EU citizens constitutes a genuine *"cornerstone of EU integration"*[8] and is recalled in the Charter of Fundamental Rights of the European Union in its Article 45. In 1989, Jacques Delors declared before the European Parliament: *"How encouraging it is to see, as I have, the enthusiasm of students, teachers and businessmen who, as a result of the exchange schemes, have become active campaigners for a fifth freedom, perhaps the most important freedom of all, the freedom to exchange ideas and experience"*[9].

Even David Cameron, who was the author of several declarations calling into question the corpus of rules currently in force in terms of free movement, cannot deny this: *"free movement of people is a necessary part of that single market"*[10].

However, affirming the fundamental significance of a freedom does **not** mean **unconditional rights**. As a matter of fact, Article 21 TFEU expressly provides that the right of EU citizens to move and reside freely within the territory of

6. There is perfect concomitance between the internal market and the single market. One has more political scope, the other, strictly more legal. The Commission prefers to use the second expression in its communications, whereas the first is the one used in legal texts. Hereafter they will be used as synonyms.
7. Terminology used in the Directive 2014/54/EU of 16 April 2014, on measures facilitating the exercise of rights conferred on workers in the context of free movement for workers.
8. Communication from the Commission, 25 November 2013, COM(2013) 837 final, *Free movement of EU citizens and their families: Five actions to make a difference.*
9. Jacques Delors, speech before the European Parliament on 17 January 1989, *Bulletin of the European Communities*, 1989, No. Supplement 1/89.
10. David Cameron, speech at the University of Suffolk, Ipswich, 25 March 2013.

the Member States is *"subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect"*.

The sources of free movement are interconnected at several levels: primary law (the Treaties on the Functioning of the EU and on European Union, the Charter of Fundamental Rights of the EU) and secondary law. It is impossible not to consider the constitutional role of the case law of the Court of Justice, which has considerably advanced this freedom[11]; to the extent that the most important legislative instrument currently in force in this area, i.e. Directive 2004/38/EC[12], is a genuine codification of case law from the judges in Luxembourg.

1.1. The historic evolution from free movement of workers to free movement of persons

Since 1957, **a far-reaching evolution** has occurred: a freedom that in principle only concerned workers and *economic stakeholders*[13] was **progressively extended to all European citizens**. For this reason, we began to speak about the free movement of persons.

European integration began **with economic integration**: even though there were several developments over the years, and even though it is common to affirm that European citizenship has become emancipated from its purely economic origins[14], from a practical viewpoint it remains undeniably easier to enjoy the benefits offered by Union law, particularly the right of residence, as a worker than as a citizen[15].

11. In the breakdown of sources of EU law, the Court's case law is sometimes considered as a subsidiary source. This designation is highly misleading, because the Court helped advance this regime in a remarkable way. The preliminary rulings of the Court have an *erga omnes* effect.
12. Directive 2004/38/EC of the European Parliament and 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, 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 (Text of interest for the EEA).
13. Which is not surprising: the EC was born as the European Economic Community (EEC), it was only in 1992 that European citizenship was introduced in the Treaties.
14. See C. Costello, "Citizenship of the Union: Above Abuse?" in *Prohibition of Abuse of Law: A New General Principle of EU Law?*, Edited by Rita de la Feria and Stefan Vogenauer, ed. Hart publishing, Oxford and Portland, Oregon, 2011, p. 345.
15. See K. S. Ziegler "Abuse of Law in the Context of Free Movement of Workers" in *Prohibition of Abuse of Law: A New General Principle of EU Law? op. cit.*, p. 299: "In order to derive access to a benefit from the principle of non-discrimination under the status of citizen, the refusal of the benefit must amount to a disproportionate restriction of the residence right flowing from Union citizenship (...). It is still much easier to invoke the status of a worker, which automatically entails equal treatment".

At the beginning, free movement was presented as a right for the "Community"[16] worker alone. Today, this freedom concerns a larger number of persons, but **the rights that derive from** its exercise **are not the same.**

The **legal regimes governing the free movement of workers** and **citizens** remain **different** and should be dissociated. **Moving to a Member State to work is not the same as moving there to live without undertaking any economic activity.** The two different situations do not grant access to the same rights or the same benefits.

BOX 1 ► Citizenship and nationality

EU citizenship appeared in the Treaty of Maastricht in 1992. It is now in Article 20 TFEU. "Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship." The **acquisition** of this citizenship is **automatic** once a person has the **nationality of one of the Member States**. There is no need to take additional steps as it is directly conferred by the Treaty.
It is up to each Member State to set the conditions for acquisition and loss of nationality. This procedure can therefore be different from one State to another[17]. In a report to the French President in 2008, Alain Lamassoure affirms that "Indeed behind the bold talk of 'European citizenship', such varied legal statuses coexist in our countries as to invite comparisons with the societies of Pericles' Athens or Augustus' Rome"[18].
This **acquisition through the intervention of Member States** can be explained by the fact that there is no European nationality, as the "European nation" has not been recognised by any text.

Even if sometimes in the collective imagination (due to a certain amount of "misinformation") free movement is associated with the idea of an **individual who settles in another Member State** and then **requests** (and obtains!)

16. This notion is defined by the Court of Justice, for want of being clarified in the Treaties, EJC, 23 March 1982, *D.M. Levin v Staatssecretaris van Justitie*, case 53/81, Rec. p. 01035.
17. The German model of *jus sanguinis* (right of blood) and the French one of *jus soli* (right of soil) have long been opposed. The naturalisation process has since then become more flexible in several Member States to adopt a hybrid, intermediary system. Differences remain, however, for example on the acquisition of nationality by marriage to a national. It is automatic in Germany, Italy and Portugal, but just simplified in Denmark, Spain and the United Kingdom. See the Report by the Committee for European Affairs of the French Senate, July 2002, *L'acquisition de la nationalité par le mariage* (the acquisition of nationality by marriage), No. LC 108.
18. Report by Alain Lamassoure to the President of the French Republic on 8 June 2008, "The Citizen and the application of Community Law".

benefits provided by national law for its own nationals, this is an **incorrect interpretation** that does not correspond to reality: Union law provides for duties in **return** for established rights[19].

It is necessary to distinguish between economically active and economically inactive citizens, as this concerns persons in very different situations and consequently for which different rights are recognised by the Union.

For several years, the Court of Justice has periodically recalled that freedom of movement *"is not **unconditional**"*[20]. From the very moment that the Court recognised a **direct effect** of Article 21 TFEU (ex Article 18 TEC), establishing the right of all citizens of the Union to move and reside freely within the territory of the Member States, it affirmed that this right is subject to conditions: *"A citizen of the European Union who no longer enjoys a right of residence as a migrant worker in a host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities and, where necessary, the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and, in particular, the principle of proportionality"*[21].

Article 45 TFEU establishes that the free movement of workers entails the **abolition of any discrimination based on nationality** between the **workers of the Member States** as regards:

- employment;
- remuneration;
- other conditions of work and employment.

Article 18 TFEU provides for the overall prohibition of any discrimination on grounds of nationality within the scope of application of the Treaties, and a list of citizens' rights is provided for by Article 20 TFEU.

19. In particular Art. 20§2 TFEU clarifies that: "citizens of the Union shall enjoy the rights and are subject to the duties provided for in the Treaties".
20. ECJ, 31 January 2006, *Commission of the European Communities v Kingdom of Spain*, case C-503/03, Rec. p. I-01097, point 43.
21. ECJ, 17 September 2002, *Baumbast and R v Secretary of State for the Home Department*, case C-413/99, Rec. p. I-07091, point 94.

BOX 2 ► A non-exhaustive list of the rights of citizens of the Union

- the right to move and reside freely within the territory of the Member States;
- the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
- the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
- the right to petition the European Parliament, to appeal to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

BOX 3 ► The general principle of non-discrimination and equal treatment

According to the Court, a violation of the principle of non-discrimination can consist of the application of different rules to comparable situations, or the application of the same rule to different situations.[22]
As a general rule, the Court's case law does not allow for the automatic extension of equal treatment to citizens of the Union who do not have the right of residence, because the citizens who reside in the host State and those who do not would not in fact be in a comparable situation. However, arrangements do exist.
The Bickel and Franz judgment of November 1998[23] is an interesting illustration and very specific in the present case.
In this judgment, the Court allowed the application of equal treatment towards a citizen of the Union when he was only enjoying his **freedom of movement** and **was not residing** within the territory of the Member State in question. The citizens of the Union involved were German speakers and they were invoking the right to use the German language before a national court, in the same way as the national German-speaking residents of the region. The Court observed that this was **likely to facilitate the exercise of freedom of movement**.
Furthermore, according to the Court's case law, the rules of equal treatment prohibit not only apparent discrimination based on nationality, but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result.[24]

22. ECJ, 3 October 2000, *Angelo Ferlini v Centre hospitalier de Luxembourg*, C-411/98, Rec. 2000 p. I-08081, point 51.
23. ECJ, 24 November 1998, *Criminal proceedings against Horst Otto Bickel and Ulrich Franz*, 274/96, Rec., 1998, p. I-07637.
24. ECJ, 16 September 2004, *Gerard Merida v Bundesrepublik (Germany)*, case C-400/02, Rec. p. I-08471, point 21.

However, the provisions of the Treaty can only be invoked if the provisions of secondary law need not apply, on the sole condition that the persons in question do not enjoy any specific rights *"under other provisions of Community law"*[25]. The provisions of the Treaty are therefore only **on a subsidiary basis.**

The Court therefore indicates that *"it should first be ascertained whether a person [...] can benefit from the provisions of secondary law [...] Should that not be the case, it would then have to be ascertained whether a person [...] can base a right [...] directly on the provisions of the FEU Treaty concerning the citizenship of the Union"*[26].

This appears to be in compliance with the classic legal principle *lex specialis derogat legi generali*. The law governing a specific subject matter overrides and therefore prevails over a law which only governs general matters. *"According to settled case-law, Article 20 TFEU, which sets out generally the right of every citizen of the Union to move and reside freely within the territory of Member States, finds specific expression in Article 45 TFEU in relation to freedom of movement for workers"*[27].

Article 21 TFEU provides that this right is *"subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect"*.

The dual dimension of **citizens of the Union** and **workers** will serve as the main thread of our analysis; when EU law allows persons to enjoy certain rights and benefits in the host State, it must be specified each time whether or not the beneficiary citizen is economically active, in other terms, whether or not (s)he has the status of worker within the meaning of Union law[28]. The question of worker today no longer raises legal difficulties. Questions for a preliminary ruling now concern the **economically inactive** European citizen: at the current time it is precisely the situation of the inactive citizen that occupies a dominant position

25. ECJ, 19 October 2004, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, case C-200/02, Rec. p. I-9925, point 24.
26. ECJ, 8 November 2012, *Yoshikazu Iida v Stadt Ulm*, case C-40/11, published in the electronic Reports of Cases, points 34-35.
27. ECJ, 4 July 2013, *Simone Gardella v Istituto nazionale della previdenza sociale*, case C-233/12, published in the electronic Reports of Cases, point 38.
28. See box No. 5: "Europeanisation of the concept of worker".

in litigation[29]. Moreover, it could be observed that it is for this reason that the Court developed the concepts and the criteria of residence and a link with the host State: the requirement of a "connecting link" with the State is not new, but it confirms a long tradition in the Court's case law[30]. Some have therefore referred to the emergence of a "residence-based citizenship", with the establishment of a "principle of proximity" through this requirement of connecting link[31].

It is important to remember the differences between the **free movement of workers and the free movement of persons.** Another basic distinction is that of the difference between **mobility of European citizens and immigration**.

1.2. The differences between mobility and immigration

Is it correct to speak of "intra-EU immigration"? The term "migration" in this context could cause a certain degree of confusion. For this reason it is preferable to use the expression "**intra-EU mobility**"[32].

It is necessary to distinguish between the legal status of citizens of the Union and that of third country nationals. As third countries are not EU members, their nationals do not have European citizenship.

Third country nationals who travel to the territory of a Member State should not be confused with citizens of the Union who travel within EU territory.

29. In particular, ECJ, *Dano*, cited above; ECJ, 19 September 2013, *Pensionsversicherungsanstalt v Peter Brey*, case C-140/12, not yet published; ECJ, 15 September 2015, *Jobcenter Berlin Neukölln v Nazifa, Sonita, Valentina and Valentino Alimanovic*, case 67/14, not yet published.
30. ECJ, 11 July 2002, *Marie-Nathalie D'Hoop v Office national de l'emploi*, case C-224/98, Rec. p. I-06191, point 38; ECJ, 15 March 2005, *The Queen (on the application of Dany Bidar) v London Borough of Ealing and the Secretary of State for Education and Skills*, case C-209/03, Rec. p. I-02119, point 57. ECJ, 18 July 2007, *Wendy Geven v Land Nordrhein-Westfalen*, case C-213/05, Rec. p. I-06347, point 25, where the Court affirms in relation to the "connecting link with the Member State concerned" that the national legislator was entitled to demand a "substantial contribution to the national labour market" from the worker; and the ECJ, 18 July 2007, *Gertraud Hartmann v Freistaat Bayern*, case C-212/05, Rec. p. I-06303, point 36.
31. J.Y. Carlier and M. Verwilghen (dir.), *Thirty years of free movement of workers in Europe*, Luxembourg, Office for Official Publications of the European Communities (in French and English), 2000; see part 4.3 on the case of access to unemployment benefits.
32. Admittedly, in the court's terminology the expression "migrant" is not absent: the Court speaks of "migrant workers" in several cases (see for example: ECJ, 26 January 2006, *Rijksdienst voor Sociale Zekerheid v Herbosch Kiere NV*, case C-2/05, Rec. p. I-01079; ECJ, 18 January 2007, *Aldo Celozzi v Innungskrankenkasse Baden-Württemberg*, case C-332/05, Rec. p. I-00563; ECJ, 22 June 2011, *Marie Landtová v* Česká *správa sociálního zabezpečení*, case C-399/09, I-05573). But it never refers to "(European) migrant citizens", an expression that is found rather in the media. Moreover, this choice of words may seem scarcely compatible with the purpose of citizen status to be the "fundamental status of nationals of the Member States" (ECJ, 20 September 2001, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, case C-184/99, I-06193 point 31).

These are two very distinct categories, to which two very distinct legal regimes correspond, each involving different rights (and duties). The Member States have greater leeway in relation to non-Europeans.

Each time, when we analyse the different situations facing a person who does not have the nationality of the host State (residence, work, access to social welfare benefits), it is necessary to remember this difference between a person from another EU Member State and one from a third country. The European Commission, in its proposal that led to Directive 2004/38/EC on the freedom of movement of persons, affirmed that *"Union citizens should,* mutatis mutandis*, be able to move between Member States on similar terms as nationals of a Member State moving around or changing their place of residence or job in their own country"*[33]. It can be noted, given the ongoing conditions, that this goal has not been reached. **Their movement is,** however, **greatly facilitated** compared with the situation of third country nationals.

In addition, alongside the two categories of citizen of the Union – third country national, it is also interesting to distinguish a third category, that of **citizens of new Member States** who can be subject to transitional measures.

When we speak about **migratory flows,** some suggest a differentiation between **internal** immigration (intra-EU) and **external** immigration (persons from third countries). However, it is not correct to use the term 'migration' in order to describe European citizens. Furthermore, as the Court of Justice occasionally points out, *"Union citizenship is destined to be the fundamental status of nationals of the Member States"*[34].

Consequently, we deem it necessary to formulate an initial observation: **speaking of internal or intra-EU immigration is not correct,** and could lead to a certain amount of confusion in a subject that is in itself already rather complex, fragmented and a source of misunderstanding.

33. Communication from the Commission, 23 May 2001, on the proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001) 257 final, point 1.3., p. 2, OJEC C 270 E of 25 September 2001, p. 150.
34. ECJ, *Grzelczyk*, cited above, point 31. According to the Advocate General Poiares Maduro *"when the Court describes Union citizenship as the 'fundamental status' of nationals of Member States it is not making a political statement; it refers to Union citizenship as a legal concept which goes hand in hand with specific rights for Union citizens"* (point 19 of his opinion of 3 April 2008 in the case ECJ, 16 December 2008, *Heinz Huber v Bundesrepublik Deutschland*, case C-524/06, Rec. p. I-9705).

Major differences are also visible concerning the **leeway** of the Member States in relation to European citizens and third country nationals. For example, the Member States still have the right to set the number of third country nationals entering their territory with the purpose of seeking employment. However, pursuant to the Treaties in force, the States do not have the right to set quotas concerning citizens of the Union accessing their territory.

It is because of these basic differences that giving the **European Commissioner in charge of immigration** a portfolio that also includes **European citizenship** was not a good choice, as it concerns different issues, different challenges and different legal regimes.[35]

In addition, **it should not be forgotten that the figures** concerning these two categories are different (for example the number of individuals present on the territory or applying for benefits or even benefiting from the social welfare system of the host State)[36]. In 2013, 3.4 million people (nationals and non-nationals) settled in an EU Member State. Among these, 1.2 million people had the nationality of a Member State other than that of the host country, representing 35.29% of people. In France, out of 332,600 people settling in the country, 27.2% had the nationality of another EU Member State. In the United Kingdom, out of 526,000 people, 38.3% came from another EU Member State. This percentage is much higher in States that welcome large numbers of European public servants, such as 73.5% in Luxembourg and 52.4% in Belgium.

35. Dimitris Avramopoulos, EU Commissioner in charge of Migration, Home Affairs and Citizenship.
36. Cécile Jolly, *"Profils migratoires européens dans la crise"*, 7 January 2015, analytical note for France Stratégie: *"Three percent of Europeans are today settled in a Member State other than their home country. Every year, one million do the same: these flows do not exceed 0.3% of the European population and represent less than half of migrants arriving in the EU area, who are mainly from third countries"*.

TABLE 1 ► Immigration by citizenship (2014)

	Total immigrants	Nationals		Non-nationals							
				Total		Citizens of other EU Member States		Citizens of non-member countries		Stateless	
	(thousands)	(thousands)	(%)	(thousands)	(%)	(thousands)	(%)	(thousands)	(%)	(thousands)	(%)
Belgium	124.8	17.6	14.1	105.9	84.9	64.6	51.8	41.3	33.1	0.0	0.0
Bulgaria	*26.6*	*9.5*	*35.7*	*17.0*	*64.0*	*1.4*	*5.4*	*15.3*	*57.4*	*0.3*	*1.2*
Czech Republic	29.9	5.8	19.3	24.1	80.7	14.8	49.3	9.4	31.4	0.0	0.0
Denmark	68.4	19.3	28.3	49.0	71.7	23.8	34.9	24.5	35.8	0.7	1.0
Germany	884.9	88.4	10.0	790.2	89.3	415.9	47.0	372.4	42.1	1.9	0.2
Estonia	3.9	2.6	65.5	1.3	34.4	0.2	4.0	1.2	29.6	0.0	0.8
Ireland	*67.4*	*12.4*	*18.4*	*55.0*	*81.6*	*26.2*	*38.8*	*28.7*	*42.6*	*0.1*	*0.1*
Greece	59.0	29.5	50.0	29.5	50.0	16.0	27.1	13.5	22.9	0.0	0.0
Spain	305.5	41.0	13.4	264.5	86.6	100.0	32.7	164.4	53.8	0.1	0.0
France	339.9	126.2	37.1	213.7	62.9	83.5	24.6	130.2	38.3	0.0	0.0
Croatia	10.6	4.8	45.3	5.8	54.6	2.3	21.9	3.5	32.6	0.0	0.1
Italy	277.6	29.3	10.5	248.4	89.5	68.1	24.5	180.3	64.9	0.0	0.0
Cyprus	9.2	1.4	15.3	7.8	84.7	3.7	40.8	4.0	43.9	0.0	0.0
Latvia	10.4	5.9	56.6	4.4	42.9	0.9	8.9	3.5	33.9	0.0	0.1
Lithuania	24.3	19.5	80.4	4.8	19.6	0.7	2.7	4.1	16.8	0.0	0.1
Luxembourg	22.3	1.3	5.9	21.0	94.0	16.5	74.1	4.4	19.9	0.0	0.0
Hungary	54.6	28.6	52.4	26.0	47.6	10.5	19.3	15.5	28.3	0.0	0.0
Malta	8.9	1.8	20.5	7.1	79.5	4.4	49.6	2.7	29.9	0.0	0.0
Netherlands	145.3	37.4	25.8	107.8	74.2	58.4	40.2	47.8	32.9	1.6	1.1
Austria	116.3	9.2	7.9	106.9	92.0	67.0	57.6	39.4	33.9	0.5	0.4
Poland	*222.3*	*127.8*	*57.5*	*94.3*	*42.4*	*27.2*	*12.3*	*67.0*	*30.1*	*0.1*	*0.0*
Portugal	19.5	10.2	52.4	9.3	47.6	3.4	17.3	5.9	30.3	0.0	0.0
Romania	136.0	123.9	91.1	12.1	8.9	1.2	0.9	10.9	8.0	0.0	0.0
Slovenia	13.8	2.5	18.3	11.3	81.7	3.3	23.6	8.0	58.1	0.0	0.0
Slovakia	5.4	2.9	54.9	2.4	45.1	2.0	36.8	0.4	8.3	0.0	0.0
Finland	31.5	7.9	24.9	23.1	73.4	9.5	30.1	13.6	43.1	0.1	0.2
Sweden	127.0	20.9	16.4	105.6	83.2	28.1	22.1	70.7	55.7	6.8	5.3
United Kingdom	632.0	81.3	12.9	550.7	87.1	263.6	41.7	287.1	45.4	0.0	0.0
Iceland	5.4	1.9	35.8	3.4	64.2	2.9	53.2	0.6	10.3	0.0	0.8
Liechtenstein	0.6	0.2	26.7	0.5	73.3	0.2	39.8	0.2	33.5	0.0	0.0
Norway	66.9	6.9	10.3	60.0	89.6	35.1	52.5	24.3	36.3	0.6	0.8
Switzerland	156.3	26.2	16.7	130.1	83.2	94.4	60.4	35.7	22.9	0.0	0.0

(') The values for the different categories of citizenship may not sum to the total due to rounding and the exclusion of the category 'unknown citizenship' from the table.

Source: Eurostat.

When referring to third States, it is necessary to underscore that among them, there are 'privileged' States, notably because the EU has signed an association agreement or a treaty of another nature with the State in question. It follows that different situations exist even between third State nationals. For example, an association agreement was signed with Turkey, and consequently Turkish nationals enjoy a special status[37].

37. This can be explained by the fact that certain relations can be governed by international treaties. In addition, nationals from other Member States of the European Economic Area (Norway, Iceland, Lichtenstein) enjoy freedom of movement for workers in general.

1.3. Differences between the free movement of persons and the "Schengen Area"

It is also important to note the difference between the **free movement of persons** and the **Schengen Area**.

When we speak of the Schengen Area, we are exclusively referring to the **border control** systems and cooperation in legal, security and asylum matters, rather than to the rights of the persons concerned once they have crossed the border.

The agreement provides for the **removal of systematic controls at internal borders** between the signatory States.

The Schengen Area is made up of 26 countries, including 22 EU members, three members of the European Economic Area (Iceland, Lichtenstein and Norway) and a third State (Switzerland[38])[39]. Among the EU Member States, six are not members of the Schengen Area: the United Kingdom, Ireland, Cyprus, Romania, Bulgaria, and Croatia. However, as EU members, they are members of the Single Market and therefore must abide by the four fundamental freedoms, which include the free movement of persons.

Having said that, **a European citizen is subject to controls at the border of a country that is not a signatory** (the United Kingdom for example), **but cannot be refused access without a valid motive,** and once (s)he has gained access to the territory, this citizen can very well exercise the rights linked to free movement of persons.

As border controls have been abolished between States that are members of the Schengen area, this is also the case for anyone crossing the border, including third State nationals. Therefore, a third State national, who travels from Belgium to France for example, will not be subjected to controls between these

38. Admittedly, it should not be forgotten that Switzerland enjoys 'special' relations with the European Union, particularly because it is linked to the EU through a whole series of agreements. Switzerland, along with the three non-EU EEA Member States forms EFTA (European Free Trade Association).
39. European Commission, *Europe without borders, The Schengen Area*, Publications Office, 2015.

two countries. However, **the third State national nevertheless does of course require a visa**[40].

The system established by the Schengen Agreement implies a sort of mutual trust between signatory States, in the sense that the national authorities are required to consider the controls carried out by the authorities of another Member State to be sufficient.

Article 1 of the Schengen Agreement provides for **the possibility of restoring border controls** by the Member States, for reasons of **public policy and national security**. A contracting State can, for a limited period and after consulting the other Parties, decide that border controls be carried out.

40. A third State national can enter and move around within the territories of the Member States for a maximum period of 3 months. For a stay exceeding 3 months, a long-stay national visa or a residence permit is necessary; rules concerning this type of visa are set by the national legislation of each State. Schengen has harmonised short-stay visas only.

2. Widespread access to the territory but conditional right of residence

The European Union law lays down the conditions relating to exercise of the right to move and reside within the territory of another Member State, both for workers and for European citizens. **Intermediary categories** also exist. The rights can vary somewhat according to the situation of the persons concerned: particularly for **students**, **pensioners** or **economically inactive persons**. Concerning third State nationals who are not refugees and not stateless, each Member State is free to accept them or not on its territory. It should be noted that *"the main motivation for EU citizens to make use of free movement is work-related, followed by family reasons"*[41].

Concerning **third State nationals who are family members of an EU citizen** exercising his or her right to free movement, the EU also determines the conditions for entry and residence within the territory of Member States, including for the purpose of family reunification.

Differences exist among Europeans, between those exercising a professional activity and those who are economically inactive, but all of them in any case they remain **exempted from the visa obligation**, contrary to third State nationals.

2.1. Right of access to the territory of European workers conferred directly by the Treaties but subject to certain limitations

The fundamental role of the free movement of workers, as well as the rights that it entails, have been recognised since the Treaty establishing the European Economic Community, which was signed in Rome on 25 March 1957 and entered into force on 1 April 1958. However, the affirmation of this right has a corresponding parallel affirmation of **its limitations**.

41. European Commission, *Free movement of EU citizens and their families: Five actions to make a difference*, 25 November 2013, COM(2013) 837 final, p. 3

BOX 4 ► Unchanging rights and limitations for workers

Article 45 TFEU (ex Article 39 TEC) has hardly changed since it was originally formulated. It has always provided for on the one hand the affirmation of a **right**, and on the other, justified **limitations**. Before even mentioning the list of rights stemming from the free movement of workers, the Article establishes under which limitations these rights can be exercised:

"1. Freedom of movement for workers shall be secured within the Union.

*2. Such freedom of movement shall entail the **abolition** of any **discrimination**, **based on nationality** between workers of the Member States as regards **employment**, **remuneration** and other **conditions of work and employment**.*

*3. It shall entail the right, subject to **limitations justified** on grounds of public policy, public security of public health:*

a) to accept offers of employment actually made;

b) to move freely within the territory of Member States for this purpose;

c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service."

The Treaty does not give a definition of the term '**worker**', but the Court has designated it as any person pursuing an activity which is real and legitimate, under the direction of another person in return for which (s)he receives remuneration[42].

42. ECJ, 27 June 1996, *P.H. Asscher v Staatssecretaris van Financien*, case C-107/94, Rec. p. I-3089, point 25.

BOX 5 ► The Europeanisation of the concept of worker

For the purpose of the application of European legislation, the definition of "worker" is governed by Union law. In fact, if the Member States could arbitrarily determine when and how to apply the provisions of Union law, there would be a questioning of the **useful effect** of this legislation, with the paradoxical result that a same norm would not be applied to European workers in the same situation but in different States, in relation to the host State.

Since freedom of movement for workers constitutes *"one of the fundamental principles of the Community, the term 'worker' [...] may not be interpreted differently according to the law of each Member State but has a Community meaning. Since it defines the scope of that fundamental freedom, the Community concept of a 'worker' must be interpreted broadly"*[43].

This concept should be defined *"in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration"*[44].

It is up to the national judge to determine **on a case by case basis** whether or not this person in question falls within the scope of this definition[45].

Article 45 TFEU also establishes that the free movement of workers entails the right to accept offers of employment made within the territory of Member States, **with the exception of certain jobs in the public service**, which do not come under the scope of rules relating to the free movement of workers[46].

The **direct effect** of Article 45 TFEU has been recognised by the Court of Justice: *"the rights of nationals of a Member State to enter the territory of another Member State and to reside there for the purposes mentioned in the Treaty follows [...] directly from the Treaty"*[47].

In order to accept the offers of employment, nationals of Member States must **be able to move freely** within the territory of the EU. This also implies the right to reside in a Member State in order to take up employment and to reside

43. ECJ, 3 July 1986, *Lawrie-Blum*, case 66-85, Rec. p. 02121, point 16.
44. ECJ, *Lawrie-Blum*, cited above, paragraph 17; ECJ, 31 May 1989, *Bettray v Staatssecretaris van Justitie*, case 344/87, Rec. p. 1621, point 12.
45. ECJ, 12 May 1998, *María Martínez Sala v Freistaat Bayern*, case C-85/96, Rec. p. I- 2691.
46. For further analysis of this exception, see section 3.3. on public service.
47. ECJ, 14 July 1977, *Concetta Sagulo, Gennaro Brenca and Addelmadjid Bakhouce,* case 8/77, Rec. p. 1495, point 4.

there after taking up employment. Access to the host State naturally represents a **necessary condition** to make free movement an **effective right**.

In order to work in another Member State, European citizens do not need a work permit[48], whether it concerns salaried employment or self-employment.

A European citizen who works in another EU country **automatically acquires the right to reside there, as is the case for family members**[49].

The fact of having an employment contract or of being self-employed will determine the applicable conditions:

- **an employment contract**, even for a fixed term, grants the right to reside in another EU country and this is the case **even if the work is part-time**;

- **if the worker is self-employed**, (s)he has the right to reside in another EU country if pursuing an **economic activity on a stable and continuous basis**[50], under the same conditions as those set out by the law of the Member State for its own nationals[51].

2.1.1. Limits related to public policy

The grounds of **public policy, public security or public health** can justify limitations by Member States, in compliance with Article 45 TFEU.

European Union law allows *"Member States to adopt, with respect to nationals of other Member States, and in particular on the grounds of public policy, measures which they cannot apply to their own nationals, inasmuch as they have no authority to expel the latter from the territory or to deny them access*

48. However certain dispositions exist: see section 3.2. "Exceptions and transitional periods".
49. To know who is considered as a family member of a European worker (as well as of a citizen) see Article 2 of the aforementioned Directive 2004/38/EC.
50. ECJ, 30 November 1995, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, case C-55/94, Rec. p. I-4165, point 25. Activities of this type do not come under the scope of free movement of persons but rather under the freedom of establishment and freedom to provide services.
51. Article 49 TFEU.

thereto"[52]. Effectively the Treaties cannot ignore *"a principle of international law"* in relations between Member States, that precludes a State *"from refusing its own nationals right of entry or residence. [...] a Member State, for reasons of public policy, can, where it deems necessary, refuse a national of another Member State the benefit of the principle of freedom of movement for workers [...] even though the Member State does not place a similar restriction upon its own nationals"*[53].

The Treaty does not provide a definition for public policy because it is a concept that can vary from one State to another, and even from one period to another. Member States are, in principle, free to determine the requirements of public policy and public security, by taking their national requirement and situations into account. The Union *"does not impose upon the Member States a uniform scale of values as regards the assessment of conduct which may be considered as contrary to public policy"*[54]. However, the ECJ legislated the interpretation of this concept to avoid overly disparate situations that would infringe on freedom of movement. As a result, the conduct of a Member State national could not be considered as contrary to public policy and of sufficiently serious nature to justify restrictions on admission or residence, in the case where the host State does not adopt, with respect to the same conduct on the part of its own nationals, repressive measures, or other genuine and effective measures intended to combat such conduct[55]. Directive 2004/38/EC gathers together the restrictive interpretations of this concept by the ECJ in its Articles 27 to 33.

52. ECJ, 19 January 1999, *Criminal proceedings v Donatella Calfa*, C-348/96, Rec. p. I-11, point 20.
53. ECJ, *van Duyn*, cited above, points 22-23.
54. ECJ, 18 May 1982, *Rezguia Adoui v Belgian State and city of Liège*; *Dominique Cornuaille v Belgian State*, joint cases 115 and 116/81, Rec. p. 01665, point 8.
55. ECJ, *Adoui*, cited above.

BOX 6 ► European framework for the concept of public policy

"The personal conduct of the individual concerned must represent **a genuine, present and sufficiently serious threat** affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on **considerations of general prevention shall not be accepted"**[56].
Measures of public policy or public security **cannot be invoked to serve economic ends**, they must respect the **principle of proportionality** and be based exclusively on the **personal conduct** of the individual concerned.
The importance of a **case by case** approach can be seen in Directive 2004/38/EC, which lists a series of aspects to take into consideration such as age, cultural integration into the host Member State, state of health or family situation.
Persons enjoying a permanent right of residence and minors have **special protection** against expulsion as it must be on '**imperative**' grounds.
The diseases justifying expulsion are also interpreted strictly. They must have epidemic potential as defined by the World Health Organization.
The persons concerned have a minimum time period to leave the territory of their own free will, and they have a right of recourse. After a reasonable length of time, they can request that the measure be lifted.

Member States however do have a certain leeway. For example, *"a Member State may consider that the use of drugs may constitute a danger for society, justifying special measures against foreign nationals who infringe legislation on drugs, in order to preserve public policy"*[57]. This danger must however be examined on a **case-by-case basis**[58]. Directive 2004/38/EC underlines the fact that the measures taken on these grounds *"shall be based exclusively on the personal conduct of the individual concerned"*[59].

The Court interprets the limitations to free movement of workers in a restrictive manner. This restrictive interpretation also applies to other fundamental freedoms of movement, of services, goods and capital: *"those requirements*

56. *Ibid.*
57. ECJ, *Calfa*, cited above, point 22.
58. ECJ, 26 February 1975, *Carmelo Angelo Bonsignore v Oberstadtdirektor der Stadt Koln*, case 67/74, Rec. p. 297.
59. Art. 27§2 of Directive 2004/38/EC.

must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions"[60].

2.1.2. Expulsion of a worker seeking employment

What is the situation for **workers seeking employment**? Job seeking should not become an **excuse** for an extended stay in the host country on the basis of freedom of movement, by bypassing its objectives. **Abusive practices** are **incompatible** with Union law[61]. According to the ECJ, there is a *"general Community law principle that abuse of rights is prohibited. Individuals must not improperly or fraudulently take advantage of provisions of Community law. The application of Community legislation cannot be extended to cover abusive practices, that is to say, transactions carried out [...] solely for the purpose of wrongfully obtaining advantages provided for by Community law"*[62]. Furthermore, *"the facilities created by the Treaty cannot have the effect of allowing the persons who benefit from them to evade the application of national legislation and of prohibiting Member States from taking the measures necessary to prevent such abuse"*[63].

In principle, European citizens have the right to **go and seek employment** in another Member State. However, once a reasonable amount of time has passed without leading to recruitment, the States have the **possibility of adopting a measure of expulsion** against the persons concerned. This was the case, for example, for a Portuguese national, settled in France with her daughter and receiving universal health cover without holding employment and without being able to prove that she had a real chance of being employed[64]. Some countries, such as Belgium, do not hesitate in using this possibility. In 2012, the Belgian State Secretary for Migration and Asylum Policy, Maggie De Block,

60. See, for the free movement of persons: ECJ, 28 October 1975, *Roland Rutili v Minister of the Interior*, Rec. p. 1219, point 27; for the free movement of goods ECJ, 10 July 1984, *Campus Oil Limited and Others v Minister for Industry and Energy and Others*, case 72/83, Rec. p. 2727; for the freedom to provide services: ECJ, 14 October 2004, *Omega Spielhallen und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, C-36/02, Rec. p. I-9609, point 30; for the free movement of capital ECJ, 14 March 2000, *Association Eglise de scientologie de Paris and Scientology International Reserves Trust v Prime Minister*, Rec. p. I-1335, point 17.
61. ECJ, 5 July 2007, *Hans Markus Kofoed v Skatteministeriet*, case C-321/05, Rec. p. I-5795, point 38.
62. *Ibid.*
63. ECJ, 7 July 1992, *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, case C-370/90, Rec. p. I-4265, point 24.
64. Administrative Appeal Court of Marseille, 20 November, *Mme C.B. v Préfet des Bouches-du-Rhône*, case No. 13MA03216 2.

announced that in the first seven months of the year, 1,224 European nationals had lost their right of residence authorisation[65].

The time limit should nevertheless be **reasonable**, in other terms, it should allow the individual to have enough time to examine the job offers corresponding to his professional qualification, and to take the necessary action to be hired.

National jurisdiction should therefore carry out a **concrete examination** of the case at hand, which seems to be a better solution *"rather than a formal, 'across-the-board' solution, based on the straightforward expiry of a time-limit"*[66]. The provisions of EU law governing the free movement of workers are not an obstacle to the legislation of a Member State which provides that a national from another Member State, having entered within its territory to seek employment, can be **forced to leave this territory** if he has not found a job **after six months**. According to the Court, the worker can oppose this measure if he can provide evidence that *"he is continuing to seek employment and that he has genuine chances of being engaged"*[67]. Directive 2004/38/EC has codified this case law construction. Without establishing a set time limit, Article 14, paragraph 4, specifies that EU citizens and their family members cannot be expelled as long as they can provide evidence that they can satisfy the aforementioned conditions.

Nevertheless, if an EU citizen who has entered the territory of a host State to seek employment is not subject to automatic expulsion, he does **not** necessarily have **access to all social welfare benefits** paid to unemployed persons in the host State[68].

In addition, Articles 27 and following of Directive 2004/38/EC, concerning grounds of public policy, public security and public health, must be respected. These provisions explicitly refer to the possibility of *"restrict the freedom of*

65. V.R., "Déjà 1 224 Européens privés de titre de séjour", *La Libre*, digital version, published on 2 August 2012.
66. Opinion of the Advocate General in the case cited above, Antonissen, point 40.
67. The six month period can only be taken into account, but it cannot be applied automatically. The interested party, after a period of six months, can provide the evidence that he is continuing to seek employment and that he has genuine chances of being engaged. Effectively, "if after the expiry of that period the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged, he cannot be required to leave the territory of the host Member State" (point 21 of the Antonissen judgment, cited above).
68. See part 4 "Access to social advantages".

movement and residence of Union citizens and their family members" by providing **procedural safeguards**.

2.2. More restricted right of residence for non-working citizens

Union citizens who are not employed can also have access to the territory of a Member State and the right of residence: *"[…] the Treaty on European Union does not require that citizens of the Union pursue a professional or trade activity, […], in order to enjoy the rights provided in Part Two of the EC Treaty, on citizenship of the Union. Furthermore, there is nothing in the text of that Treaty to permit the conclusion that citizens of the Union who have established themselves in another Member State in order to carry on an activity as an employed person there are deprived, where that activity comes to an end, of the rights which are conferred on them by the EC Treaty […]."*[69]

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 was adopted on 29 April 2004, a few days before the major enlargement of 1 May 2004, that marked the **entry of 10 new Member States into the EU**.

Its adoption was marked by the need to **go beyond a piecemeal right of movement and residence**, through the codification of an entire series of different instruments relating to legislation and case law.

This Directive includes the recognition of a **widespread right of residence** for EU citizens who are not enjoying a right of residence **in another specific capacity** (for example as salaried employees).

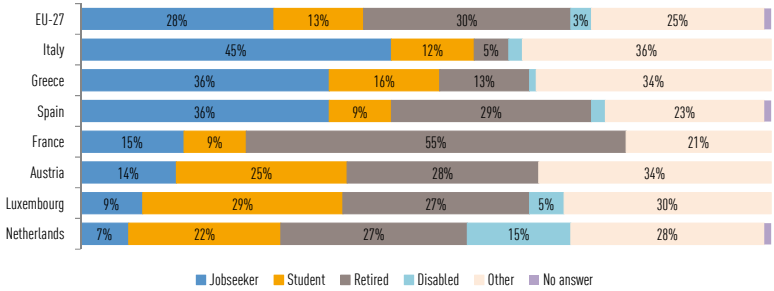
Nevertheless, this right *"is **not unconditional**"*[70]. Limitations and conditions to be respected are set for each category of residence. These rules are only valid for stays between three months and five years, after that, they cease to apply. The Directive distinguishes three different periods: a period of residence not

69. ECJ, *Baumbast*, cited above, point 83.
70. ECJ, *Brey*, cited above, point 46.

exceeding three months, a period of residence between three months and five years and a period of residence exceeding five years, also known as "**permanent residence"**. Member States cannot provide for conditions other than those specified by the Directive.

Before acquiring the right of permanent residence, Union citizens and their family members can be subjected to expulsion on the grounds of **troubles to public policy, public security or public health**[71], **abuse of rights** or **fraud** relative to the right of residence[72].

FIGURE 1 ► Non-active intra-EU migrants by category (2012)



Source: Sofia Fernandes, "Access to social benefits for EU mobile citizens: 'tourism' or myth?", *Policy paper No. 168*, Jacques Delors Institute, June 2016.

- **Residence for up to three months** (Article 6 of the Directive) → the only condition imposed on the EU citizen is that of possessing a valid **identity card or passport**. Also, (s)he must not become an unreasonable burden on the social assistance system of the host Member State[73], but given that the latter is not obliged to extend equal treatment to him or her, this is highly unlikely;

- **Residence for three months to five years** (Article 7 and following) → EU citizens do **not automatically** benefit from the right of residence for a period exceeding three months. They must have **sickness insurance**

71. Art. 27 of Directive 2004/38/EC cited above.
72. Art. 35 of Directive 2004/38/EC cited above.
73. Art. 14§1 of Directive 2004/38/EC cited above.

cover[74] and **sufficient resources** for themselves and their family members not to become a burden on the social assistance system of the host Member State[75] or **pursue their studies**, including vocational training, while having **comprehensive sickness insurance** in the host Member State[76]. The Member States may require EU citizens (whether or not they have worker status) to notify the relevant authorities of their presence on the national territory[77]. Failure to comply with this requirement in the host State whose legislation provides for compulsory **registration**, may render the person concerned liable to proportionate and non-discriminatory sanctions, i.e. the payment of a fine. In any case, it cannot lead to loss of the right of residence[78].

How is it possible to verify if the condition of having **sufficient resources** is no longer satisfied? When the authorities of the host State deem that the social benefits paid are too high[79], they can issue an **obligation to leave the territory**[80] to EU citizens **without personal resources**.

In any case, the fact that a Union citizen or his or family member has recourse to the social assistance system of the host Member State should not lead to an automatic expulsion measure[81]. A case-by-case examination of each specific situation is necessary, and must in particular take into account the duration of the right of residence, and the level of integration into the host Member State[82].

74. This citizen must be able to justify comprehensive sickness insurance cover, which implies that the insurance covers all types of sickness, whatever their nature. Justification is required in order to ensure that the citizen does not become an unreasonable burden on the social assistance system of the host State.
75. Art. 7§1(b) of Directive 2004/38/EC cited above. The Member States cannot lay down the amount of resources that they consider as sufficient, but these are considered as sufficient if they are higher than the minimum threshold to justify the granting of aid in the host State to its own nationals. Furthermore, the States must take into account the personal situation of the interested party.
76. Art. 7§1(b) of Directive 2004/38/EC cited above.
77. Art. 8 of Directive 2004/38/EC cited above.
78. ECJ, 8 April 1976, *Jean Noël Royer*, case 48/75, Rec. p. 497.
79. To find out more about French law: Sabine Haddad, "OQTF et loi sur l'immigration n°2011-672 du 16 juin 2011 dite 'Besson'", published 27 September 2011 (in French) and Human Rights Watch, France's compliance with the European Free Movement Directive and the Removal of Ethnic Roma EU citizens, Briefing Paper Submitted to the European Commission in July 2011, published 28 September 2011.
80. For example, French procedure for the transposition of Directive 2004/38/EC cited above provides that this authority rests with the prefects, who, by exercising their discretionary power can pronounce an OQTF (obligation to leave French territory), stipulated in Article L511-3-1 of the Code of Entry and Residence of Foreigners and the Right to Asylum (CESEDA).
81. Considering Article 16 of Directive 2004/38/EC cited above, and its Article 14 entitled "Retention of the Right of Residence".
82. Other elements that must be taken into account in particular are the state of health, age, the time elapsed since the application for assistance was submitted, or the amount of assistance in question. As the Commission points out these rights in its guidance for better transposition and application of Directive of 29 April 2004, COM(2009)0313 final of 2 July 2009..

- **Residence for over five years, or right of permanent residence** (Article 16 and following) → Union citizens who have resided legally for a **continuous period of five years** in the host Member State shall have the right of permanent residence there, and they are no longer subject to the conditions analysed above. The **continuity** of residence during the five years is considered in a rather flexible way: absences not exceeding a total of six months a year are accepted; also, temporary absences of a longer duration, up to 12 consecutive months are accepted if justified by important reasons (for example serious illness, vocational training, study in another Member State or in a third country).

- Once acquired, **this right can** however **be lost**, if the holder leaves the host Member State for a period exceeding two consecutive years. The person concerned may not be subject to an expulsion measure *"except on serious grounds of public policy or public security"*[83].

Economically inactive persons *"represent only a limited share of total mobile EU citizens; moreover, 64% of them had worked previously in their current country of residence. 79% are living in a household with at least one member in employment"*[84].

2.3. A right that is recognised for family members but linked to the Union citizen

Family members of a Union citizen are also concerned by Directive 2004/38/EC, whatever their nationality is. However, their right of residence is directly dependent on that of the Union citizen. Third country nationals do not benefit from an autonomous right of residence but a "**derived right**" which is granted through their family link with an EU citizen, who thus becomes the "**reference person**", because it is through this person that the right of residence is acquired by the family member, national of a third State. Such family members retain their right of residence **exclusively on a personal basis**.

83. Art. 28§2, Directive 2004/38/EC cited above.
84. European Commission, *Free movement of EU citizens and their families: Five actions to make a difference*, 25 November 2013, COM(2013) 837 final, p. 3.

These persons enjoy the right of residence if they are members of a family, already constituted in the host Member State, of a Union citizen already satisfying these conditions of right of residence. The latter must therefore have **sufficient resources** for him and for his family members to not become an unreasonable burden on the social assistance system of the host Member State during their period of residence, and they must be comprehensively covered by **sickness insurance** in the host Member State. The right of residence of family members of an EU worker is therefore more accessible than for family members of an EU citizen who is not working.

The right of residence **in the host State** is set out as follows:

- **Residence for up to three months** → The Member States are obliged to allow onto their territory the family members of Union citizens with a valid identity card or passport, who are not nationals of a Member State and who are **holders of a valid passport**. This of course must not jeopardise the provisions concerning travel documents applicable to national border controls. The conditions stipulated for the citizens also apply to their family members, accompanying or joining them;

- **Residence for three months to five years** → The right of residence extends to family members who are not nationals of a Member State when they **accompany or join** the Union citizen in the host Member State, if the former satisfies the necessary conditions (in particular if he has **sufficient resources** for himself and his family members);

- **Residence for over five years** → It also applies to family members who are not nationals of a Member State and who have legally resided **with the Union citizen** in the host Member State **for a continuous period of five years**.

Article 2 paragraph 2 of Directive 2004/38/EC considers the following persons as "**family members**":

- the spouse[85];
- the partner with whom the Union citizen has contracted a registered partnership[86];
- the direct descendants who are under the age of 21 or are dependants and those of the spouse or registered partner;
- the dependent direct relatives in the ascending line and those of the spouse or registered partner.

BOX 7 ► Stricter administrative formalities for third country nationals

The host State can impose registration on Union citizens, but in the case of non-compliance with this requirement, expulsion from the territory cannot take place.
However, third State nationals who are family members of an EU citizen exercising his or her right of residence, are subject to stricter requirements. They must request a residence permit if they stay for more than three months within the host State. Article 10 of Directive 2004/38/EC lists the documents that can be requested:

- a valid passport;
- a document attesting to the existence of a family relationship or of a registered partnership;
- the registration certificate or, in the absence of a registration system, any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining;
- documentary evidence certifying that they are the dependent direct descendants or the dependent direct relatives in the ascending line of the Union citizen or his spouse or partner;
- a document issued by the relevant authority of the country of origin or country from which they are arriving, that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen, when they do not correspond to the definition of family members stipulated in the Directive;
- proof of the existence of a durable relationship with the Union citizen, for a partner who is neither married nor in a registered partnership.

85. Access to spousal status involves marriage, which is defined as "a union between two persons of the opposite sex". ECJ, 31 May 2001, *D and Kingdom of Sweden v Council of the European Union*, case C-122/99, Rec. p. I-04319, point 34. In this particular case, it concerned a partnership registered between two persons of the same sex and not a marriage. The Court distinguished between legal effects of a registered partnership and of marriage. Gay marriage has since been recognised in several Member States, to such an extent that this case law should evolve, especially since the Charter of Fundamental Rights of the European Union recognises the right to marry and start a family without specifying that it concerns heterosexual couples and not homosexuals.
86. The registered partner can in this case be a person of the same sex as the EU worker. In the judgment of 21 July 2015, *Oliari and Others v Italy*, the ECHR condemned Italy as it did not provide for any legal recognition of homosexual couples. This suggests that this concept of registered partnership extended to homosexual couples will become the norm.

In addition, States can impose the obligation of an entry visa, but contrary to other third State nationals, they are entitled to this visa[87].

What happens if a family member **illegally enters the territory** of the host State? Article 5 paragraph 4 of Directive 2004/38/EC establishes that the State concerned shall, *"before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time"*.

The possibility of such an expulsion is rather difficult in light of the case law of the ECJ, which ruled that the national of a non-member country *"benefits from the provisions"* of Directive 2004/38/EC *"[...] irrespective of [...] the circumstances in which he entered the host Member State"*[88].

What is the situation in the event of **death** or **departure** of the EU citizen? Directive 2004/38/EC provides that the death of the Union citizen does not lead to the loss of the right of residence of his/her family members who are not nationals of a Member State and who have been residing in the host Member State as family members for **at least one year** before the Union citizen's death.

Before acquiring the right of permanent residence, the persons concerned remain *"subject to the requirement that they are able to prove they are workers or self-employed persons, or that they 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 that they have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements"*. Concerning sufficient resources, Article 8 of the Directive must be respected: Member States may not lay down a fixed amount which they regard as "sufficient" but they must take into account the personal situation of the person concerned. In all cases, this amount should not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where

87. ECJ, 31 January 2006, *Commission v Kingdom of Spain*, case C-503/03, Rec. p. I-1097, point 42.
88. ECJ, 25 July 2008, *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform*, case C-127/08, Rec. p. I-6241, point 81.

this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.

Such family members retain their right of residence exclusively **on a personal basis**.

Furthermore, the death or departure of a Union citizen *"does not entail the loss of the **right of residence of his/her children** or of **the parent who has actual custody of the children**, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies"*[89].

The Directive also concerns the eventuality of retention of the right of residence by family members in the event of **divorce, annulment of marriage** or **termination of registered partnership**[90]. As in the case of death or departure of the citizen, the right of residence of family members who are nationals of a Member State is not, in principle, affected under these circumstances. These possibilities do not entail the loss of right of residence of the family members of a Union citizen who are not nationals of a Member State if the marriage (before the divorce) or the registered partnership (before its termination) lasted **at least three years**, including **at least one year** in the host Member State, or in the case of one of the specific possibilities expressly covered by the Directive (Article 13 a). Requirements linked to **family life** and to the **protection of the interests of minors** should be taken into consideration. This is the case in particular when the spouse or partner who is not a national of a Member State has custody of the children of the Union citizen (Article 13 b); *"this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting"* (Article 13 c); or when *"the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required"* (Article 13 d).

89. Article 12 of Directive 2004/38/EC cited above
90. Article 13 of Directive 2004/38/EC cited above.

The right of residence is automatically acknowledged for the family member who is a national of a third State when the Union national is legally residing in a Member State other than that of origin. This is not, however, automatically the case in the event where he returns to or is in his country of origin.

Does Union law recognise the right of residence for a Union worker's family members, who are third State nationals, in the country of origin and of residence of the reference person?

In the *Carpenter* judgment[91] the Court affirmed that a right of residence can be recognised for a third State national, who is a family member of an EU citizen, when it is necessary to **guarantee the effective exercise of the fundamental freedom of movement by the EU citizen**. The Court was called upon to interpret Article 56 TFEU, (ex Article 49 TEC), in terms of freedom to provide services, and it affirmed that this provision *"read in the light of the fundamental right to respect for family life, precludes, in circumstances such as those in the case which gave rise to that judgment, a refusal, by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country"*[92].

BOX 8 ► The *Carpenter* case, when the family situation influences the right of residence

The case in question concerned a Filipino national, who entered the United Kingdom as a holder of a six-month residence permit. She stayed in the United Kingdom after the end of this period and neglected to request an extension for her residence permit. She then married Mr Carpenter, a British national. Her husband was exercising his right of **freedom to provide services**: he was running a business from his country of origin, which provided services to persons residing in other Member States, and occasionally he travelled to these Member States. The British State refused to recognise an authorisation for Mrs Carpenter to reside in the United Kingdom, where she was living with her husband and his children. It is important to specify that the national jurisdiction had observed that she "played an important part in the upbringing of her stepchildren" and that "she could be indirectly responsible for the increased success

91. ECJ, 11 July 2002, *Mary Carpenter v Secretary of State for the Home Department*, case C-60/00, Rec. p. I-6279.
92. ECJ, *Carpenter*, cited above, point 46.

of her husband's business"[93]. The ECJ decided that "the separation of Mr and Mrs Carpenter would be detrimental to **their family life** and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse"[94].

This solution can be transposed to the situation of cross-border EU workers, as confirmed by the Court in its *S and G* judgment[95].

The facts in the main proceedings are very similar to those giving rise to the *Carpenter* judgment: a third country national is looking after the children of a Union citizen who systematically travels to another Member State as a frontier worker[96].

It is important that the refusal to recognise the right of residence does not become a **deterrent** for the Union citizen, by making him leave his Member State of origin to start family life in another Member State. A refusal should not jeopardise the "useful effect" of the right to free movement of workers that the Court aims to protect: *"The effectiveness of the right to freedom of movement of workers may require that a derived right of residence be granted to a third-country national who is a family member of the worker – a Union citizen – in the Member State of which the latter is a national"*[97]. The possible derived right of residence is only granted insofar as its refusal would call into question the effectiveness of the freedom of movement of workers.

It is up to the national judge to establish the "**necessary**" nature of the derived right of residence "in order to guarantee" the freedom of movement of the worker. He must therefore verify the effects of refusing to grant a right of residence.

93. ECJ, *Carpenter*, cited above, point 18.
94. ECJ, *Carpenter*, cited above, point 39.
95. ECJ, 12 March 2014, *S. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v G.*, case C-457/12, not yet published.
96. This is the basic difference with the *Carpenter* case, i.e. the fundamental freedom that is exercised by the citizen. In *Carpenter* it concerns the freedom to provide services, in *S. and G.* it concerns the free movement of workers because the citizen, who is a Dutch national, systematically travels to Belgium to carry out a professional activity there.
97. ECJ, *S. and G.*, cited above, point 40.

The Court however demands that the worker **regularly** travels to the host Member State.

The situation is more complex when the citizen has exercised freedom of movement but has returned to his or her country of origin.

The **right to family reunification**, concerning third-country nationals who are members of the family of a citizen of the Union, is a major bone of contention, as several issues have not yet been completely exhausted.

In 2014, the ECJ[98] had the opportunity to adjudicate in the case of a Union citizen going back to his country of origin, after exercising his freedom of movement; the prior use of freedom of movement being the prerequisite to benefit from the rights granted by Union law[99]. The "evidence" of settling in a host State therefore becomes a key element. The Court specified that in order to be considered as "**effective**" the "period of mobility" must respect a minimum period of **three consecutive months** of residence in the host Member State[100].

This requirement helps to **avoid residence of convenience** with the intention of benefiting from an EU law. Thanks to this condition, the Court **prevents** situations of **abuse** of rights.

When a Union citizen has not exercised the right of free movement, or his movement is considered as being too short, family reunification is governed by the national law of the country of origin of the person concerned, and not Union law.

In the *Akrich* case[101], a third State national did not have the right to reside in the United Kingdom. He married a British national, even though he was residing illegally in the country. When he received his obligation to leave the

98. ECJ, 12 March 2014 *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B*, case C-456/12, not yet published.
99. If EU law is not applicable, the situation is legally governed by national law, which is often less favourable to family reunification.
100. These three months must be consecutive when the reference person does not have the status of worker. However, if the citizen is employed, the Court demands only that he travels regularly to the host State, the period of residence being no longer required. This shows clearly that the Court's approach is much more favourable towards migrant workers, as regards their role in the economy, which is key in developing the internal market.
101. ECJ, 23 September 2003, *Secretary of State for the Home Department v Hacene Akrich*, case C-109/01, Rec. p. I-9607.

territory, he asked to be sent to Ireland, where his spouse had just settled. It was agreed that the marriage was not one of convenience, but that the move of both spouses to Ireland had occurred to circumvent British law and allow the third State national to reside in the United Kingdom on their return. The Court affirmed that this did not constitute an abuse, if the Union citizen had indeed resided lawfully for a certain period of time in the host Member State.

3. Access to employment

3.1. The right to seek and occupy employment in another EU country

Article 45 TFEU establishes that freedom of movement for workers entails the right to accept offers of employment actually made.

The **purpose** of the freedom of movement for workers is to allow European citizens to **have access to employment in another Member State** other than their own. Article 1 of Regulation 492/2011/EU[102] stipulates that:

"Any national of a Member State shall, irrespective of his place of residence, have the ***right to take up an activity as an employed person****, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State. He shall, in particular, have the right to take up available employment in the territory of another Member State with* ***the same priority as nationals of that State****"*[103].

If, in accordance with the principle of **non-discrimination,** no **disadvantage** should be shown in the host State to the non-national applying for employment, nor should any **advantage** be shown to him or her for the same reason: in particular, (s)he **cannot** claim to be **exempted**, because of his or her status as a non-national, from the linguistic skills required in relation to the nature of the employment in question, as is the case for instance for teachers[104].

European citizens therefore have the right to seek employment in another EU country and to work there without requiring a work permit. The free movement of workers also includes the right to benefit from the **same treatment** as

102. Regulation 492/2011/EU of the European Parliament and the Council of 5 April 2011, on freedom of movement for workers within the Union, OJEU L 141/1.
103. Article 1 of Regulation 492/2011/EU, cited above, which reproduces a provision already present in Regulation 1612/68.
104. ECJ, 28 November 1989, *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee*, case C-379/87, Rec. p. 3967.

citizens of that country as regards access to employment (recruitment procedures for example), work conditions (such as salary and grade), recognition of professional experience and seniority, and any other social or tax advantage, as well as the right to stay even after occupying this post.

The Member States are authorised to reserve certain public service employments for their own nationals[105].

Nevertheless, the **mobility** of EU workers **remains limited**, in particular because *"EU citizens are still hesitant to look for a job in another EU country because they are worried about their situation if they do not find one quickly"*[106].

3.2. Exceptions and transitional periods

At the current time, the Member States **cannot provide for quotas** either for workers from other Member States or for citizens who have access to their territories[107].

Nevertheless, the Member States can provide for **transitional provisions** applicable to nationals from the **new Member States** or **safeguard clauses** for a certain period of time. Transitional provisions can be found in the Accession Treaty of each Member State.

Member States have the right to apply **restrictions** to nationals from the new Member States, for **a certain period**, in an autonomous manner. These restrictions only concern the possibility of taking up a salaried **activity** and not self-employment, and cannot exceed a transition period of **seven-year maximum** from the date of accession. These restrictions are possible, but the Member States can decide to fully apply the freedom of movement of persons to the new members from the very first year. Furthermore, the principle of **Community preference** still applies to workers undergoing transitional periods in relation to workers who are third country nationals.

105. For further analysis of the public service see Section 3.3. of this document.
106. European Commission, "EU Citizenship Report 2013", p. 7.
107. That being said, certain dispositions exist, in particular concerning nationals from the new Member States.

BOX 9 ► Progressive phases up to seven years

During these seven years it is possible to distinguish three periods:
1. First phase
This is for a period of two years (this ended for Croatia on 30 June 2015) → the Member States are free if they so wish, to not apply the principles governing the right of residence of workers to nationals from the new State, in other terms to **limit the number of paid jobs accessible**. It is therefore the national legislation that is applicable. A **work permit** can therefore be requested. However, they cannot restrict their freedom of movement as European citizens.
2. Second phase
This is for a period of three years. The Member States must **notify the European Commission** if they wish to continue for an additional three years the non-application of rules governing freedom of movement.
3. Third phase
This is a two-year period. In this case, the Member States can continue to apply their national legislation, instead of the EU legislation in terms of free movement of workers, in the case of a **serious disturbance** (real or threatened) to their labour market, and after **notifying the Commission**.

This is currently the case for Croatia (which joined the Union on 1 July 2013): Croatian citizens wishing to work in certain EU countries, and certain EU citizens wishing to work in Croatia require a **work permit**.

The 13 Member States who decided to apply transitional provisions to Croatia are: Austria, Belgium, Cyprus, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Slovenia, Spain and the United Kingdom.

On 30 June the first phase of transitional arrangements for Croatian workers came to an end. By that date Member States were required to notify the Commission whether they intended to maintain restrictions on access of Croatian citizens to employment or whether they already want to fully open their labour markets to them.

Belgium, Cyprus, France, Germany, Greece, Italy, Luxembourg and Spain have decided to allow Croatian citizens full access to their labour markets. They therefore fully apply the EU legislation on free movement of workers as of 1 July 2015. On the other hand, Austria, Malta, the Netherlands, Slovenia and the United Kingdom have decided to maintain their restrictions for another three years."

Before Croatia, transitional provisions had been adopted for Spain and Portugal[108] and some of the ten new Member States at the time of the 2004 enlargement. Malta and Cyprus did not have such periods applied to them. At the time, Ireland, Sweden and the United Kingdom had decided not to apply the transition periods to the new entrants of 2004, whereas only Austria, Belgium, Denmark and Germany applied them for the full seven years allowed. The transitional periods were used much more in the case of Bulgaria and Romania.

The right of residence for citizens of the 10 new Member States, although sometimes subject to transitional periods, would have permitted the increase by 1% the GDP of the rest of the EU Member States, according to the European Commission[109].

During this transitional period, Member States can also activate a **safeguard clause**. It can only be invoked when a State *"undergoes or foresees disturbances to on its labour market which could seriously threaten the standard of living or level of employment in a given region or occupation"*[110]. It was the case for Spain which activate the clause from 23 July 2011 to 21 December 2013 for Romanian citizens[111].

108. Articles 55 to 60 and 215 to 220 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties, p. 35, 36, 88 and 89, OJ L302, of 15 November 1985.
109. European Commission, "Employment and Social Developments in Europe 2011", 15 December 2011, p. 274.
110. Point 7 of Annex VI of the Act concerning the conditions of accession to the EU of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the EU is founded, OJEU L 157 p. 279.
111. European Commission, MEMO/11/554, 11 August 2011.

TABLE 2 ► Member States' policies towards workers from the new Member States

Member State		Workers from the EU-8/EU-15	Workers from BG and RO/EU-25
EU-15	Belgium (BE)	Restrictions with simplifications	Restrictions with simplifications
	Denmark (DK)	Restrictions with simplifications	Restrictions with simplifications
	Germany (DE)	Restrictions with simplifications *	Restrictions with simplifications *
	Ireland (IE)	Free access (1 May 2004)	Restrictions
	Greece (EL)	Free access (1 May 2006)	Restrictions
	Spain (ES)	Free access (1 May 2006)	Restrictions
	France (FR)	Free access (1 July 2008)	Restrictions with simplifications
	Italy (IT)	Free access (27 July 2006)	Restrictions with simplifications
	Luxembourg (LU)	Free access (1 November 2007)	Restrictions with simplifications
	Netherlands (NL)	Free access (1 May 2007)	Restrictions
	Austria (AT)	Restrictions with simplifications*	Restrictions with simplifications*
	Portugal (PT)	Free access (1 May 2006)	Restrictions
	Finland (FI)	Free access (1 May 2006)	Free access, subsequent registration for monitoring purposes
	Sweden (SE)	Free access (1 May 2004)	Free access
	United Kingdom (UK)	Free access (1 May 2004), mandatory workers registration scheme for monitoring purposes	Restrictions
EU-10	Czech Republic (CZ)	No reciprocal measures	Free access
	Estonia (EE)	No reciprocal measures	Free access
	Cyprus (CY)	-	Free access, subsequent registration for monitoring purposes
	Latvia (LV)	No reciprocal measures	Free access
	Lithuania (LT)	No reciprocal measures	Free access
	Hungary (HU)	Reciprocal measures (simplifications as of 1 January 2008)	Restrictions with simplifications
	Malta (MT)	-	Restrictions
	Poland (PL)	No reciprocal measures (17 January 2007)	Free access
	Slovenia (SI)	No reciprocal measures (25 May 2006)	Free access, subsequent registration for monitoring purposes
	Slovakia (SK)	No reciprocal measures	Free access
EU-2	Bulgaria (BG)	-	No reciprocal measures
	Romania (RO)	-	No reciprocal measures

Source: European Commission, "The impact of free movement of workers in the context of EU enlargement. Report on the first phase (1 January 2007 – 31 December 2008) of the Transitional Arrangements set out in the 2005 Accession Treaty and as requested according to the Transitional Arrangement set out in the 2003 Accession Treaty", Communication COM(2008) 765 final, 18.11.2008.

3.3. The specificity of the public service

Since the Treaty of Rome of 1957, employment in the **public service** has been excluded from the scope of the free movement of workers. This means that the Member States are not required to comply with principles of non-discrimination or equal treatment in this area. This exclusion is found directly in Article 45, paragraph 4, of the TFEU.

This derogation has however been **interpreted very strictly** by the Court of Justice, and the European Commission has also wished to limit it.

In 1988, *"the Commission decided to undertake systematic action to eliminate restrictions based on nationality, which in each Member State deny workers from other Member States access to employment in specified public sectors"*[112]. This action kept some derogations[113] and is focused on certain services of the public sector[114].

The European Commission therefore took **many actions** against States that interpreted this derogation too broadly. *"The effect of 1988 action and the infringement procedures was that the Member States undertook **extensive reforms opening their public sectors**"*[115].

As the Treaty does not specify the posts that fall within the concept of public service, the Court of Justice defined them as *"posts that involve direct or indirect participation **in the exercise of powers conferred by public law**, and the discharge of functions whose **purpose is to safeguard the general interest** of the State or of other public authorities and which therefore require **a special relationship of allegiance to the State** on the part of persons occupying*

112. Communication of the European Commission, 'Freedom of workers and access to employment in the public service of Member States – Commission action in respect of the application of Article 48 (4) of the EEC Treaty', OJ C-72/2 of 18 March 1988.
113. The following sectors were not concerned: the armed forces, the police and other forces of the maintenance of order; the judiciary; the tax authorities and local authorities and other similar bodies, central banks insofar as staff (public servants and other workers) who perform activities organized around a public legal power of the State or another legal entity governed by public law, such as the preparation of acts, their implementation, monitoring of their application and the supervision of subordinate bodies.
114. The following services were concerned as a priority: bodies in charge of managing a commercial service (for example: public transport, electricity and gas distribution, air or sea navigation companies, telecommunications posts, radio-television broadcasting bodies); operational public health services; teaching in public schools; research for civil purposes in public schools.
115. Communication of the European Commission, COM(2002) 694 final, of 11 February 2002, p. 20.

them and reciprocity of rights and duties which form the foundation of the bond of nationality"[116].

BOX 10 ► The ECJ's restrictive approach concerning the exception of the public service

The Court of Justice stated that the concept of public service should *"receive* ***uniform interpretation*** *and* ***application*** *throughout the Community and cannot therefore be left entirely to the discretion of Member States"*[117].

The Court affirmed that this **exception clause** should be **strictly interpreted**[118], and that it only concerns the conditions of access to employment in the public service and not working conditions once the worker is admitted[119]. Moreover, *"access to certain posts cannot be limited by reason of the fact that in a given Member State the persons appointed to such posts are governed by staff regulations of civil servants"*[120]. Access to a post must not be restricted solely on the grounds that a promotion would cause the exercise of the powers conferred by public law, because the derogation can be exercised *"within a same career, a same service or a same structure"*[121].

Derogations are not allowed, including when posts effectively include the powers of a public authority, but they are only exercised occasionally. This was the case in the judgement concerning the masters and chief mates of the Spanish merchant navy who exercised the duty of representing the flag State on an occasional basis[122].

In 2002, *"the Commission [...] adopted* ***a stricter approach*** *than it did in 1988"*[123]. It maintains derogations for some sectors of the public service, but further restricts them[124]. It strives to **fight discrimination** related to the procedures of competition and internal recruitment and recalls that *"Member States are not allowed to refuse migrant workers the status of civil servant, if relevant, once they have been integrated into the public sector"*[125]. It adds that professional experience, including that within another Member State, must be taken into account for determining professional advantages, in the same way as in their own system.

116. EJC, 17 December 1980, *Commission v Belgium*, case 149/79, Rec. p. 3881, point 10; EJC, 10 September 2014, *Iraklis Haralambidis v Calogero Casilli*, case C-270/13, not yet published, point 44.
117. ECJ, 30 September 2003, *Colegio de Oficiales de la Marina Mercante Española v Administración del Estado*, case C-405/01, Rec. p. I-10391, point 38.
118. ECJ, 16 June 1987, *Commission v Italy,* case 225/85, Rec. p. 2625, point 7; EJC, 3 July 1986, *Deborah Lawrie-Blum v Land Baden-Württemberg*, case 66/85, Rec. p. 2121, point 26.
119. ECJ, 12 February 1974, *Giovanni Maria Sotgiu v Deutsche Bundespost*, case 152/73, Rec. p. 153, point 4.
120. ECJ, 3 June 1986, *Commission v France*, case 307/84, Rec. p. 1725.
121. ECJ, 17 December 1980, *Commission v Belgium*, case 149/79, Rec. p. 3881, point 21.
122. ECJ, *Colegio de Oficiales de la Marina Mercante*, cited above.
123. Communication of the European Commission, COM(2002) 694 final, of 11 February 2002, p. 21.
124. The Commission considers for example that the post of an official who helps prepare decisions on granting planning permission should not be one of the derogations. Communication of the European Commission, COM(2002) 694 final, cited above, p. 22.
125. *Ibid*.

Certain posts of the public service can require that a **specific diploma** be earned if there is an **overriding reason relating to the public interest** that may justify an exception to the freedom of movement for workers. However, this exception must not go beyond what is necessary to attain that objective[126]. This could be justified in the area of health, but *"requiring nationals of Member States who are already qualified to pass the ENSP* (Ecole nationale de la santé publique) *entrance examination, which is intended to recruit candidates who are not yet qualified, is not a measure necessary to achieve the objective of selecting the best candidates in the most objective conditions possible"*[127]. Adjustments may be made in order to find out if Union citizens from other Member States actually have the required qualifications.

The **public service** in Member States has therefore **been greatly opened** to citizens from other Member States, but there is no absolute right to be posted in the public sector of another Member State or to access it directly. The Commission has however urged their authorities to strengthen the mobility of their employees. *"Member States have as a consequence introduced numerous bilateral possibilities for secondment and exchange of workers between their services"*[128].

3.4. Posted workers

Posted workers are employees **bound by a contract** to an enterprise, which sends them to work on a **temporary basis**, in the framework of a **transnational delivery of services**, in a Member State other than the one in which it was established.

The development of the internal market and through it, the freedom to provide transnational services, increased the number of posted workers, even though it remains limited. Therefore in 1991, the European Commission proposed a directive[129] to **govern this phenomenon**. Its purpose was to **ensure legal security** by determining rules applicable to this scheme, to coordinate, **without harmonisation**, national laws concerning **the "mandatory" rules** related to posted

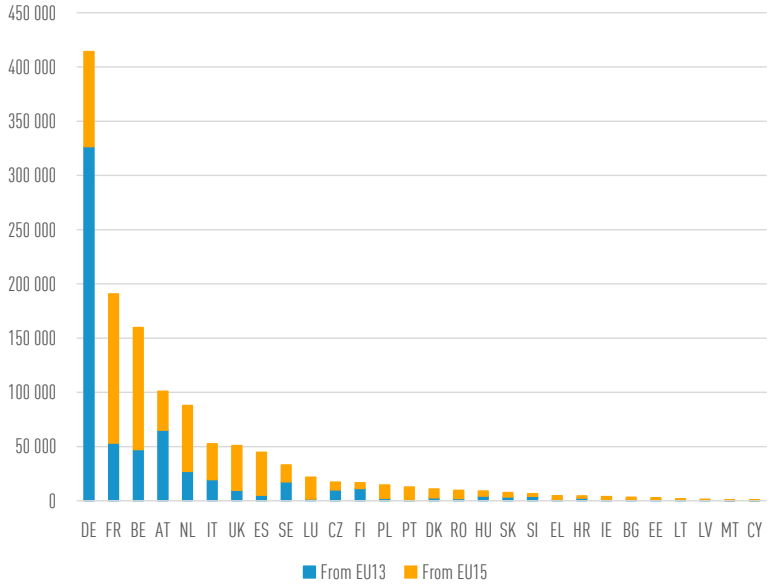
126. ECJ, 11 July 2002, *Deutsche Paracelsus Schulen für Naturheilverfahren GmbH v Kurt Gräbner*, case C-294/00, Rec. p. I-6515, point 39.
127. ECJ, 9 September 2003, *Isabel Burbaud v Ministre de l'Emploi et de la Solidarité*, C-285/01, Rec. p. I-08219, point 105.
128. Communication of the European Union, COM(2002) 694 final, cited above, p. 23.
129. European Commission, COM(91) 230 final, 1 August 1991.

workers, to **ensure a "hard core" of minimum** protective working conditions in force in host countries and protect the workers concerned.

This proposal was put forward at a time when **fear of social dumping** was growing, with regard to workers coming from Greece[130], Portugal and Spain[131], which had recently joined the European Economic Community (predecessor to the EU).

The directive was adopted in 1996[132] with a transposition deadline in December 1999. Its implementation was therefore studied in the 2000s.

FIGURE 2 ► Posted workers by destination country, 2014



Source: European Commission, "Posting of workers: report on A1 portable documents issued in 2014", December 2015.

130. Date of integration in 1981.
131. Date of integration in 1986.
132. Directive 96/71/EC, of the European Parliament and Council, of 16 December 1996, concerning the posting of workers in the framework of the provision of services, OJEU L 18 of 21 January 1997.

It has been applied in **three situations**:

- When an employer posts workers to another Member State on its account and under its direction, within the framework of **transnational provision of services** that must be conducted in this State;
- When an employer posts workers **to an establishment or enterprise owned by the same group** in the territory of another Member State;
- When an employer, as an **interim employment agency** or placement bureau, hires out a worker to a client organisation established or operating in another Member State[133].

During the posting period, the **work relationship** between the employer and the worker **must be maintained**.

The "**hard core**" is made up of working and employment conditions of the Member State where the service is provided, laid down by law, regulation or administrative provisions and/or by collective agreements or arbitration awards which have been declared universally applicable[134].

Exceptions are possible when the length of the posting is short or if the work to be done is not considered "significant"[135].

However, posted workers remain **linked to the social protection system of their home country**. When the difference between contributions in social protection systems between home and host countries is significant, it must be considered to be social competition in terms of labour taxation[136].

In order to implement this scheme properly, **Member States must cooperate among themselves, exchanging information** on their working and employment conditions, including in the event of *"manifest abuses or possible cases of unlawful transnational activities"*[137].

133. Art. 1§3 of Directive 96/71/EC cited above.
134. Art. 3§1 of Directive 96/71/EC cited above: it concerns maximum work periods and minimum rest periods, minimum paid holidays, the minimum rates of pay, including overtime rates, the conditions of hiring-out workers, safety, health and hygiene at work, employment of pregnant women and women who have recently given birth, of children and of young people, equality of treatment between men and women and other provisions on non-discrimination.
135. Art. 3§2 2, 3, 4 and 5 of Directive 96/71/EC, cited above.
136. Kristina Maslauskaite, "Posted Workers in the EU: State of Play and Regulatory Evolution", Jacques Delors Institute, *Policy Paper No. 107*, 24 March 2014.
137. Art. 4§2 of Directive 96/71/EC cited above.

These protections have however proven to be insufficient, and **many criticisms** have been raised against the posting of workers[138]. The enlargement of the European Union to the East, to countries with a lower standard of living, compounded the fears of **social dumping**. These fears were represented in the image of the "**Polish plumber**"[139]. The directive was established by Member States which had similar social systems, although they were different compared to the new States joining the EU in the 2000s. Moreover, the essence of this directive was not always respected and **Member States did not effectively require monitoring** in undertakings, in compliance with this norm. In addition, the **directive** was **not sufficiently clear** with regard to a number of concepts, for instance the length of posting, which led to abuses.

One of the most widely known abuses was the technique of "**empty-shell** companies"[140] in Member States where labour taxation is lower.

EJC case law also reduced the scope of the protection of posted workers. In the cases of *Laval*[141] and *Luxembourg*[142], the Court stated that the hard core laid down in the directive should not be considered a minimum to ensure, but that it constituted an exhaustive list of rights. Trade union action, which constitutes a basic right, was weighed against the free provision of services and lost in the *Viking* case[143]. The Court also states in the *Rüffert* case[144] that only universally applicable collective agreements should apply to undertakings posting workers.

In 2012, the European Commission proposed to strengthen posted worker law, in order to create the conditions for fairer competition through an enforcement directive and a **new regulation**. The latter was abandoned rapidly because it was **rejected** by several national parliaments, under the **principle**

138. Dominique Gallois, "Après le 'plombier polonais', voilà la polémique du travailleur détaché", *Le Monde*, 2 February 2013.
139. Jean-Pierre Thibaudat, "Le plombier polonais, fossoyeur du oui", *Libération*, 11 June 2005; Thomas Morel, "Le 'plombier polonais' est toujours là", Europe 1, 13 November 2012.
140. Report of Gilles Savary in the Senate, no. 1785, of 11 February 2014, "*sur les propositions de loi visant à renforcer la responsabilité des maîtres d'ouvrage et des donneurs d'ordre dans le cadre de la sous-traitance et à lutter contre le dumping social et la concurrence déloyale*", page 31.
141. EJC, 18 December 2007, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, case C-341/05, Rec. p. I-11767.
142. EJC, 19 June 2008, *Commission of European Communities v Grand-Duchy of Luxembourg*, case 319/06, Rec. p. 4323.
143. EJC, 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti.*, case C-438/05, Rec. p. 10779.
144. EJC, 3 April 2008, *Dirk Rüffert v Land Niedersachsen*, case C-346/06, Rec. p. I-1989.

of subsidiarity. The **enforcement directive**, adopted in 2014[145], aims to **increase information** of workers and undertakings on their rights and their obligations.

The transposition deadline was set in June 2016, but the European Commission did not wait until the deadline to put forward a revision[146] of the initial directive. This proposal does not remove anything from the enforcement directive and is meant to be *"complementary and mutually reinforcing"*[147].

BOX 11 ► Towards a revision of the directive on posted workers?

This **modernisation of the directive** of 1996 was called for in a joint letter issued by Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Sweden. However, Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia considered that such modernisation was premature before the end of the transposition deadline of the enforcement directive.
The challenge is finding the balance between recognising the principle **of equal pay for equal work done in the same place,** desired by countries with high labour taxation, and the **principle of competition** of the single market with the free provision of services, put forward by countries with lower labour taxation.
The proposal for the revision of the directive provides a series of changes.
It states that when the **length** of the posting **exceeds 24 months**, the State providing the services is deemed to be the country in which the worker habitually accomplishes his or her work and the labour law of this country would therefore be applied.
It extends the **universally applicable collective agreements** of the host country to all of the sectors and not only those mentioned in the appendix.
The concept of **"minimum rates of pay"** is replaced by **"remuneration"**, in compliance with case law[148].
A posted worker is only receiving the minimum salary for now. With that modification, (s)he would also have the right to bonuses and allowances.
The proposal would also require Member States to publish on the Internet *"elements on how remuneration of posted workers is composed"*, in order to enable **better cooperation**.

145. Directive 2014/67/EC, of 15 May 2014 relating to the enforcement of directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, OJEU 159/11.
146. European Commission, COM(2016) 128 final, *Proposal of a directive amending Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services*.
147. *Ibid.*, p. 3.
148. ECJ, 12 February 2015, *Sähköalojen ammattiliitto ry v Elektrobudowa Spółka Akcyjna*, case C-396/13, not yet published.

A new provision would enable Member States to oblige enterprises to **subcontract** only to enterprises that grant workers certain conditions of remuneration applicable to the contracting party, including those resulting from collective agreements that are not universally applicable. That could only be the case if the same requirements are established for all national subcontractors.
Another significant change concerns **posted temporary workers**. The conditions that are applied to enterprises assigning them should be those which, under Article 5 of the directive on temporary agency work[149], shall be applied to national enterprises assigning workers. This article imposes that *"basic working and employment conditions, for the duration of their assignment at a user undertaking, should be at least those that would apply if they had been recruited directly by that undertaking to occupy the same job"*.
This proposal aims to **strengthen the legislation on posted workers** and **ensure fair competition** between Member States, so as not to fall into social dumping. The doubts over the efficacy of the enforcement directive would be partially addressed through this proposal. Its adoption however remains uncertain on account of the positions of the Eastern European Member States.

3.5. Access to employment for family members of European citizens

When analysing the access to employment, it is also important to consider the possibility of work for family members of European workers, whether they be European citizens or nationals from third States.

Directive 2004/38/EC distinguishes between family members **who have or do not have European citizenship**.

According to Article 7, paragraph 1, family members who are also Union citizens may reside in the host State and take up an activity as an employed or self-employed person.

Article 7, paragraph 2, read in combination with Article 23, also establishes the possibility for family members who are not European citizens to take up employed or self-employed work in the host State: this is a **prerogative limited to the territory of that State**, without covering the entire territory of the Union. Union law *"does not confer on a national of a third country the right*

149. Directive 2008/104/EC of 19 November 2008, on temporary agency work, OJEU L 327.

to take up an activity as an employed person in a Member State other than the one in which his spouse, a Community national, pursues or has pursued an activity as an employed person in exercise of her right to free movement."[150] In the *Mattern* and *Cikotic* case, the spouse of a female student from Luxembourg living in Belgium, a national of a third State, applied for a work permit in Luxembourg. It was refused because he could not submit his application to the Member State where the EU citizen exercised her right of residence, namely in Belgium.

150. ECJ, 30 March 2006, *Cynthia Mattern and Hajrudin Cikotic v Ministre du Travail et de l'Emploi*, case C-10/05, Rec. p. I-3145.

4. Access to social advantages

Directive 2004/38/EC introduces **equal treatment** of Union citizens using their freedom of movement with regard to nationals of the host country, in order to facilitate this movement. This equal treatment is however subject to **conditions** and is **not the same** for people who are economically active and those who are not.

Striking differences concern the access to benefits on the basis of the specific situations of the person applying for the benefit: if it is a person already working in the host State, or a person seeking employment.

It is also necessary to take account of the nature of the benefit concerned, as well as the nationality of the interested party: Union citizens and nationals of third States do not have the same rights.

It is important to note that in most Member States, mobile EU citizens *"are net contributors to the host country's welfare system – they pay more in tax and social security contributions than they receive in benefits"*[151].

4.1. Access to social advantages for European workers: consequences of the principle of equal treatment

Equal treatment is a **key element** of the free movement of workers. Without it, workers would tend to be much less mobile. That is why this concept is an important focus of the directive of 2004 on freedom of movement for Union citizens[152].

It is also found in the regulation of 2011 on freedom of movement for workers within the Union, which states that a **worker who is a national of a Member**

151. European Commission, *Free movement of EU citizens and their family members: Five actions to make a difference*, 25 November 2013, COM(2013) 837 final, p. 4.
152. Art. 24 of Directive 2004/38/EC cited above.

State and who is employed in the territory of another Member State *"shall enjoy the same **social and tax advantages** as national workers"*[153].

The Court had the opportunity to recall this requirement and state that *"the advantages which this regulation extends to workers who are nationals of other Member States are all those which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to **facilitate their mobility within their Community**"*[154] and that making this right subject to the existence of a reciprocal agreement between the host State and the home State is prohibited[155]. To cite this provision, it is above all necessary that the interested party benefit from the **status of worker**[156]: the only **beneficiaries** are workers exercising their professional activity on the territory of another Member State. European citizens who go to a host State to **seek a job are therefore excluded**, as the Court of Justice confirmed. This precision was also stated in Article 24 paragraph 2 of Directive 2004/38/EC.

According to the **principle of equal treatment**, Member States cannot subject access to a social or tax benefit for a worker from another Member State, to requirements that are different from their national conditions[157]. But at the same time, the worker would not be **exempted from complying with the conditions required by national law**, which should not constitute a covert form of discrimination[158].

To be able to access benefits, **workers must fulfil the conditions laid down for nationals** (except nationality of course): they may therefore not be allowed

153. Article 7§2 of Regulation 492/2011/EU cited above.
154. ECJ, 31 May 1979, *Criminal proceedings against Gilbert Even and Office national des pensions pour travailleurs salariés (ONPTS), case* 207/78, Rec. p. 2019, point 22; ECJ, *Martínez Sala*, cited above, point 25.
155. ECJ, 12 July 1984, *Carmela Castelli v Office national des pensions pour travailleurs salariés (ONPTS)*, case 261/83, Rec. p. 3199.
156. With regard to the definition of worker within the meaning of EU law cited above (see section 1.1.).
157. For example, a residence permit explanation in this connection is the Martínez Sala ruling cited above, in which Belgium required nationals of other Member States (in this case it was a Spanish national) for the purposes of granting a benefit to produce a formal residence permit.
158. ECJ, 12 September 1996, *Commission of the European Communities v Kingdom of Belgium*, case C-278/94, Rec. p. I- 4307.

to receive specific benefits that are granted in exchange for a service rendered to the nation, for instance military service obligations[159].

Benefits are often **financial**, but may also have **elements that are not financial**. Financial benefits may be varied: a **tax break** (resulting from abatements or a way of calculating taxes), **exemption of expenses** (a reduction card for transport tickets) or **payment of a sum of money** (education allowance for family expenses or a social allowance guaranteeing a minimum subsistence income). Non-financial benefits are more rare and may be **emotional** (for instance the presence of an unmarried partner) or **psychological** (for instance the use of one's language in criminal proceedings against a person)[160].

Remuneration is a key point in the equal treatment of workers. Article 45 TFEU prohibits any discrimination in the area of employment, remuneration and working conditions. The **right to equal treatment in terms of remuneration** (and other working conditions) is therefore **conferred directly** by the treaties: Article 45 TFEU *"has a direct effect in the legal orders of the Member States and confers on individuals rights which national courts must protect"*[161]. Regulation 492/2011/EU also lays down in Article 7, paragraph 4, that *"Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States"*.

Generally, the Court has ruled that *"the situations of residents and of non-residents in a given State are **not generally comparable**"* and that *"the fact that a Member State does not grant a non-resident certain tax advantages which it grants to a resident is **not, as a rule, discriminatory** having regard to the **objective differences** between the situation of residents and that of non-residents, from the point of view both of the source of their income, and of their personal ability to pay tax or their personal and family circumstances"*[162].

159. ECJ, 14 March 1996, *Peter de Vos v Stadt Bielefeld*, case C-315/94, Rec. p. I-6761; ECJ, *Gilbert Even*, cited above.
160. For a detailed analysis see Bernard Teyssié, *Droit européen du travail*, LexisNexis, 5th edition, 2013, pp. 170 and ff.
161. ECJ, *van Duyn*, cited above, point 1.
162. ECJ, 14 September 1999, *Frans Gschwind v Finanzamt Aachen-Außenstadt*, aff. C- 391/97, Rec. p. I-5451, points 22-23.

BOX 12 ► Concessions obtained by the United Kingdom

In its negotiations with the European Union to obtain **new concessions** meant to avoid a **Brexit**, the United Kingdom concluded an agreement with the European Council to reduce **access to some of these non-contributory in-work benefits**. "That **access** would become **gradual**, only allowing full and equal access after a **maximum of 4 years**, on the basis of **a safeguard mechanism** that can be invoked **for 7 years**"[163]. The other concession consists in "allowing them to tailor **family benefits paid to children** who have remained in their parents' country of origin to the standard of living in that country and to the level of family benefits paid in that country"[164]. The functioning of these concessions was supposed to be determined by the Council and the European Parliament, had the United Kingdom decided in its referendum to remain in the European Union. It decided to leave on the 23th of June 2016, so the set of arrangements will cease to exist[165].

These proposed concessions were put forward at a time when the **United Kingdom** was among the Member States that **did not wish to use the transitional period** towards the newly entered Member States of 2004, but which used it with regard to Bulgaria and Romania for 7 years and is now using it with regard to Croatia. It should be noted that among the 20 nationalities claiming the most benefits paid to working age people in 2011, eight were European and only one was a 2004 enlargement country, Poland, coming in third place. The others were EU-15 countries: Portugal (6th place), France (11th), Ireland (12th), the Netherlands (14th), Italy (16th), Spain (17th) and Germany (20th)[166].

It is worth noting that a majority of benefit claimants in the UK come from third states and not from EU states.

163. Yves Bertoncini, Alain Dauvergne, António Vitorino, "The EU-UK Agreement: much ado about (almost) nothing?", Jacques Delors Institute, *Tribune - Viewpoint*, 25 February 2016.
164. Yves Bertoncini, Alain Dauvergne, António Vitorino, "The EU-UK Agreement: much ado about (almost) nothing?", cited above.
165. Conclusions of the European Council of 18 and 19 February 2016, EUCO 1/16, point 4.
166. Report by ICF GHK, in association with Milieu Ltd, submitted to the European Commission on 14 October 2013, p. 174.

TABLE 3 ► Nationality at NINo registration: DWP working age benefit claimants by world area of origin, Great Britain

Thousands and percent

World Area of Origin	Feb 2008		Feb 2009		Feb 2010		Feb 2011		Feb 2012		Feb 2013		Feb 2014		Feb 2015	
	number	% of total	number	% of total	number	% of total	number	% of total	number	% of total	number	% of total	number	% of total	number	% of total
All	**5,174.88**	*100*	**5,802.48**	*100*	**5,917.56**	*100*	**5,765.34**	*100*	**5,881.70**	*100*	**5,695.39**	*100*	**5,309.58**	*100*	**5,129.52**	*100*
UK	**4,886.17**	*94.4*	**5,472.74**	*94.3*	**5,560.72**	*94.0*	**5,394.31**	*93.6*	**5,474.79**	*93.1*	**5,298.23**	*93.0*	**4,914.16**	*92.6*	**4,758.30**	*92.8*
non-UK and unknown - total	**288.72**	*5.6*	**329.75**	*5.7*	**356.84**	*6.0*	**371.02**	*6.4*	**406.90**	*6.9*	**397.16**	*7.0*	**395.42**	*7.4*	**371.22**	*7.2*
of whom:																
European Union (not UK)	**65.09**	*1.3*	**84.08**	*1.4*	**89.89**	*1.5*	**91.31**	*1.6*	**116.52**	*2.0*	**121.28**	*2.1*	**130.99**	*2.5*	**113.96**	*2.2*
EU excl. Accession Countries	*52.48*	*1.0*	*60.41*	*1.0*	*63.67*	*1.1*	*62.57*	*1.1*	*66.80*	*1.1*	*62.33*	*1.1*	*63.72*	*1.2*	*55.33*	*1.1*
EU Accession Countries	*12.61*	*0.2*	*23.67*	*0.4*	*26.22*	*0.4*	*28.74*	*0.5*	*49.72*	*0.8*	*58.95*	*1.0*	*67.27*	*1.3*	*58.63*	*1.1*
Other non-UK	**223.63**	*4.3*	**245.67**	*4.2*	**266.95**	*4.5*	**279.72**	*4.9*	**290.38**	*4.9*	**275.88**	*4.8*	**264.43**	*5.0*	**257.26**	*5.0*
Europe - non-EU	*19.46*	*0.4*	*21.29*	*0.4*	*22.40*	*0.4*	*21.99*	*0.4*	*22.34*	*0.4*	*21.31*	*0.4*	*20.08*	*0.4*	*17.85*	*0.3*
Africa	*77.12*	*1.5*	*84.38*	*1.5*	*93.28*	*1.6*	*98.76*	*1.7*	*101.87*	*1.7*	*94.70*	*1.7*	*88.98*	*1.7*	*85.98*	*1.7*
Asia and Middle East	*99.59*	*1.9*	*108.86*	*1.9*	*118.16*	*2.0*	*125.69*	*2.2*	*132.04*	*2.2*	*128.03*	*2.2*	*126.11*	*2.4*	*125.58*	*2.4*
The Americas	*13.32*	*0.3*	*15.38*	*0.3*	*17.36*	*0.3*	*18.31*	*0.3*	*19.72*	*0.3*	*18.71*	*0.3*	*17.47*	*0.3*	*16.72*	*0.3*
Australasia and Oceania	*1.67*	*0.0*	*2.23*	*0.0*	*2.19*	*0.0*	*2.08*	*0.0*	*2.11*	*0.0*	*2.00*	*0.0*	*1.85*	*0.0*	*1.86*	*0.0*
Others and Unknown	*12.47*	*0.2*	*13.53*	*0.2*	*13.56*	*0.2*	*12.89*	*0.2*	*12.30*	*0.2*	*11.13*	*0.2*	*9.94*	*0.2*	*9.29*	*0.2*

Sources: NINo allocations to adult overseas nationals entering the UK: registrations to March 2013, DWP, 29 August 2013
NINo allocations to adult overseas nationals entering the UK: registrations to June 2014, DWP, 28 August 2014
National Insurance number allocations to adult overseas nationals to June 2015, DWP, 27 August 2015
Nationality at point of NINo registration of DWP working age benefit recipients: data to Feb 2015, DWP, 27 August 2015

Source: Richard Keen and Ross Turner, "Statistics on migrants and benefits", *Briefing Paper Number CBP 7445*, House of Commons, 8 February 2016.

What if a citizen **stops pursuing his/her activity**? The status of worker can be **retained**, in compliance with Article 7 paragraph 3 of Directive 2004/38/EC:

"A Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

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

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

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

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

The Union citizen who retains the status of worker if he/she is in involuntary unemployment, as in the circumstances described in Article 7 paragraph 3 c), *"retains his right of residence in the host Member State under Article 7 of Directive 2004/38/EC and may, consequently, rely on the principle of equal treatment, laid down in Article 24(1) of that directive"*[167].

The Union citizen who retains the status of worker if (s)he engages in university studies, in relation with the previous employment, may also continue to benefit from the provisions concerned, provided that there is *"continuity between the previous occupational activity and the studies pursued"*[168]. However, this condition is no longer required from the time when the person *"has involuntarily become unemployed and is obliged by conditions on the labour market to undertake occupational retraining"*[169].

Of course, **abusive behaviour will not be covered** by such provisions: this is the case when an individual enters the host State *"for the sole purpose of enjoying, after a very short period of occupational activity, the benefit of the [...] assistance system in that State"*[170].

Therefore, there is a **justified difference in treatment** between nationals of Member States that have **not yet entered into an employment relationship** in the host Member State where they are looking for work, and those **who are already working** in that State or who, having worked there but no longer being in an employment relationship, are nevertheless considered to be workers. The former can only be entitled to equal treatment with regard to **access to employment**, whereas the latter can claim *"the **same social and tax advantages as national workers**"*[171].

167. ECJ, *Alimanovic*, cited above, point 53.
168. ECJ 6 April 2003, *Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst*, case C-413/01, Rec. p. I-13187.
169. *Ibid.*
170. *Ibid.*
171. ECJ 23 March 2004, *Brian Francis Collins v Secretary of State for Work and Pensions*, case C-138/02, Rec. p. I-2703, point 31.

However, the employment relationship must not be too far back in time, otherwise the job seeker could be considered to be looking for his first job in the host Member State[172]. It seems *"legitimate for the national legislature to wish to ensure that there is a **genuine link** between an applicant for an allowance and the geographic employment market in question"*[173].

4.2. Access to social benefits for economically inactive European citizens

The principle of non-discrimination on the grounds of nationality is established by Article 18 TFEU. It involves **equal treatment,** which is laid down in the directive on free movement of persons, but **only** if they enjoy the **right of residence**[174]. Moreover, a derogation allows Member States to deny entitlement to social assistance during the first three months of residence, or when Union citizens no longer fulfil the conditions for a right of residence, as long as they can provide evidence that they are continuing to seek employment, and that they have a genuine chance of being engaged[175]. The **right to social assistance and social benefits**, like the right of residence, are therefore not **unconditional rights**.

Access to social assistance and benefits for economically inactive Union citizens hence seems **limited**. This makes it possible to prevent "**social tourism**" that could in theory exist, given the different social assistance models within the EU. However, it is important to point out that the **main motivation** of people using their freedom of movement is to **find work**, regardless of the amount of social assistance in the host country.

172. ECJ, *Collins*, cited above, points 28-29.
173. ECJ, *D'Hoop*, cited above, point 38.
174. Art. 24§1 of Directive 2004/38/EC cited above.
175. Art. 24§2 of Directive 2004/38/EC cited above.

BOX 13 ► "Universal Credit" of the United Kingdom[176]

The "Universal Credit" has been introduced in the United Kingdom in phases, since April 2013 and is to be fully applied by 2017. It aims to **simplify** the different social benefits and ensure that the allowances do not stop suddenly when people find employment, since the job may be part time or low paid. It will replace the:

- Income-based job seeker's allowance;
- Income-based employment and support allowance;
- Income support;
- Working tax credit;
- Child tax credit;
- Housing benefit.

This benefit is directly deposited every month in the beneficiary's bank account. In return, the beneficiary must sign an **undertaking concerning his or her job search**. This consequently makes **family and housing benefits conditional upon seeking employment**, which was not the case previously. Its full implementation was delayed several times and subject to amendments.

European citizens with access are those who enjoy the **right of residence** as European workers and those who retain this status, self-employed workers and those who retain this status, their family members and certain beneficiaries of permanent residence (workers and self-employed workers who have stopped their activity, pensioners, permanently disabled people, people working abroad but residing in the United Kingdom, family members of deceased workers).

Another category of **European citizens enjoying the right of residence** may have access, **but must fulfil the condition of habitual residence**: people seeking a job for under six months, people with sufficient resources, students, their family members, other people enjoying the permanent right of residence.

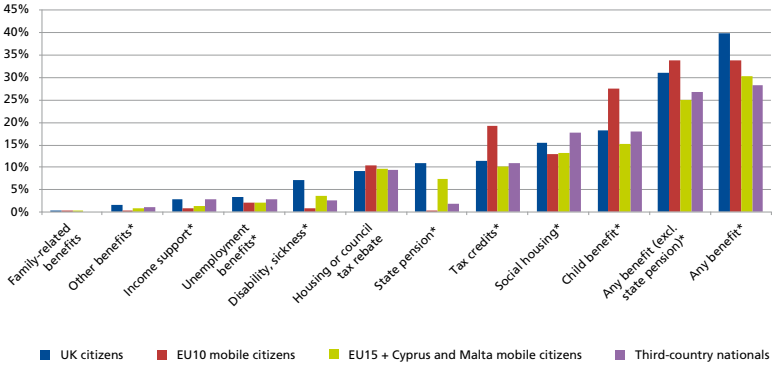
Lastly, **European citizens who do not enjoy the right of residence** cannot apply for Universal Credit and **some who enjoy the right of residence cannot have access**: those who enjoy the right of residence for less than three months, job seekers who cannot justify habitual residence in the United Kingdom, family members of a child who is a European citizen enjoying a right of residence.

Some nationals from third States may enjoy a **right of residence** in the State of origin of European workers if the opposite case would prevent them from exercising their rights as European citizens (see the *Carpenter* case, section 2.3). Such people are also **excluded from this system.**

We cannot be sure of the impact of the Brexit, but European citizens and their family members could be excluded from this system.

176. See Decision-makers' guide, Chapter C1: Universal credit.

FIGURE 3 ► Take-up of different benefits, by citizen groups, (population aged 18-69 years), UK, 2013



Notes: Population aged 18–69 years; weighted estimates; * indicates that the difference between EU10 citizens and UK nationals is significant at least at the 5% level.

Source: UK Labour Force Survey, 2013 Q2

Source: Eurofound study, page 48 (data "UK Labour Force Survey, 2013 Q2").

The Court of Justice made it possible to **extend equal treatment to a small extent**. The case of the *Trojani* judgment of September 2004 allowed for equal treatment of a French national in Belgium at a time when he did not meet the conditions of the Directive 2004/38/EC, while he was **residing legally** in the host State because he had a **residence permit** granted under Belgian national law, enabling him to enjoy social assistance[177]. In addition, the Court of Justice explicitly affirmed that a Member State may not refuse to grant a tide over allowance to a national of another Member State seeking his first employment on its territory and having completed his studies in another Member State[178].

Case law of the **Court has however not ruled out derogations**. It recalled the validity of the derogation concerning people seeking employment in the *Vatsouras* judgment[179].

177. ECJ, 7 September 2004, *Trojani v Centre public d'aide sociale de Bruxelles*, case C-456/02, Rec. p. I-7573, point 46.
178. ECJ, 15 September 2005, *Office national de l'emploi v Ioannis Ioannidis*, case C-258/04, Rec. p. I-8275.
179. ECJ, 4 June 2009, *Athanasios Vatsouras and Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900*, joint cases C-22/08 and C-23/08, Rec. p. I-4585.

4.2.1. Residence of under three months

Member States are **free** to determine whether to grant social assistance benefits to European citizens for the **first three months** of residence.

As a result, when the British Prime Minister announced: *"We are changing the rules so that no one can come to this country and expect to get out-of-work benefits immediately; we will not pay them for the first three months"*, he announced a reform that is perfectly compatible with Union law[180].

Moreover, Directive 2004/38/EC indicates that the right of residence of Union citizens under three months persists as long as *"they do not become an* **unreasonable burden** *on the social assistance system of the host Member State"*.

4.2.2. Residence between three months and five years

The right to reside on the territory of another Member State without exercising an economic activity there is **not unconditional**.

Directive 2004/38/EC **lays down** the **conditions for exercising** this right to which Union citizens who do not (or no longer have) the status of worker are subjected. One of the conditions is having **sufficient resources** so as not to become an **unreasonable burden** on the social assistance system of the host Member State. As the Court of Justice underlined in several judgments *"such a condition is based on the idea that the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of the Member States, in this instance, the protection of their public finances"*[181].

The directive therefore enables the host State to impose on the Union citizen, national of another Member State and residing on its territory, when he does not have or no longer has the status of worker, **legitimate restrictions** concerning the granting of social benefits so that he does not become an unreasonable burden on the social assistance system.

180. David Cameron, "Free movement within Europe needs to be less free", *Financial Times*, published on 26 November 2013.
181. Judgment *Brey*, cited above; judgment *Baumbast and R.*, cited above, point 90, judgment *Zhu and Chen*, cited above, point 32.

However an expulsion measure **must not be the automatic consequence** of a Union's citizen's or his or her family member's recourse to the social assistance system of the host Member State[182].

BOX 14 ► The case-by-case review of the concept of unreasonable burden

The *Brey* case of 2013 is an interesting example of the review of the **risk** of a citizen becoming an **unreasonable burden on the host Member State**.
In this judgment, the Court affirmed that the national authorities may not automatically draw the conclusion that a citizen applying to receive a benefit of the social assistance system could become an unreasonable burden on the host Member State. In order to evaluate if this is effectively the case, they must carry out an **overall assessment of the specific burden** which granting that benefit would place on the **national social assistance system as a whole**, by reference to the **personal circumstances** characterising the individual situation of the person concerned. In their review, authorities must take into account a range of factors in the light of the **principle of proportionality**.
This means conducting a **case-by-case** review, which must take into account the circumstances of the specific case.
In this case, the Court declared incompatible with EU law an Austrian legislation that automatically considers that a citizen does not fulfil the condition of sufficient resources merely because he applied for a social assistance benefit.

In the *Dano* case, the Court had to rule on *"whether a Member State can exclude nationals of other Member States who are in need from access to non-contributory subsistence benefits [...], in order to prevent such benefits from becoming an unreasonable burden on that Member State, even though they would be granted to its own nationals in the same situation"*[183].

BOX 15 ► The *Dano* judgment, case law is going forward not backward

The Court validates the decision of Jobcenter Leipzig, which refused to grant a Romanian national residing in Germany with her child **special non-contributory cash benefits**. The applicant in the main

182. Art. 14§3 of Directive 2004/38/EC cited above.
183. Advocate-General's Opinion in the *Dano* case, cited above, point 1.

proceedings sought the granting of benefits by way of basic provision for **job seekers**, while "there is nothing to indicate that she had looked for a job"[184].

The benefits sought apply in this case to German nationals in the same situation as the applicant in the same proceedings, in other words as nationals who do not exercise a professional activity (and who are not seeking employment) enjoy them.

First the Court points out that Article 24 paragraph 2 of Directive 2004/38/EC clearly establishes that the host Member State **is not obliged to grant a social assistance benefit** during the first three months of residence, or even during a longer period "**to persons other than workers**, self-employed persons, persons who retain such status and members of their families".

This judgment does not seem **to be a break** with the past. It is not a reversal of case law if we consider the previous judgments handed down in the area of social assistance and the free movement of persons. For example in the *Rundgren* case[185], the Court ruled that Regulation 1612/68/EC (current Regulation 492/2011/EU), with the resulting benefits, **was not to apply to a person** who did not have employment in the host Member State and who **was not seeking employment**.

The Court considers that, in compliance with European law, **a citizen who settles in another Member State** without carrying out a professional activity there but **solely in order to obtain its social assistance may be excluded from the enjoyment of certain social benefits**.

With the purposes of accessing certain social benefits, a European citizen residing in another Member State may only claim equal treatment with nationals of this State if his or her residence meets the conditions of Directive 2004/38/EC. Yet, that is not the case of a person in a situation such as that of Ms. Dano, who does not benefit from the application of the said directive since **she does not have sufficient resources**.

"A Member State must therefore have the **possibility** [...] of **refusing to grant social benefits** to economically inactive Union citizens who exercise their right to **freedom of movement solely in order to obtain another Member State's social assistance** although they do not have sufficient resources to claim a right of residence.

To deny the Member State concerned that possibility would [...] thus have the consequence that persons who, upon arriving in the territory of another Member State, do not have sufficient resources to provide for themselves would have them automatically, through the grant of a special non-contributory cash benefit which is intended to cover the beneficiary's subsistence costs.

Therefore, **the financial situation of each person concerned** should be examined specifically, without taking account of the social benefits claimed, in order to determine whether he meets the condition of having sufficient resources to qualify for a right of residence under [...] of Directive 2004/38/EC.

In the main proceedings, according to the findings of the referring court, the applicants do not have sufficient resources and thus cannot claim a right of residence in the host Member State under Directive

184. *Dano* judgment, cited above, point 39.
185. ECJ, 10 May 2001, *Sulo Rundgren*, case C-389/99, Rec. p. I-3731.

2004/38/EC. Therefore, [...] they cannot invoke the principle of non-discrimination [...] of the same directive"[186].

The ECJ recently provided **clarifications** on the relation between **right to residence** and **access to social benefits**, in the case Commission v United Kingdom, just a few days before Brexit.

This case concerns the so-called "Child benefits", which are cash benefits funded from taxation and not from recipients' contributions. Under the United Kingdom legislation, in order to be eligible for those benefits, the claimant must satisfy a fundamental requirement: being lawfully resident in the national territory. The Commission argued that this legislation was not compatible with the EU law, notably with regulation EC/883/2004, on the coordination of social security systems, and with the general principle of non-discrimination.

In response to those arguments, the UK, relying on the judgment in *Brey*, argued that the host State may lawfully impose that only Union citizens who fulfil the conditions for possessing a right to reside in its territory are entitled to access to social benefits. According to the UK, such conditions are compatible with EU law, and are laid down in directive 2004/38/EC. Moreover, the UK acknowledges that such conditions are more easily satisfied by its own nationals (as they have, by definition, a right of residence), but it maintains that in each case this condition is a proportionate measure, in order to ensure that benefits are paid to persons who are sufficiently integrated in the UK.

In its judgement the ECJ dismissed the Commission's action and validated the United Kingdom's arguments. The Court holds that the condition requiring a right to reside in the UK gives rise to unequal treatment, because there is no doubt that UK nationals can satisfy it more easily than nationals of the other Member States. However, this difference in treatment can be justified by a legitimate objective, such as **the need to protect the finances of the host Member State**, provided that it does not go beyond what is necessary to attain that objective. The Court finds that the UK authorities verify whether residence is lawful in conformity with the conditions laid down in the directive

186. *Dano* judgment, cited above, points 78-81.

2004/38/EC. Thus, this monitoring is not carried out systematically by the UK authorities for each claim, but only in the event of doubt. Therefore, the Court states that the condition requiring a right of residence does not go beyond what is necessary to attain the **legitimate objective** pursued by the national system, namely the need to protect its finances.

4.2.3. Residence for over five years

The European citizen who has acquired a **right of permanent residence** in another Member State is **no longer subject to special conditions** (like having sufficient financial means), but he or she may claim social assistance as nationals[187].

In all cases, these conditions **are without prejudice to more favourable provisions** of Member States. Therefore, Spain chose not to transpose in domestic law the conditions of the right of residence of Union citizens in the Royal Decree of 2007[188]. European legislation hence establishes *"an unconditional right of residence for Union citizens"*[189]. Union citizens may therefore enjoy equal treatment without worrying about these conditions over three months of residence in Spain.

4.3. Access to unemployment benefits

Every EU country has its own rules in the area of unemployment benefits[190].

In France, it is necessary to have been affiliated to the system for at least four months over the previous 28 months or the previous 36 months, for workers aged 50 or older at the time of the termination of the employment contract. The amount of the benefit comprises a fixed part, equal to €11.64 a day, and a variable part, equal to 40.4% of the daily reference wage. The duration of payment of

187. Joint reading of Articles 16 and 24 of Directive 2004/38/EC cited above.
188. Article 7 of Royal Decree 240/2007, Official Journal of Spain (BOE) No. 51, 28 February 2007, p. 8560.
189. European Union Agency for Fundamental Rights, *The situation of Roma EU citizens moving to and settling in other EU Member States*, November 2009, p. 41.
190. Art. 16 of Directive 2004/38/EC.

the benefit to the job seeker is equal to the duration of the latter's employment, but cannot exceed two years or three years if he or she if over 50 years old.

In Portugal, it is necessary to have been affiliated to a scheme for at least a year over the previous two years. The amount of the benefit is equal to 60% of the reference income. The duration of the payment of the unemployment benefit depends on the age of the beneficiary, and the number of months of the income remunerations recorded for the social security since the last period of unemployment. When the job seeker is under 30 years old, he or she is entitled to 30 days for every five years with registered earnings. This period is 60 days for every five years with registered earnings for workers 50 years of age and older.

In Poland, it is necessary to have been affiliated for at least a year during the 18 last months and have received the minimum wage. The amount depends on the time of employment and decreases after the first three months of payments. For up to five years of employment, this amounts to 664.90 zlotys (or 151.37 euros) a month for the first three months, and then 522.10 zlotys (or 118.87 euros). For over 20 years of employment, this amounts to 997.40 zlotys (or 227 euros) a month for the first three months, and then 783.20 zlotys (or 178 euros)[191].

If a European citizen loses his or her employment when he or she is working in another European Union country, his or her **professional situation** and place of residence – and **not nationality** – will determine **what country must pay unemployment benefits**[192].

If **the Union citizen remains in the country in which (s)he lost his or her employment**, (s)he must apply for his or her unemployment benefit there[193]. In order to facilitate the calculation of unemployment benefits, the European Union created the form U1 that provides evidence of the periods of insurance in another Union country, in Iceland, in Liechtenstein, in Norway and in Switzerland.

191. "Moving and working in Europe, Your rights country by country", available on the website of the European Commission, DG Employment, Social Affairs & Inclusion, consulted in May 2016.
192. Art. 65 of Regulation 883/2004, 29 April 2004, on the coordination of social security systems, OJEU L166, p. 1.
193. Art. 65§2 of Regulation 883/2004 cited above.

If **the Union citizen decides to return to his/her country of origin or to go to another Member State concerned by the regulation**, he or she must claim his/her benefits there[194]. They can be calculated on the basis of possible previous activity in this country, otherwise, it is necessary to request a transfer of unemployment benefits of the country in which he or she lost his/her employment. In this case, it is necessary to complete form U2.

The Court of Justice, in the *Kakse* case, reaffirmed the **principle of non-discrimination** of Article 45 TFEU in this area. A German-Austrian citizen worked ten years in Austria then had several periods of employment in Germany. After losing her last employment in Germany, she returned to Austria and claimed unemployment benefits. The office replied that she had not worked a minimum of 15 years on its territory, which was required in Austrian legislation. The Court affirmed that this provision should *"be regarded as **a restriction on the right of freedom of movement and as discriminating on grounds of nationality**"*[195].

In the *Merida* case, the Court recalled that Article 45 TFEU *"**prohibits** not only covert discrimination based on nationality but **all covert forms of discrimination** which, by applying other distinguishing criteria, in fact achieve the same results"*[196]. A French person was working on German territory. He was paid by the German authorities and paid his social contributions in Germany. The remainder of taxes were paid in France, where he resided. After losing his job, he received interim assistance. In order to receive such assistance, it is necessary to deduct social contributions and taxes. The latter not being paid in Germany, the German authorities took into account the German tax rate. This worked to the detriment of the worker concerned, because the tax rate in France is lower than in Germany. This was therefore considered **contrary to the principle avoiding double taxation**[197].

Failing to pursue effectively a professional activity, a European citizen cannot be entitled to the same social and tax advantages as national workers[198].

194. *Ibid.*
195. ECJ, 5 February 2002, *Doris Kaske v Landesgeschäftsstelle des Arbeitsmarktservice Wien*, case C-277/99, Rec. p. I-1261, point 38.
196. ECJ, 16 September 2004, *Gerard Merida v Bundesrepublik Deutschland*, case C-400/02, point 21.
197. ECJ, *Merida*, cited above, point 37.
198. ECJ, *Rundgren*, cited above.

Seeking employment can lead to recognising a right of residence, under certain conditions, notably within a reasonable period. But seeking employment **does not automatically confer entitlement to all of the social assistance benefits** paid to unemployed people in the host Member State[199].

The Court of Justice pointed this out in the *Vatsouras* judgment[200]. It said that even if the granting of a financial benefit intended to facilitate access to employment in the host Member State is not, in principle, excluded from the scope of application of free movement of workers, it is legitimate for a Member State to establish beforehand *"a **real link between the job seeker and the labour market of that 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"*[201].

This search for a real link *"should enable them in any event to identify those persons who are not genuinely looking for employment. Such persons could not claim a right of residence, even if they recently arrived in the host State, or as a result, abuse the social advantages accruing under national law"*[202].

4.4. Access to social benefits for family members of a European citizen

Family members of a European citizen who enjoys a right of residence are themselves entitled to this right of residence, but are linked to this "**reference**" person. When that is the case, they may enjoy equal treatment, regardless of their nationality.

The Court of Justice has gradually extended the application of Article 7 paragraph 2 of Regulation 492/2011/EU, which provides for equal treatment for European workers, to family members of European workers. It is **derived right**, which makes the right of family members to social and tax advantages subject to the condition that the worker on which they depend is entitled to

199. In compliance with Art. 24§2 of Directive 2004/38/EC cited above.
200. ECJ, *Vatsouras*, cited above.
201. ECJ, *Vatsouras*, cited above, points 38-41.
202. Advocate-General's Opinion in the *Antonissen* case, cited above, point 39.

invoke these provisions, family members only being **indirect beneficiaries** of the provisions in question[203].

Similarly, social and tax advantages may only be granted to family members if they qualify as such with regard to the worker: this is not the case, for example, of a worker's descendant who has reached the age of 21 and is no longer dependent on him or her[204].

A European worker may, on the same basis as a national worker, claim family benefits, regardless of whether his or her children reside in the host Member State. However, if they do not reside in the European worker's host Member State, a priority rule is imposed to avoid overlapping in the two different countries.

BOX 16 ► The priority rule in the event of overlapping of family benefits

Under Article 68 paragraph 1 of Regulation 883/2004 on the coordination of social security systems, where, during the same period and for the same family members, benefits are provided for under the legislation of more than one Member State, the following rules shall apply:

a) in the case of benefits payable by more than one Member State on different bases, the order of priority shall be as follows: Firstly, rights available on the basis of an activity as an employed or self-employed person, secondly, rights available on the basis of receipt of a pension and finally, rights obtained on the basis of residence;

b) in the case of benefits payable by more than one Member State on the same basis, the order of priority shall be established by referring to the following subsidiary criteria:

  i) in the case of rights available on the basis of an activity as an employed or self-employed person: the place of residence of the children, provided that there is such activity, and additionally, where appropriate, the highest amount of the benefits provided for by the legislations under consideration. In the latter case, the cost of benefits shall be shared in accordance with criteria laid down in the Implementing Regulation;

  ii) in the case of rights available on the basis of receipt of pensions: the place of residence of the children, provided that a pension is payable under its legislation, and additionally, where appropriate, the longest period of insurance or residence under the conflicting legislations;

  iii) in the case of rights available on the basis of residence: the place of residence of the children.

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203. ECJ, 25 June 1997, *Carlos Mora Romero v Landesversicherungsanstalt Rheinprovinz*, case C-131/96, Rec. p. I-3659 points 16-19.
204. ECJ, 18 June 1987, *Centre public d'aide sociale de Courcelles v Marie-Christine Lebon*, case C-316/85, Rec. p. I-2811.

To apply this priority rule, benefits must have been paid in another State subject to the regulation. If family benefits can be received in another State, but the application for them has not been submitted, the priority rule does not apply. That is what the Court pointed out in 2010 in the *Schwemmer* case[205]. A mother worked and resided in Germany with her two children. She applied for family benefits in Germany, which should have amounted to 154 euros. From that, the amount that her ex-spouse, the father of her children, could have received, who worked and resided in Switzerland (subject to the regulation in question), was deducted. The amount received by Mrs Schwemmer was therefore only €44.25. The Court overturned this ruling because the ex-spouse did not apply for family benefits in Switzerland.

BOX 17 ► The concessions negotiated by the United Kingdom

In the framework of an agreement that was meant to avoid the **Brexit,** the United Kingdom had negotiated the power to set the amount of family benefits paid to **children residing in a country other** than the host country of the parent applying for them, on the basis of the **standard of living** of that country, and the **level of family benefits** that are paid there[206]. One of the main purposes of this agreement was to allow the United Kingdom to spend less on social benefits for European workers whose children are living in a country where the standard of living and amount of family benefits are lower (for example in Bulgaria or in Romania). However, the implementation of such scheme would have been **extremely complex,** because Member States all have **different scales for calculating the amount of family benefits**, in addition to those of the member countries of the European Economic Area subject to the regulation. For example in France, family benefits are only received after the second child, and amount to €129.99 in 2014, then increases to 166.55 when there are more than two children. This policy is thus more beneficial to large families. In Denmark, benefits vary greatly on the basis of the child's age. In 2014, family benefits amounted to 4,404 Danish crowns (approximately 592 euros) every three months for children aged 0 to 2 and 950 Danish crowns (approximately 122 euros) every three months for children aged 15 to 17. In Bulgaria, the monthly amount is decided every year by the State on the basis of its budget. In 2014, it was 35 Bulgarian lei (approximately 18 euros). In Romania, family benefits are calculated on the basis of the social reference indicator, the net income per family member and the number of family members. Accordingly, the maximum amount when the family is made up of two parents is 40 lei per month per child (the amount is the same per child, regardless of the number of children) i.e. 8.9 euros. In the United Kingdom, the amount is

205. ECJ, 14 October 2010, *Gudrun Schwemmer v Agentur für Arbeit Villingen-Schwenningen – Familienkasse*, case C-16/09, Rec. p. I-9717.
206. See the Box 12 "Concessions obtained by the United Kingdom".

£82 per month for the first child (approximately 104 euros) and £54.20 per month for the following children (approximately 69 euros). This policy is less beneficial to large families[207].
The functioning of this concession obtained by the United Kingdom was supposed to be determined by the Council and the European Parliament, in case the United Kingdom would have decided in its referendum to remain in the Union.
The gains of this concession were not clear. The United Kingdom was therefore engaged in an **administrative nightmare**, which it would not necessarily gain from with respect to budgets.
However, after the referendum of 23 June 2016, the United Kingdom decided to leave the EU, so everything will have to be renegotiated, and it is very difficult to predict how the legal framework will look like.

The period of three months, during which the host State can decide not to grant social benefits, also applies to them, even if the European citizen that they join has been on the territory of the host State for more than three months. For example in the *Garcia-Nieto* case[208], the child of the spouse of a Spanish national came to join her in Germany, where she was working. They applied for subsistence benefit one month after the child arrived. This benefit was only granted after three months. The Court of Justice confirmed that nationals of other Member States may be refused certain social benefits in their first three months of residence, and pointed out that such a refusal does not presuppose an assessment of the individual situation of the person concerned.

207. European Commission, "Moving and working in Europe", cited above.
208. ECJ, 25 February 2016, *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto e.a.*, case C-299/14, not yet published.

TABLE 4 ► Child Benefit claims under EC Regulation 883/2004 in respect of children living in another EEA member state (or Switzerland)

	October 2009		July 2010		June 2011		September 2012		December 2012		December 2013	
	No. of awards	*No. of children*	*No. of awards*	*No. of children*	*No. of awards*	*No. of children*	*No. of awards*	*No. of children*	*No. of awards*	*No. of children*	*No. of awards*	*No. of children*
Austria	29	52	29	45	34	52	27	41	29	47	23	37
Belgium	153	297	159	310	155	303	146	290	138	274	75	140
Bulgaria	45	70	79	113	142	186	175	227	174	238	186	245
Croatia	..	..	..	..	..	..	..	..	..	..	*5 (a)*	*5 (a)*
Cyprus	51	82	55	89	61	87	54	78	53	80	39	61
Czech Rep.	197	340	175	295	168	277	179	293	176	282	124	203
Denmark	13	24	18	32	18	33	20	34	20	35	13	23
Estonia	17	30	19	29	28	39	37	57	43	63	45	65
Finland	16	29	16	30	20	38	15	33	16	30	12	23
France	1,256	2,346	1,266	2,343	1,257	2,320	1,155	2,146	1,080	2,003	789	1,429
Germany	311	529	337	578	339	583	368	647	366	641	283	495
Greece	51	81	57	88	57	85	53	79	51	76	44	69
Hungary	96	172	80	130	103	157	132	203	132	203	136	196
Iceland	2	4	3	5	3	5	3	5	3	5	*5 (a)*	*5 (a)*
Italy	175	300	187	316	199	336	202	350	193	330	156	273
Latvia	259	346	295	404	536	732	822	1,109	853	1,117	797	1,091
Liechtenstein	0	0	0	0	0	0	0	0	0	0	0	0
Lithuania	747	1,093	710	1,012	982	1,342	1,212	1,710	1,276	1,772	1,215	1,712
Luxembourg	14	26	15	28	12	25	10	21	10	21	7	14
Malta	17	26	17	25	19	27	15	21	14	21	15	22
Netherlands	185	373	197	390	205	410	194	384	192	379	142	288
Norway	45	92	42	79	40	73	37	72	14	65	30	61
Poland	22,858	37,941	17,212	28,760	16,230	27,018	15,251	25,623	15,499	25,659	13,174	22,093
Portugal	222	329	233	346	246	368	236	355	239	364	202	309
Rep. Ireland	883	1,818	957	1,972	1,086	2,251	1,242	2,529	1,281	2,609	1,231	2,505
Romania	36	53	75	130	158	264	197	334	196	328	230	392
Slovakia	1,483	2,573	1,180	2,051	1,077	1,870	1,105	1,953	1,083	1,881	692	1,232
Slovenia	5	7	6	9	6	10	7	12	7	13	11	21
Spain	741	1,230	796	1,322	832	1,386	776	1,291	756	1,275	600	1,019
Sweden	57	107	65	130	60	114	64	112	66	122	49	96
Switzerland	104	216	113	235	117	244	121	242	122	238	77	150
Totals	**30,068**	**50,586**	**24,393**	**41,296**	**24,190**	**40,635**	**23,855**	**40,251**	**24,082**	**40,171**	**20,400**	**34,268**

Sources: HC Deb 6 Sep 2010 c190W [PQ11051]
HC Deb 6 Sep 2011 c400-1W [PQ 68533]
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Note: For the purposes of Data Protection Act compliance, in the Dec 2013 data the number is withheld where it is fewer than 5 and greater than 0.

Source : Richard Keen and Ross Turner, "Statistics on migrants and benefits", *Briefing Paper Number CBP 7445*, House of Commons, 8 February 2016.

CONCLUSION

The free movement of workers was provided from very early on in the European integration project, and was extended to include people in general, before the introduction of European citizenship. This extension did not occur to the detriment of the social systems of the Member States, because conditions still exist to enjoy equal treatment.

The freedom of movement has had and continues to have a good image amongst citizens, but it is still a target of regular attacks that could discourage its supporters. These attacks are often stereotypical and misleading, sometimes even part of an anti-European Union "marketing" campaign, reflecting the image of the Polish plumber which has been projected for over ten years since its inception.

Union law contains safeguards, in the absence of greater coordination in social insurance and remuneration systems between Member States. Improvements can still be made, but it is important to take the heat out of the debate in order to analyse the law as it exists. Only this even-tempered analysis will improve the texts and reassure citizens about how they are used.

LIST OF BOXES, GRAPHS AND TABLES

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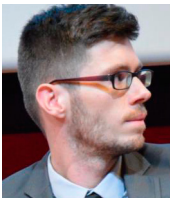

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Managing Editor: Yves Bertoncini

Translation from French: Vicky Mc Nulty, Janet Roberts Maron and Barbara Banks (Foreword).

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FREE MOVEMENT OF EUROPEANS
TAKING STOCK OF A MISUNDERSTOOD RIGHT

The free movement of persons within the European Union is often the subject of debate. Preconceived ideas are deeply rooted in the collective imagination, such as the Polish plumber exploiting the directive on posted workers, or poor citizens who exercise their right to free movement solely in order to obtain another Member State's social benefits, commonly referred to as "social tourism".

This Study by Martina Menghi and Jérôme Quéré has the great merit of taking the heat out of a debate often divided between its enthusiastic defenders and its sworn opponents. It presents and analyses the EU law in order to determine what is truth and what is fiction, while giving figures on the nature and the magnitude of free movement in Europe.

Firstly it gives historic and contextual elements of the free movement of workers, established in the Treaty of Rome in 1957, but which has progressively evolved and now applies to all citizens. This mobility takes place between the EU Member States, independently of their membership of the Schengen Area. EU citizens and their families benefit from the right to move and reside freely within the territories of the Member States. This right however is not without conditions or limits.

As far as access to work is concerned, this Study underlines that EU citizens should not be discriminated against when it comes to employment in another Member State. However, there are some exceptions for certain types of employment in the public sector, and for citizens of new Member States going through transitional periods. The case of posted workers receives particular attention.

This Study notes that equal treatment is not guaranteed in relation to benefits and social welfare for a worker having used his or her freedom of movement. It reminds us that EU law distinguishes between workers and economically inactive persons, while preventing a citizen from becoming an unreasonable burden for the host State.

As António Vitorino stresses in this foreword, this Study by Martina Menghi and Jérôme Quéré gives a very salutary intellectual and political contribution to the crucial debate on one of the "4 freedoms" proclaimed by the Treaty of Rome, almost 60 years after its signature.

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ISSN 2257-4840