

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**

CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



Constitutional Affairs

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Obstacles to the right of free movement and residence for EU citizens and their families

Comparative Analysis

Study for the LIBE and PETI Committees



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CONSTITUTIONAL AFFAIRS**

**CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS
PETITIONS**

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Comparative Analysis

STUDY

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE and PETI Committees, presents a synthesis of in-depth studies in nine Member States in addition to broader EU and national research. Based on an analysis of selected provisions of Directive 2004/38/EC in Belgium, France, Germany, Ireland, Italy, Poland, Spain, Sweden and the UK, it identifies the main persisting barriers to free movement for EU citizens and their family members. The study also examines discriminatory restrictions to free movement, measures to counter abuse of rights and refusals of entry and residence rights, in addition to expulsions. It finds that, ten years after the deadline for transposition, there is general compliance, though some challenges remain. More systematic data collection, evaluation and guidance is thus required. The nine country studies are made available separately.

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LIST OF ABBREVIATIONS

AT	Austria
BE	Belgium
BG	Bulgaria
CAO	Central Applications Office
CEPS	Centre for European Policy Studies
CJEU	Court of Justice of the European Union
CRDS	Contribution pour le Remboursement de la Dette Sociale
CSG	Contribution Sociale Généralisée
CY	Cyprus
CZ	Czech Republic
DE	Germany
DK	Denmark
EctHR	European Court of Human Rights
EE	Estonia
EHIC	European Health Insurance Card
EL	Greece
ERRC	European Roma Rights Centre
ES	Spain
EU	European Union
FI	Finland
FR	France
GISTI	Groupe d'Information et de Soutien des Immigrés

HR	Croatia
HU	Hungary
IE	Ireland
INIS	Irish Naturalisation & Immigration Service
IT	Italy
LT	Lithuania
LU	Luxembourg
LV	Latvia
MT	Malta
NGO	Non-Governmental Organisation
NHS	National Health Service
NL	The Netherlands
PL	Poland
PPS	Personal Public Service
PT	Portugal
RD	Royal Decree
RO	Romania
SE	Sweden
SI	Slovenia
SK	Slovakia
TCN	Third Country National
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom

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EXECUTIVE SUMMARY

This Study presents the main findings of the research on obstacles to the right of free movement and residence for European Union (EU) citizens and their families. The aim of the research was to identify the remaining transposition issues of Directive 2004/38/EC (the Directive) and the primary barriers to free movement (including entry, residence and access to social security), to provide an assessment of the main challenges at both EU and national level, and to determine the extent to which these obstacles hinder citizens in exercising their right to free movement. It also examines the existence of legal or practical instances of discrimination, the measures to counter abuse of rights used by Member States, and data on refusal of entry and/or residence, expulsions and the reasons for such decisions.

- **Overview of the transposition of key provisions of the Directive**

Transposition of selected provisions of the Directive (Chapter 2) was examined in nine selected Member States (i.e. **BE, DE, ES, FR, IE, IT, PL, SE, UK**). While transposition is for the most part in line with the Directive in these Member States, challenges remain 10 years after the deadline for transposition of the Directive. Of the key provisions analysed in the Member States, **Article 14 on the retention of the right of residence and Article 27 on restrictions to entry and residence on grounds of public policy, security and health** appear to be the **most problematic** with issues identified in the majority of the nine selected Member States. For example, **Poland** has not transposed Article 14 at all, while the transposing legislation in **Germany, France** and **Ireland** does not exclude expulsion as an automatic consequence of recourse to the social assistance system. In addition, **Belgium's** transposing legislation does not require that the verification of the conditions of residence must not be carried out systematically.

Moreover, another issue concerning transposition of the Directive relates to terms that are broad and leave a margin of discretion to Member States to define them. One of the most problematic terms is the concept of **'sufficient resources'**. The Directive establishes as a condition for residence for more than three months that EU citizens and their family members have sufficient resources not to become a burden on the social assistance system of the host Member State. **While the notion of 'sufficient resources' is recognised in the transposing legislation of most Member States, it is not always defined (e.g. DE, PL), which causes difficulties with respect to entitlement to a registration certificate or residence card. There are also some cases (FR, IE, IT and UK) where the definition of 'sufficient resources' in national legislation does not fully comply with the Directive.**

The concept of **'unreasonable burden'**, set out in Article 14 of the Directive as a condition for the retention of the right of residence, has also proved challenging in most Member States. **While some Member States mirror the Directive's provision, they do not define the concept (e.g. BE, ES), leaving it up to the discretion of the competent authorities. Others transpose the concept incorrectly or interpret it narrowly. These inconsistencies have led to expulsions on the grounds that an individual is deemed an unreasonable burden on the social assistance system of the host Member State.**

The Directive does not define clearly the concepts of **'dependent family members', 'durable relationship duly attested', 'genuine chance of being engaged' and 'public security'**, leaving a wide margin of discretion to Member States.

- **Analysis of the primary barriers to the right to entry**

In terms of the right of **entry** (Chapter 3), **EU citizens** have experienced only a few obstacles in exercising their entry rights within the EU. These include the **obligation to report their presence** in the Member State within a **reasonable period of time**. Also, in the **UK**, ID cards have been rejected and **passports** have been **required**. There is also **no appeals mechanism** against refusal of entry in **Ireland**.

By contrast, family members, in particular third country national (**TCN**) **family members**, encounter a number of obstacles in exercising their right of entry, particularly in relation to the **issuance of visas**. These include **excessive delays**, visas **not** being issued **free of charge** and **refusal** of the **accelerated procedure**. Visas are also often **refused on invalid grounds** or **without a justified reason**. There are often **excessive documentation requirements** to obtain a visa and **scarce and confusing information** is available regarding visas. Immigration authorities are also unaware of Decision 565/2014 abolishing the visa requirement for TCN family members who hold a valid residence permit issued by certain Member States (e.g. **Cyprus**).

- **Analysis of the primary barriers to the right to residence**

Moreover, EU citizens and their TCN family members have encountered a number of obstacles in exercising their **residence** rights in the Member States (Chapter 4). For example, they encounter a number of **bureaucratic issues** (i.e. excessive delays and unnecessary documentation requirements) in obtaining residence cards/registration certificates.

Another significant issue reported in a number of Member States is that **invalid grounds** are often used to **justify denials** of the right to reside. This is particularly the case for permanent residency applications. There is also a **lack of sufficient information** available regarding the right of residence in a number of Member States. A specific issue concerns **inadequate and contradictory information** provided by national authorities regarding long-term resident status. In addition, some Member States adopt a **restrictive interpretation** of the **proof of health insurance** necessary to obtain a residence card.

- **Analysis of the primary barriers related to social security**

In terms of accessing **social security** (Chapter 5), EU citizens and their family members have experienced numerous obstacles in accessing old age pensions, healthcare, family benefits and unemployment benefits in the Member States. Most of the problems reported in accessing social benefits concern **old age pensions**, chief among them are a lack of coordination between national authorities for the calculation of the contribution periods, imposition of a residence requirement for EU citizens and their family members in order to be entitled to old age pensions and ignorance of the aggregation rules for old age pensions. Other obstacles relate to problems of double-taxation of pensions and the obligation to terminate a pension contract on departure abroad and to reimburse the state contributions.

Obstacles regarding accessing **healthcare** include issues with the recognition and coverage of the European Health Insurance Card (EHIC), lack of knowledge of the applicable legal framework and difficulties in obtaining the S1 form (attesting to healthcare entitlement) when moving to another Member State.

Delays, refusals to pay and other obstacles in obtaining **family benefits** have been reported in a number of Member States. The most frequent issues are the imposition of a residence requirement and bureaucratic problems in obtaining the necessary documents. Substantial barriers to receiving **unemployment benefits** have also been frequently reported.

The most widespread problem relating to access to social security is the **lack of coordination and communication** between national authorities of different Member States. This leads to the non-recognition of rights to which the EU citizens and their family members are entitled under the Directive. It also leads to excessive delays in accessing free movement rights. Issues relating to **social security contributions** centre on difficulties in demonstrating payment of such contributions in another Member State. Ignorance of rules determining the applicable legislation also often leads to the refusal of social benefits.

- **Other recurring barriers**

EU citizens and their family members experience **other recurring obstacles** (Chapter 6) that have an impact on the exercise of their free movement and residence rights in the Member States. These include **accessing employment, using vehicles** in another Member State, **double taxation** of salaries and pensions, **poor administrative services, additional requirements** for EU citizens seeking to **register to vote/stand as a candidate** in European and municipal elections in another Member State and issues with the **recognition of academic diplomas** from another Member State.

- **Review of legal or practical instances of discrimination**

While the research shows some **discrimination in the exercise of free movement rights** (Chapter 7), most issues of discrimination tend to occur after the EU citizens and family members have entered and settled in the host Member States when accessing the employment market or services.

Recurrent cases of **discrimination on grounds of nationality** concerning EU citizens and their family members have been identified. These include **accessing employment**, including obstacles in accessing employment for **Romanian and Bulgarian** nationals despite the end of the transitional measures on 1 January 2014, and **civil service employment positions** being reserved for nationals in several Member States. In addition, recurring issues have been reported of EU citizens and their TCN family members being inhibited from **accessing education/schools** on grounds of their nationality, as well as **different tuition fees** being applied to nationals and non-nationals. Other recurring issues are **different fees** being applied to EU citizens compared to nationals (e.g. for residence cards, car insurance premiums, etc), **banks discriminating against non-nationals**, and **price discrimination** for EU citizens/their TCN family members for using **public transport**.

Only a limited number of complaints and petitions have been found concerning discrimination of EU citizens and their family members on grounds of **their civil status/sexual orientation**. However, one particular obstacle experienced is that EU citizens' civil partnerships are not recognised for the purposes of entry or residence in some Member States (e.g. **CY** and **SI**) although the Member State recognises civil partnerships. A number of discriminatory obstacles to free movement have been encountered by same-sex couples in registered partnerships in **Slovakia** and **Poland**.

These include refusal of the right of permanent residence status, non-recognition of residence cards issued by another Member State leading to refusal of entry, refusal to grant a residence card or work permit, uninsured persons being excluded from the health insurance of their partner, refusal to issue a birth certificate to children of same-sex partners and non-eligibility for financial compensation in the case of death of one of the partners.

Very few complaints and petitions have been made concerning EU citizens and their family members being discriminated against on **grounds of their racial or ethnic origin** in exercising their free movement and residence rights. However, **Roma** have faced discrimination when registering in another Member State or have been barred from living in caravans and subject to evictions, expulsions and deportations as a result. They also experience barriers in accessing employment, education, financial services, accommodation and social protection.

- **Comparative overview of Member States measures to counter abuse of rights**

All Member States have adopted measures to tackle **marriages of convenience**, and most of them have also adopted measures to address different kinds of **fraud** aimed at obtaining free movement rights (Chapter 8). The most common measure adopted in the Member States tackles the issue of false information or forged documents. These measures provide for the refusal, termination or withdrawal of any right conferred by the Directive. In addition, abuses and fraud could lead to **finances** and **imprisonment** in a substantial number of Member States. In certain Member States, these measures have a **negative or disproportionate impact** on the right to free movement. Serious concerns relate to an **inversion** of the **burden of proof**, when EU citizens and their spouses are required to demonstrate that their marriage is not a marriage of convenience. Under Directive 2004/38, the burden of proof lies with the national authorities. Moreover, certain Member States **systematically investigate** marriages between EU citizens and TCNs.

- **Overview of the extent of the refusal of entry and residence expulsions in Member States**

Data concerning **refusal of entry, refusal of residence rights and expulsions** (Chapter 9) are rarely publicly available in the Member States. Moreover, national authorities are often unwilling to provide this sort of information. The same applies to data on the main reasons invoked by Member States to justify these decisions.

Refusals of residence and expulsions on the basis of a **lack of sufficient economic resources** are a recurrent issue in certain Member States. In some cases, the concerned Member State seems not to take into account all the relevant considerations to establish whether a person has become an unreasonable burden on the social assistance system, potentially in violation of Directive 2004/38.

A considerable number of Member States also misapply the possible restriction on free movement based on **public policy and public security**. In particular, certain Member States expel EU citizens and their family members on the basis of criminal convictions without taking into due account all the relevant circumstances of the case.

Not all Member States respect the **increased protection** established by the Directive for EU citizens and family members who have resided in the host member State for more than five or ten years. Moreover, in many Member States the grounds for refusals of entry, residence and expulsion are not sufficiently determined by legal provisions and administrative guidelines. This leaves the national authorities with excessive discretion and leads to **legal uncertainty** for EU citizens and their family members.

Overall, transposition and implementation of Directive 2004/38/EC remains problematic 14 years after its adoption. While transposition is largely compliant with the Directive, issues exist in all of the Member States analysed. The practical implementation shows a tendency to make the most of the permitted restrictions to the rights of entry and residence and to interpret the Directive in a restrictive manner. As a result, a careful monitoring of the full transposition and implementation of the Directive is necessary to guarantee free movement rights. In addition, bureaucratic barriers continue to be an obstacle to the full enjoyment of free movement rights.

- **Recommendations**

In terms of **recommendations** (Chapter 11) for the **European Parliament and the European Commission**, the following have been proposed:

- The European Commission should require Member States to **collect and provide data** on the **number of refusals of entry and residence and the number of expulsions** of EU citizens and their family members as well as the **reasons** for the refusals and expulsions. The European Commission should also request Member States to **regularly report information** on the **implementation of the Directive**. To this end, the European Commission should request precise and clear information on the key rights established in the Directive, in particular regarding the points where the most issues and barriers have been identified, but also to assess the trends and the possible impact of recent events (the immigration crisis, terrorist attacks, the outcome of the **UK** referendum and its implications, new legal or practical measures) on the implementation of the Directive.
- The European Commission should **monitor closely and enforce the full transposition of the Directive** in all the Member States. The European Commission should **act more systematically** on Member States breaches of the Directive. While the European Commission has initiated 29 infringement proceedings since 2008 related to various transposition issues, the fact that transposition is still problematic in several Member States shows that rigorous monitoring and action from the Commission is needed.
- The European Commission should **update and expand its guidance for better transposition and application of Directive 2004/38/EC** in order to **include recent case-law from the CJEU** as well as **additional clarifications on aspects of the Directive** which were not covered. The European Commission should use the approach of the Transposition Implementation Plans (TIPS) to ensure the complete and proper application of the Directive, in particular with the support of interpretative transposition guidelines and a transposition checklist.
- The European Parliament Petitions Committee should **continue to monitor closely petitions** in relation to free movement rights and work **in close**

collaboration with the European Commission to address the petitions. It is crucial that **complaints** received within the SOLVIT system are dealt with **effectively and rapidly**. Therefore, the **SOLVIT service** should be supplemented with a **hotline** that would allow EU citizens and their family members to receive timely information and support when they face barriers to the exercise of their free movement rights.

- The European Parliament and the European Commission should **increase** their **efforts at raising awareness** among EU citizens and their family members of their free movement rights.

In terms of **recommendations** for **Member States**, the following have been proposed:

- Member States must take, without delay, the **necessary action** to ensure that their **national legislation reflects all of the requirements of the Directive**.
- Member States should ensure the **removal of unnecessary barriers** to the rights of **entry and residence** in particular the requirement to report **one's presence in another Member State upon arrival and the administrative requirements** at the borders of EU and non-EU Member States. Member States should also ensure the provision of an accelerated procedure for the entry of TCN family members and the establishment of an appeal system against refusals of entry/residence and any discriminatory practices on their territory.
- Member States should ensure that **national authorities provide clear and sufficient information** regarding **visa requirements** and **residence rights** for TCN family members.
- Member States should ensure the **proper training of relevant staff** regarding **the correct application of the Directive**. Member States should also ensure that the **Directive's requirements** are **sufficiently defined in national legislation** and, if needed, **supplemented by adequate administrative guidelines** in order for national authorities to have clear instructions on the application of the Directive.

1. INTRODUCTION

1.1. Legal Context

From the outset, the European Community set itself the objective, inter alia, of abolishing obstacles to the freedom of movement of persons¹. These free movement rights were originally conceived for the sole purpose of enhancing economic integration and were, therefore, confined to those persons engaged in economic activity as workers and self-employed persons, as well as those giving or receiving services.

The EU competence to legislate on the free movement of persons has evolved overtime as reflected in subsequent Treaties. The Maastricht Treaty constituted a turning point by explicitly introducing the concept of Union citizenship, together with a number of associated rights, such as the right to move and reside freely in all Member States².

In 2009, the Lisbon Treaty recognised the free movement of persons among the objectives of the European Union³. **Article 21** of the Treaty on the Functioning of the European Union (TFEU) establishes that every citizen of the Union has **the right to move and reside freely** within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and to the measures adopted to give effect to that right. Moreover, Article 45 of the **Charter of Fundamental Rights of the European Union** (the Charter) also guarantees the right of every EU citizen to move and reside freely within the territory of the Member States. The Charter is legally binding and applicable to the EU since the Lisbon Treaty entered into force in 2009.

The right for a person to exercise free movement is central to **EU citizenship**⁴ and complements the other freedoms of the EU internal market, i.e. freedom of movement for workers⁵, services⁶, capital⁷ and freedom of establishment⁸. In addition, as people can move freely between Member States, the principle of non-discrimination on the basis of nationality⁹, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation¹⁰ forms a crucial component of freedom of movement.

In parallel with the evolution of EU competence, free movement rights have been extended through legislation and case law to encompass not only workers, but all categories of citizens. The following Directives were adopted in 1990: **Council Directive 90/365/EEC**¹¹ on the right of residence for employees and self-employed persons who have ceased their occupational activity, **Council Directive 90/366/EEC**¹² on the right of

¹ Article 3(1)(c) of the Treaty establishing the European Economic Community, EEC Treaty, signed in Rome in 1957 and entered into force on 1 January 1958.

² Treaty on the European Union, signed in Maastricht in 1992 and entered into force on 1 November 1993.

³ Article 3 of the Treaty on the European Union, consolidated version, OJ C 326, 26.10.2012, p. 13.

⁴ Articles 20 and 21 of the TFEU, introduced by the Treaty establishing the European Community (Nice consolidated version – '**Treaty of Nice**'), signed in Nice in 2001 and entered into force on 1 February 2003.

⁵ Article 45 of the TFEU, introduced by the Treaty of Nice.

⁶ Article 56 of the TFEU, introduced by the Treaty of Nice.

⁷ Article 63 of the TFEU, introduced by the Treaty of Nice.

⁸ Article 49 of the TFEU, introduced by the Treaty of Nice.

⁹ Article 18 of the TFEU.

¹⁰ Article 19 of the TFEU.

¹¹ Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, OJ L 180, 13.7.1990, p. 28.

¹² Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students, OJ L 180, 13.7.1990, p. 30.

residence for students, and **Council Directive 90/364/EEC**¹³ on the right of residence for nationals of Member States who do not hold this right under other provisions of Community law, together with the members of their families.

Directive 2004/38/EC¹⁴ was subsequently adopted to take account of the large body of case law linked to the free movement of persons and to integrate the fragmented approach of the previous Directives. The provisions of this Directive establish the right of entry and residence in the EU Member States for EU citizens and their family members as well as providing some safeguards against refusals of residence and expulsions.

While the Directive drew extensively from previous legislation, it introduced the following innovations:

- **The extension of EU citizens' family reunification rights to include the registered partner** where the host Member State treats registered partners as equivalent to spouses¹⁵.
- New rights for family members in the event of **death or departure of the EU citizen** or the dissolution of the marriage or registered partnership¹⁶.
- The right of EU citizens and their families to reside for a **period of up to three months** without any conditions or formalities other than the requirement to hold a valid identity card or passport¹⁷.
- For periods of residence of **more than three months**, EU citizens no longer need to obtain a residence permit in the Member State of residence¹⁸.
- A right of **permanent residence** after five years of continued legal residence in the host Member State¹⁹.
- Limited possibility for Member States to **end the right of residence** of EU citizens and their families on grounds of non-compliance with residence conditions and on grounds of public policy, public security and public health²⁰. It explicitly states that expulsion must not be the automatic consequence of recourse to social assistance in the host Member State²¹.
- Limited possibility for **expulsion on grounds of public policy and public security** of EU citizens and their families who have acquired a right of permanent residence; limited possibility for expulsion of EU citizens who have resided in a Member State for the previous 10 years, or who are minor children, to cases based on imperative grounds of public security²².
- Reinforcement of the existing procedural **guarantees against expulsion**, including their extension to cases of expulsion on grounds of non-compliance with residence conditions²³.

¹³ Council Directive 90/364/EEC of 28 June 1990 on the right of residence, OJ L 180, 13.7.1990, p. 26.

¹⁴ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States 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 with EEA relevance), OJ L 158, 30.4.2004, p. 77.

¹⁵ Article 2(2)(b) of Directive 2004/38/EC.

¹⁶ Articles 12-14 of Directive 2004/38/EC.

¹⁷ Article 6 of Directive 2004/38/EC.

¹⁸ Article 7 of Directive 2004/38/EC.

¹⁹ Article 16 of Directive 2004/38/EC.

²⁰ Article 27 of Directive 2004/38/EC.

²¹ Article 14 of Directive 2004/38/EC.

²² Article 28 of Directive 2004/38/EC.

²³ Article 31 of Directive 2004/38/EC.

Directive 2004/38/EC **interacts** with other EU acts intended to regulate specific aspects of the free movement of persons, often related to the internal market. Specific rules governing freedom of movement for workers are contained in **Regulation (EU) No 492/2011**²⁴ on freedom of movement for workers within the Union. Relevant rules are also contained in **Regulation (EC) No 883/2004**²⁵ on the coordination of social security systems and its implementing **Regulation (EC) No 987/2009**²⁶; **Directive 2014/50/EU**²⁷ on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights; and **Directive 2014/54/EU**²⁸ on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers. These rules do not apply to posted workers, who are not themselves exercising their free movement rights and are instead protected by the Posting of Workers Directive (**Directive 96/71/EC**²⁹).

Finally, in order to reside legally in another EU Member State, any EU citizen should be able to practise his/her profession freely there. This requires the recognition of professional qualifications obtained in other Member States. **Directive 2005/36/EC**³⁰ (as revised by **Directive 2013/55/EU**³¹) on the recognition of professional qualifications consolidates and updates the previous Directives covering recognition rules. It thereby complements Directive 2004/38/EC.

1.2. Application of Directive 2004/38 until 2008

Directive 2004/38 was adopted on 29 April 2004 entering into force on 30 April 2004, day of its publication in the Official Journal of the European Union. The deadline for its transposition was set for 30 April 2006, two years after its entry into force³².

In 2008, the Commission published a **report** on the application of Directive 2004/38/EC³³. In this Report, the Commission reported initiating **infringement proceedings** against 19 Member States³⁴ between June 2006 and February 2007 for their failure to communicate the text of the provisions of national law adopted to transpose the Directive. However, by

²⁴ Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (Text with EEA relevance, OJ L 141, 27.5.2011, p. 1.

²⁵ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p. 1.

²⁶ Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (Text with relevance for the EEA and for Switzerland), OJ L 284, 30.10.2009, p. 1.

²⁷ Directive 2014/50/EU of the European Parliament and of the Council of 16 April 2014 on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights (Text with EEA relevance), OJ L 128, 30.4.2014, p. 1.

²⁸ Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers (Text with EEA relevance), OJ L 128, 30.4.2014, p. 8.

²⁹ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997, p. 1.

³⁰ Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (Text with EEA relevance), OJ L 255, 30.9.2005, p. 22.

³¹ Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications; Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market **Information System ('the IMI Regulation')**(Text with EEA relevance), OJ L 354, 28.12.2013, p. 132.

³² Article 40 of Directive 2004/38.

³³ **European Commission, 'Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', Brussels, 10.12.2008 COM(2008) 840 final, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0840:FIN:en:PDF>.**

³⁴ All Member States except Denmark, Ireland, Netherlands, Austria, Slovenia, Slovakia, Bulgaria and Romania.

the time of publication of the Commission Report, all Member States had adopted transposition measures and the infringement proceedings for non-communication were closed. Despite this, the Commission found the overall transposition of Directive 2004/38/EC to be **rather disappointing**: 'Not one Member State has transposed the Directive effectively and correctly in its entirety. Not one Article of the Directive has been **transposed effectively and correctly by all Member States**'³⁵. Considerable parts of the Directive, along with crucial provisions, had been incorrectly transposed in most Member States.

With respect to the practical application of the Directive, the Commission reported that, in the 30 months in which the Directive had been applicable, it had received more than 1,800 individual complaints, 40 questions from the Parliament and 33 petitions on its application. It had registered 115 complaints and opened five infringement cases for incorrect application of the Directive. Persistent violation of the core rights of EU citizens related mostly to the right of entry and residence of third country family members (e.g. problems with entry visas or when crossing the border, additional conditions attached to the right of residence, and delays in issuing residence cards), as well as to the requirement for EU citizens to submit additional documents to those specified in the Directive in their residence applications. In 2013, the Commission reported having opened further infringement proceedings in 2011 against 12 Member States. In 2012, it sent reasoned opinions to the relevant Member States in seven of these 12 cases³⁶. Since 2013 the Commission closed four infringement procedures relating to Directive 2004/38 and sent two reasoned opinions³⁷.

Following its 2008 Report, the Commission published a set of **guidelines** in 2009 to assist Member States in the transposition of the Directive³⁸.

Also in 2009, the Parliament commissioned a **comparative study** on the application of Directive 2004/38/EC³⁹. The study covered the period between June 2008 and February 2009 and focused on 10 Member States⁴⁰ in depth, selected for being representative of the problems in implementing the Directive, as well as for their significant migration flows and to achieve a reasonable geographical balance within EU-27. The study concluded that the Commission should have taken a more proactive approach to ensure the correct application of the Directive. At the same time, the Commission appeared to have taken effective measures particularly with regard to the situation of the Roma and the security

³⁵ European Commission, 'Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', Brussels, 10.12.2008 COM(2008) 840 final, available at: [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0840:FIN:en:PDF, p. 3](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0840:FIN:en:PDF,p.3).

³⁶ European Commission, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions under Article 25 of the TFEU on progress towards effective EU Citizenship 2011-2013, 8.5.2013, COM(2013) 270 final, available at: http://ec.europa.eu/justice/citizen/files/com_2013_270_en.pdf.

³⁷ European Commission, database on infringement procedures available at: http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&r_dossier=&decision_date_from=&decision_date_to=&DG=JUST&title=Directive+2004%2F38&submit=Search.

³⁸ European Commission, 'Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', 2.7.2009, COM(2009) 313 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52009DC0313>.

³⁹ European Parliament, 'Comparative study on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', 2009, PE 410.650, available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET\(2009\)410650_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET(2009)410650_EN.pdf)

⁴⁰ Belgium, Estonia, France, Greece, Hungary, Ireland, Italy, Romania, Sweden and the UK.

package ('Pacchetto sicurezza') in **Italy** and the denial of sickness cover to British residents in France⁴¹.

The Parliament⁴² and the Commission⁴³ recognised that action was needed to address the issues raised by the right to entry and residence of third country family members and the excessive requirements for EU citizens in applying for residence, and they committed to **monitoring Member States' implementation** of the Directive.

Finally, in 2013, the Commission published a Communication on the five priority actions in the field of free movement⁴⁴: helping Member States to combat marriages of convenience; helping authorities to apply EU social security coordination rules; helping authorities to meet social inclusion challenges; addressing the needs of local authorities by promoting the exchange of best practice; helping local authorities to apply EU free movement rules in practice. As part of its commitment, in 2014 the Commission issued a handbook to help national authorities to fight abuse of the right to free movement⁴⁵.

1.3. Objective and methodology

This Study presents the main findings of the research on obstacles to the right of free movement and residence for EU citizens and their families which was commissioned by **the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs** at the request of the LIBE and PETI Committees. The aim of the research was to identify the remaining transposition issues of Directive 2004/38/EC and the primary barriers to free movement, including, for example, entry, residence and access to social security systems, to provide an assessment of the main challenges at both EU and national level, and to determine the extent to which these obstacles hinder citizens in exercising their right to free movement. It also sets out to examine the existence of legal or practical instances of discrimination, the measures to counter abuse of rights used by Member States, and the data on refusal of entry and/or residence, expulsions and the reasons for such decisions.

The scope covers both the transposition and the practical implementation of selected provisions of Directive 2004/38/EC, in particular the changes since the 2008 Commission report and 2009 Study commissioned by the Parliament. Since the Study focused on key

⁴¹ European Parliament, 'Comparative study on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', 2009, PE 410.650, available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET\(2009\)410650_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET(2009)410650_EN.pdf), p.16-17.

⁴² European Parliament, 'Report on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', 23.3.2009, (2008/2184(INI)), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2009-0186+0+DOC+PDF+V0//EN>.

⁴³ European Commission, 'Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', Brussels, 10.12.2008 COM(2008) 840 final, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0840:FIN:en:PDF>

⁴⁴ European Commission, 'Communication from the Commission to the European Parliament and the Council, the European Economic and Social Committee and the Committee of the Regions - Free movement of EU citizens and their families: Five actions to make a difference', 25.11.2013, COM (2013) 837 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0837&from=EN>.

⁴⁵ European Commission, 'Communication from the Commission to the European Parliament and the Council helping national authorities fight abuses of the right to free movement: Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens', 26.9.2014, COM(2014) 604 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0604&from=EN>.

aspects of the Directive's rights, it does not provide or aim to provide a full assessment of the transposition of the Directive.

The analysis at national level focused in particular on nine Member States. The Member States selected for closer analysis were defined in agreement with the European Parliament **Policy Department for Citizens' Rights and Constitutional Affairs during the inception phase: BE, DE, ES, FR, IE, IT, PL, SE** and the **UK**. The selection was based on several agreed criteria such as keeping a geographic balance across the EU, with big and small Member States, the large amount of EU citizens and their TCN family members moving to (e.g. **BE, IE, the UK**) and moving from some of these Member States (e.g. **PL**), and the known problems regarding the exercise of free movement and residence rights that were already highlighted in some Member States (e.g. **SE**) in the Commission 2008 report and the 2009 study commissioned by the European Parliament. Detailed country reports were developed for each of these countries and these are publicly available. The assessment of the remaining 18 Member States was based on targeted questionnaires, following a similar structure and scope as the selected country reports, with the aim of obtaining an overview on recurring barriers to free movement.

A key methodological approach in this project was the use of highly qualified national experts to carry out the in-depth analysis of the nine selected Member States. This ensured a high degree of accuracy, as the experts not only provided their technical knowledge but also their awareness of the national context. National experts were also used for the assessment of the situation in the other 18 Member States.

In order to ensure a harmonised approach to the country analysis and facilitate comparable information, experts were provided with a template and detailed guidelines describing the method for the in-depth analysis of the situation in the Member States. In addition, the core team carried out a first coordinated literature review in order to identify relevant sources of information at EU and national level to be used by the national experts. The sources of information used include EU sources, such as the 2008 Commission report⁴⁶, the 2009 Study commissioned by the European Parliament⁴⁷, the Centre for European **Policy Studies' (CEPS) 2009 Report on the implementation of Directive 2004/38/EC**⁴⁸, petitions submitted to the European Parliament from 2012 to 2014, together with the Your Europe Advice Quarterly Reports covering the period between 2012 and 2015. Experts were also provided with relevant case law from the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). A second literature review by each national expert ensured that the data and information in each Member State was fully updated.

Where needed, interviews with national competent authorities, NGOs, equality bodies and/or experts were carried out in order to obtain specific data or information on the main challenges faced during the practical implementation of the legislation.

⁴⁶ European Commission, 'Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', Brussels, 10.12.2008 COM(2008) 840 final, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0840:FIN:en:PDF>, p. 4.

⁴⁷ European Parliament, 'Comparative study on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', 2009, PE 410.650, available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET\(2009\)410650_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET(2009)410650_EN.pdf).

⁴⁸ Carrera, S. and Faurer Atger, A., Implementation of Directive 2004/38 in the context of EU enlargement, April 2009, Centre for European Policy Studies, Brussels, 2009, available at: <http://aei.pitt.edu/10758/1/1827.pdf>.

The main challenge identified during the course of the project relates to the scarce availability of data. Member States do not gather information on the implementation of the right to entry or residence in a systematic way, differentiating type of citizens and the motivation behind each case's **decision**. Some Member States make publicly available statistical data or information on certain aspects while in others the publicly available data or information is very scarce. In addition, the project did not aim at systematically gathering all the information available on each specific issue but to raise examples that would be representative of the situation, challenges or best practices related to free movement in each country. On that basis, the examples mentioned do not respond to a systematic approach both due to the scope and method of the project and to the scarcity of the information in most Member States.

2. OVERVIEW OF THE TRANSPOSITION OF KEY PROVISIONS OF THE DIRECTIVE IN MEMBER STATES

KEY FINDINGS

- While transposition is **for the most part in line** with the Directive, **challenges remain**, 10 years after the deadline for transposition of the Directive. Transposition issues have been identified for all the 10 selected provisions except for Article 28 concerning protection against expulsion.
- Out of the key provisions analysed, **Article 14** on the **retention of the right of residence** appears to be the **most problematic** with issues in the majority of the nine selected Member States. For example, **Poland** has not transposed this provision. The transposing legislation in **Germany, France** and **Ireland** do not exclude expulsion as an automatic consequence of recourse to the social assistance system. **Belgium's** transposing legislation does not require that the verification of the conditions of residence must not be carried out systematically.
- The Directive includes broad terms which leave a margin of discretion to Member States to define them further, which can lead to interpretation against the spirit of the Directive. One of the most problematic terms is the concept of **'sufficient resources'**. While the concept of **'sufficient resources'** is recognised in the transposing legislation of most Member States, it is not always defined (e.g. **DE, PL**), which causes difficulties with respect to entitlement to a registration certificate or residence card. In those Member States where the concept is defined there are some cases (**FR, IE, IT and UK**) where the definition of **'sufficient resources'** in national legislation does not fully comply with the Directive.
- The concept of **unreasonable burden**, set out in Article 14 of the Directive as a condition for the retention of the right of residence, has proved challenging in most Member States. While some Member States mirror the Directive's provision, they do not define the concept (e.g. **BE, ES**), leaving it up to the discretion of the competent authorities. Others transpose the concept incorrectly or limit its interpretation. These inconsistencies have led to expulsions on the grounds that an individual is deemed an unreasonable burden on the social assistance system of the host Member State.

2.1. Context: Difficulties in Transposition

The transposition of all provisions of Directive 2004/38/EC has proved challenging, as recognised by the 2008 Commission Report, which stated that no single Article of the Directive had been fully transposed by all Member States, and announced infringement proceedings against most Member States under Article 258 TFEU⁴⁹. A year later, the Study commissioned by the European Parliament confirmed this disappointing situation.

Since 2008, the European Commission has initiated a number of **infringement proceedings** for non-compliance with the Directive⁵⁰. The table below shows an overview

⁴⁹ All Member States except Denmark, Ireland, the Netherlands, Austria, Slovenia, Slovakia, Bulgaria and Romania.

⁵⁰ The procedure starts when the Commission sends a 'Formal Notice' asking for information to the non-complying Member States to be answered during a specified period of time (usually two months). If the Member States do not provide a justified answer, the Commission sends a formal request to comply (Reasoned Opinion). If the Member States fail to ensure compliance after the second request, the case is transferred to the CJEU. For more

of the number of Member States that have received a formal notice for not ensuring compliance with the Directive. The table illustrates, that the European Commission launched infringement proceedings against **13 Member States (BE, CZ, DE, ES, IT, CY, LT, HU, MT, AT, PL, SE, UK)** for not complying with the Directive. For instance, the table displays the incorrect transposition of the Directive with regard to the rights to move and reside freely (i.e. problems with registration certificates, residence cards and permits) in **BE, CZ, DE, CY, HU, AT, SE, UK**. The Commission also brought cases concerning discrimination regarding labour market access in **IT** and **the UK**. Furthermore, **BE** and **LT** did not protect EU citizens against unfair expulsions. According to the information reported by the European Commission, these cases were closed in only four Member States (**ES, IT, CY** and **MT**) while in the remaining countries the Commission sent a second request (Reasoned Opinion) to comply⁵¹.

Table 1: Countries that have received a formal notice from the Commission after 2008 for not ensuring compliance with the Free Movement Directive (2004/38/EC)

MS	Infringement Number	Transposition issues	Decision Type (a)
BE	20112033	<u>Rights to move and reside freely + safeguards against expulsions:</u> BE does not facilitate the entry and residence of TCN family members of Union Citizens (Visa and residence cards). Belgium has not transposed the procedural safeguards against the expulsion of EU citizens who have recourse to the Belgium Social Assistance system.	Formal Notice (June 2011) / Reasoned Opinion (February 2013)
CZ	20112077	<u>Rights to move and reside freely:</u> CZ obliges EU citizens and family members to present a certificate of accommodation with their applications for residence documents.	Formal Notice (June 2011) / Reasoned Opinion (January 2012)
DE	20112086	<u>Rights to move and reside freely:</u> DE does not have a procedure to facilitate the entry and residence for extended family members of EU nationals. DE has not adopted any legislation to ensure that extended family members are granted the full set of rights established by the Directive (i.e. registration certificates, residence cards).	Formal Notice (June 2011) / Reasoned Opinion (June 2012)
ES	20112035	<u>No clear information:</u> "Regarding unresolved problems with the remaining Member States, infringement proceedings were launched over the period from March to June 2011 against Austria, Cyprus, Czech Republic, Germany, Malta, Lithuania, Spain, Sweden, Poland and the United Kingdom".	Formal Notice (March 2011) / Closing of the case (April 2013)
IT	20112053	<u>Discrimination regarding access to the labour market:</u> For instance, legislation in the province of Bolzano provides that job candidates' who are resident for at least two years have preference over other candidates in accessing the labour market in the public sector.	Formal Notice (October 2011) / Closing Case: December 2013

information see European Commission, 'Infringements: Frequently Asked question', Base de données des communiqués de presse, Strasbourg 17 January 2012.

⁵¹ The period between the first and second request (formal notice vs reasoned opinion) is on average one year or more.

CY	20112064	<u>Rights to move and reside freely</u> : establishes fines of up to €1 000 for EU citizens staying in the country for longer than 21 days without reporting their presence within 35 days of their arrival. In addition, there are excessive delays in issuing residence cards for family members.	Formal Notice (May 2011) / Closing of the case (July 2014)
LT	20112083	<u>Safeguards against expulsions</u> : Legislation does not ensure that national authorities may only expel those citizens who are a real and present danger to society.	Formal Notice (June 2011) / Reasoned Opinion (January 2012) / Additional Reasoned Opinion (May 2013)
HU	20106001	<u>Rights to move and reside freely</u> : HU argues that Slovakia infringed European law by refusing the entry of the Hungarian president in Slovakia in August 2009.	Reasoned Opinion (October 2011)
MT	20112032	<u>No clear information</u> : "Regarding unresolved problems with the remaining Member States, infringement proceedings were launched over the period from March to June 2011 against Austria, Cyprus, Czech Republic, Germany, Malta, Lithuania, Spain, Sweden, Poland and the United Kingdom".	Formal Notice (March 2011) / Closing of the case (January 2013)
AT	20112034	<u>Rights to move and reside freely</u> : AT law does not grant extended family members with a "residence card for EU family members" but with a residence permit valid only for 1 year and not for the envisaged period of residence of the Union citizen (if it is < 5 years). They also need to apply for a specific work permit.	Formal Notice (June 2011) / Reasoned Opinion (June 2012)
PL	20112074	<u>No clear information</u> : "Regarding unresolved problems with the remaining Member States, infringement proceedings were launched over the period from March to June 2011 against Austria, Cyprus, Czech Republic, Germany, Malta, Lithuania, Spain, Sweden, Poland and the United Kingdom".	Formal Notice (March 2011)
SE	20112060	<u>Rights to move and reside freely</u> : SE does not provide a formal procedure to facilitate entry and residence rights for extended family members (i.e. registration certificates, residence cards, the high cost of visas). Furthermore, according to Swedish law, the rejection of registration applications cannot be appealed.	Formal Notice (May 2011) / Additional formal notice (September 2011) / Reasoned opinion (June 2012)
UK	20112054	<u>Rights to move and reside freely + discrimination regarding access to the labour market</u> : the UK does not allow extended family members to apply for their residence in the UK before the arrival of the EU citizen. In addition, during the first year, the UK does not issue workers from Romania and Bulgaria with the same documents as workers from other EU Member States.	Formal notice (June 2011) / Reasoned Opinion (April 2012)

The freedom of movement of people within the internal market has been recognised in the EU Treaties as a fundamental freedom of the EU since 1968. The Charter of Fundamental Rights changed the approach to free movement, with Article 45 recognising it as a right of all EU citizens and not only EU workers, as was the case under the EC Treaty. EU citizens therefore have the right to move and establish their residence freely within the territory of the EU. Directive 2004/38/EC sets out the framework for the implementation of this right, establishing the limitations and conditions according to the Treaty and case law. **The Directive's provisions are therefore applicable to EU citizens and their family members** from both EU and TCN countries, enabling them to travel and reside in an EU Member State which is not their country of origin. This change is the likely cause of the difficulties in the transposition and implementation of Directive 2004/38/EC.

Recent developments highlight the importance of this Directive. The **'intergovernmental'** negotiations and agreement between the European Council and the UK government before the UK referendum focused on the possible introduction of restrictive changes to the **free movement regime in the EU. This agreement 'fell'** and will not be implemented following the referendum results, but the EU and the UK will have to negotiate the UK exit from the EU and the status of UK citizens in other MSs and vice-versa. The EU could also decide to take this occasion to strengthen the fundamental right free movement of persons in the EU, which is one of the main pillars of the EU and cherished by citizens. A clear framework in Member States which is properly enforced is more necessary than ever in order to **ensure that all citizens' rights are properly transposed into national legislation and therefore, properly implemented.**

2.2. Overview of the transposition of key provisions of the Directive

This section reviews in detail the transposition status of selected provisions in the nine selected Member States. Section 2.2.1 reviews the selected provisions, while section 2.2.2 provides an overview of the current transposition status of those selected provisions.

Additionally, the transposition analysis looked at issues of transposition flagged by the 2008 Commission report and the 2009 Study commissioned by the European Parliament (in section 2.2.3). Those vary from one Member States to another and therefore do not allow for a comparative overview.

Lastly, this section will then discuss terms of the Directive that are particularly problematic **in Member States, including the notions of 'sufficient resources' and of 'unreasonable burden on the social security system'** (in section 2.2.4).

2.2.1. Analysis based on selected provisions

The purpose of this section is to provide an overview of the transposition of **selected provisions** of Directive 2004/38/EC, updating the information presented in the 2008 Commission Report and the 2009 study commissioned by the European Parliament. It focuses on nine Member States, namely **BE, DE, ES, FR, IE, IT, PL, SE** and the **UK**.

The Directive requires the transposition of the right of entry, the right of residence for up to three months, the right of residence for more than three months, the retention of the right of residence, right of permanent residence and the grounds for restriction of the

rights of entry and residence. **Key articles** identified as the focus of the analysis of the transposition are:

- **Article 3(2)**: This provision refers to the persons who can benefit from the rights set out in the Directive. The second paragraph deals with the conditions in law or practice for **family members** (especially **third country family members**) to exercise their free movement and residence rights. In particular, Member States are required to facilitate their entry and residence. Incorrect transposition of this provision could result in specific conditions not provided in the Directive for TCN family members to obtain the right of residence⁵².

In addition, the provision deals with the approach of Member States towards **partners of EU citizens**, in particular **same-sex partners** of EU citizens (be them spouses or in a civil partnership). This is especially relevant with regard to the interpretation and application of the requirements of 'a durable relationship, duly attested', and the notion that Member State authorities 'shall undertake an extensive examination of the personal circumstances'. The host Member State is also required to undertake an extensive examination of the personal circumstances of the people asking for entry and to justify any denial of entry or residence to these potential beneficiaries.

- **Article 5(1)(2)**: According to this provision, Member States must allow EU citizens and their family members to **enter their territory** with a valid identity card. The transposition analysis examines whether or not Member States have introduced facilities in their legislation for family members to **acquire an entry visa** in line with the Directive, and whether any distinction has been made between TCN family members of EU citizens and TCNs in obtaining such a visa.
- **Article 6**: It provides for the right of **residence for up to three months** for EU citizens and their family members. The transposition analysis looks at whether or not Member States include additional formalities for EU citizens or their family members to obtain the right of residence that may be contrary to the Directive.
- **Article 7(1)(2)**: This provision deals with the right of **residence for more than three months**. Similar to the short-term residence rights, the analysis of this provision reviews whether or not Member States include additional requirements for EU citizens or their family members to obtain the right of residence that may be contrary to the Directive⁵³.
- **Article 14**: This Article provides the requirements for the **retention of residence rights**, including in cases of recourse to the social assistance system. The transposition assessment particularly looks at Member States' interpretation of 'being an **unreasonable burden on the social assistance system**' and whether this is in line with the Directive. The analysis includes whether or not Member States allow for the expulsion of family members on grounds of being an unreasonable burden on the social assistance system.
- **Article 16**: This provision sets out the rules for the right to **permanent residence**. The analysis examines whether Member States attach conditions to the right of permanent residence after five years that may go beyond the Directive.

⁵² e.g. the requirement to have previously been a legal resident in another Member State.

⁵³ e.g. the requirement to have satisfactory accommodation.

- **Article 24(1)**: This provision establishes the right to **equal treatment** between EU citizens and their family members and host Member State nationals. The analysis assesses whether the provision is correctly transposed in the Member States, particularly regarding the possibility set out in the Directive to limit the access to social assistance after the first three months of residence.
- **Article 27**: This provision enables Member States to take measures limiting the freedom of movement (including expulsion) of EU citizens and their family members on grounds of **public policy, public security or public health**. The review of transposition aimed to analyse whether these grounds may be invoked to serve economic objectives, which is specifically prohibited by this provision. Furthermore, the transposition measures should ensure that decisions on grounds of public policy or public security comply with the principle of proportionality.
- **Article 28**: This provision provides **exceptions and safeguards against expulsion**. A correct transposition needs, among others, to guarantee that personal circumstances are assessed when taking such a decision.
- **Article 35**: It enables Member States to adopt **measures against abuse of rights**, including refusal and withdrawal of residence rights. Correct transposition ensures that the proportionality principle and procedural safeguards are in place.
- In addition, the notion of **sufficient resources** set out in **Article 8** has been assessed. This article enables Member States to require EU citizens staying for periods of residence longer than three months to register with the relevant authorities and comply with certain conditions such as presenting a valid identity card or passport, a confirmation of engagement from an employer or an employment contract. In this sense, the transposition of the notion of 'sufficient resources' is critical.

If additional provisions have been identified as presenting transposition problems in the Member States, those were also analysed.

2.2.2. Transposition challenges regarding the selected provisions

The analysis of the nine selected Member States demonstrates that, while the transposition is **for the most part in line** with the Directive, **challenges still remain**, 10 years after the deadline for transposition of the Directive. The table below shows the provisions assessed as fully transposed with a 'Yes' and, where a transposition issue has been identified (whether small or important), it has been marked as 'No'.

Table 2: Overview of the transposition of selected provisions in the nine Member States

MS	Art. 3(2) Beneficiaries	Arts. 5(1), (2) Entry	Art. 6 Residence ≤ 3 months	Arts. 7(1), (2) Residence ≥ 3 months	Art. 14 Retention of residence	Art. 16 Permanent residence	Art. 24(1) Equal treatment	Art. 27 Restrictions public policy, security, health	Art. 28 Protection against expulsion	Art. 35 Abuse of rights	Other issues not systematically analysed in all Member States ⁵⁴
BE	Yes	Yes	Yes	Yes	No	Yes	Yes	No	Yes	Yes	Arts. 7(3) (retention of the status of worker or self-employed), 17(1)(c) (exemptions for persons no longer working in the host Member State and their family members), 20(1) (permanent residence card for family members who are not nationals of a Member State)
DE	No	No	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Art. 7(4) (right of residence for more than three months for the spouse, registered partner or dependent children)
ES	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes	-
FR	No	No	No	Yes	No	No	Yes	No	Yes	Yes	Arts. 3(1) (beneficiaries), 8 (administrative formalities for EU citizens)
IE	Yes	No	No	Yes	No	Yes	Yes	No	Yes	Yes	Art. 31 (procedural safeguards)
IT	Yes	Yes	No	Yes	Yes	Yes	Yes	No	Yes	Yes	Art. 7(3) (retention of the status of worker or self-employed)
PL	No	Yes	Yes	Yes	No	Yes	No	Yes	Yes	Yes	Arts. 2(2)(b) (definition of 'family member'), 7(3) (retention of the status of worker or self-employed), 7(4) (right of residence for more

⁵⁴ Please note that the articles listed under this column were indicated, as being problematically transposed in the 2008 Commission report and the 2009 Study commissioned by the European Parliament, although these articles were not systematically analysed in all the nine Member States.

MS	Art. 3(2) Beneficiaries	Arts. 5(1), (2) Entry	Art. 6 Residence \leq 3 months	Arts. 7(1), (2) Residence \geq 3 months	Art. 14 Retention of residence	Art. 16 Permanent residence	Art. 24(1) Equal treatment	Art. 27 Restrictions public policy, security, health	Art. 28 Protection against expulsion	Art. 35 Abuse of rights	Other issues not systematically analysed in all Member States⁵⁴
											than three months for the spouse, registered partner or dependent children), 20(1) (permanent residence card for family members who are not nationals of a Member State)
SE	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	-
UK	No	Yes	Yes	Yes	No	Yes	No	No	Yes	No	Arts. 7(3) (retention of the status of worker or self-employed), 30 (notification of decisions), 31 (procedural safeguards)

As the table above illustrates, **transposition issues have been identified for all the selected provisions except Article 28** concerning protection against expulsion **and Articles 7(1) and 7(2) concerning the right of residence** for more than three months for EU citizens and their family members based on employment, sufficient resources or student status. In some cases, the issues relate to a lack of transposition of the provision; in others incorrect transposition of parts of the provision or incomplete transposition. Main issues related to a lack of transposition of a provision involve the absence of transposition of key passages of the provision or the incorrect transposition of important requirements. Such an example is where the national transposition measure does not exclude expulsion as an automatic consequence of recourse to the social assistance system⁵⁵. In other cases, the transposition issue may relate to an ambiguous term or a term that does not properly reflect the scope of the Directive's requirements. For example, the wording 'essential' is replaced by the weaker term 'as necessary' in the Belgian transposing legislation⁵⁶.

The main challenges with **Article 3(2)** of the Directive relate to the transposition of the requirement to facilitate entry and residence rights for the full list of beneficiaries, including people in civil partnerships or same-sex partners (e.g. **UK**), and the obligation to justify any denial of entry or residence rights (i.e. **DE, FR, PL**). In addition, while the provision may be correctly transposed in national legislation, the requirements may not be sufficiently defined under national legislation leaving the door open to possible issues of implementation. For example, the definition of what might constitute a 'durable relationship' (i.e. **IT**) and what is required to prove the durable character of the relationship (e.g. **ES** and **PL**) is unclear in several Member States (see more details in section 2.2.4). The lack of harmonised rules on the mutual recognition of documents relating to personal status (such as birth certificates and marriage certificates) exacerbates these problems.

In relation to **Articles 5(1) and 5(2)**, the establishment of specific facilities for granting entry visas (being subject to an accelerated procedure and issued free of charge) to people in durable relationships or to TCN family members of EU citizens that are clearly differentiated from those applied to TCNs, remains problematic in **Germany, France** and **Ireland**. Similarly, the French and Irish transposing legislation does not specifically provide that no entry visa or equivalent formality may be imposed on EU citizens.

Article 6 on the right of residence for up to three months has been correctly transposed in the selected Member States except **France, Italy** and **Ireland** where the transposing legislation adds additional conditions, which are contrary to the Directive, namely requiring people to demonstrate that they do not become an unreasonable burden on the social welfare system of the State (**FR** and **IE**)⁵⁷. Moreover, the French transposition measures require a guarantee from the applicant that he/she does not present a threat to public

⁵⁵ See Kelly, G., 'Study on Obstacles to the right of free movement and residence for EU citizens and their families: Country report for Ireland', 2016.

⁵⁶ See Meurens, N. and Van Caeneghem, J., 'Study on Obstacles to the right of free movement and residence for EU citizens and their families: Country report for Belgium', 2016.

⁵⁷ Code on the entry and stay of foreigners and the right to asylum (*Code de l'Entrée et du Séjour des Etrangers et du Droit d'Asile*) (CESEDA), Article L121-4, available at: <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070158-1>; Regulation 6(1) of European Communities (Free Movement of Persons) Regulations 2015, (S.I. No. 548 of 2015), available at: <http://www.irishstatutebook.ie/eli/2015/si/548/made/en/pdf>.

policy or public security⁵⁸. The law also requires TCN family members to apply for a residence card if they are over 18 years of age. Such an application must take place within **two months, in breach of the Directive's provision that** EU citizens and their family members have a right of residence for up to three months with no formalities required other than valid identification⁵⁹. A new **Italian** provision imposes additional formalities not allowed by the Directive, since the EU citizen can legally stay in Italy for less than three months if he/she can show, in addition to an identity card or passport, the document issued by the police stating that he/she reported his/her presence⁶⁰.

Article 14 of the Directive on the retention of the right of residence is problematic in the majority of the nine selected Member States. For example, **Poland** has not transposed Article 14. The transposing legislation in **Germany, France** and **Ireland** does not exclude expulsion as an automatic consequence of recourse to the social assistance system. **Belgium's** transposing legislation does not require that the verification of the conditions of residence must not be carried out systematically.

All the selected Member States but **France** have transposed **Article 16** correctly. The transposition issue identified in the French legislation relates to the conditions attached to the right of permanent residence beyond five years. The French transposing measure requires all foreign nationals to have health insurance coverage in order to obtain the right of permanent residence in France. This requirement goes beyond Directive 2004/38/EC, which only requires the possession of an identity card. In addition, the national legislation does not contain any reference to the exceptions to the continuous period of five years (six months per year, military obligations, etc.).

Article 24(1) of the Directive on equal treatment is yet to be fully transposed into **Polish** and **Swedish** law. The **UK** has not directly transposed Article 24, although it is arguably partly reflected through a series of statutory amendments to existing UK legislation on social security and student maintenance. The provision has been transposed almost verbatim in **Spanish** legislation. However, instead of referring to 'on the basis of the Directive' it refers to 'on the basis of the Royal Decree (RD)', (i.e. the transposing measure) which may create problems if the RD does not transpose the Directive correctly.

Article 27 of the Directive limiting the restriction of the freedom of movement and residence rights of Union citizens and their families on grounds of public policy, public security or public health, and the requirement that measures taken be in line with the principle of proportionality have not been fully transposed in **Belgium, France, Ireland** and **Spain**. The Belgian legislation does not guarantee that information on criminal records cannot be requested after three months of residence or entry into the country. In addition, the **Belgian transposing provision uses the weaker wording 'as necessary'** rather than

⁵⁸Code on the entry and stay of foreigners and the right to asylum (*Code de l'Entrée et du Séjour des Etrangers et du Droit d'Asile*) (CESEDA), Article R121-1, available at: <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070158>.

⁵⁹ Code on the entry and stay of foreigners and the right to asylum (*Code de l'Entrée et du Séjour des Etrangers et du Droit d'Asile*) (CESEDA), Article R121-14, available at: <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070158>.

⁶⁰ Article 6 of Legislative Decree 6 February 2007, n.30, Implementation of the European Directive in the rights of citizens of Union and their family members to move and reside freely within the territory of member states (*Attuazione della direttiva 2004/38/CE relativa al diritto dei cittadini dell'Unione e dei loro familiari di circolare e di soggiornare liberamente nel territorio degli Stati membri*), Official Journal n. 72 of 27 March 2007, as amended by Decree-Law 89/2011 Urgent measures to complete the transposition of Directive 2004/38 (*Decreto Legge 23 giugno 2011, n. 89 'Disposizioni urgenti per il completamento dell'attuazione della direttiva 2004/38/CE sulla libera circolazione dei cittadini comunitari e per il recepimento della direttiva 2008/115/CE sul rimpatrio dei cittadini di Paesi terzi irregolari*), Government Journal. 23/06/2011, n.144.

'essential' regarding the possibility to request previous police records. The Spanish transposing legislation does not mention the principle of proportionality and has not transposed the fourth paragraph of Article 27. Ireland and France do not clearly provide that these grounds must not be invoked to serve economic ends. The Irish transposition of Article 27(2), (3) and (4) is also incomplete, while those paragraphs have not been transposed at all in French law. Articles 27(3) and 27(4) have also not been transposed in **UK** law. Article 27 has been incorrectly transposed in **Italy** as the transposing legislation allows for removal for other reasons of public policy or public security without defining such conditions. Therefore, these grounds for removal remain ambiguous and do not address the transposition issues identified by the 2008 Commission report. In particular, Italy fails to identify the interests it intends to protect with regard to these grounds for expulsion⁶¹.

the **UK** transposition of **Article 35** is found to be incorrect. The UK transposing legislation goes beyond the Directive adding that a denial of entry into the UK is justified in cases when an EU citizen has been removed in the past 12 months for not residing in the UK as a 'qualified person' i.e. as a working, self-employed or self-sufficient individual, where the EU citizen cannot demonstrate that the conditions for a right to reside, beyond the Article 6 right of residence up to three months, will be met.

2.2.3. Additional transposition issues in the selected Member States

In addition to analysing the selected provisions, the transposition assessment also looked at issues of transposition flagged by the 2008 Commission report and the 2009 Study commissioned by the European Parliament in order to check whether the issue has been addressed fully or not. Since the transposition issues flagged in those reports in 2008 and 2009 vary from one Member States to another, they do not allow for a comparative overview nor do they provide a complete transposition overview as the reports only flagged a selection of issues.

Belgium

Transposition of the Directive into Belgian law has taken a long time and a number of amendments have been made to the national legislation. While **largely in line** with the Directive, transposition remains **incomplete**. Many of the transposition issues identified by the Commission and the Study commissioned by the European Parliament have been addressed, although a number of transposition problems remain. In addition to those mentioned above under section 2.1.1, **Article 7(3)** of the Directive on the right of residence for more than three months has not been properly transposed, as Belgian legislation provides for the retention of the 'residence right' rather than 'worker status', which has a different scope. Similarly, **Article 17(1)(c)** of the Directive on the right to permanent residence of workers or self-employed persons has not been fully transposed, as Belgian legislation does not recognise the right for a worker to retain residence in the host Member State where, after three years of continuous employment and residence in Belgium, he/she goes to work in another Member State. In addition, the legislation does not guarantee that a residence card will be renewed automatically every ten years (**Article 20(1)** of the Directive). Instead, the permanent residence card is only valid for five years.

⁶¹ European Commission, Communication on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 2.7.2009, [COM(2009) 313 final], p. 13.

France

While most of Directive 2004/38/EC has now been effectively transposed into French law, a number of **conformity issues still remain**. In relation to provisions previously flagged as problematic by the Commission's report, **Articles 3(1) and 8** contain some transposition issues. Since 2013, France has recognised the full rights of free movement and residence for same-sex couples. However, to date there is no explicit transposition of the obligation under **Article 3(1)** to justify any denial of entry or residence. In terms of **Article 8** relating to registration with the competent authorities, French legislation still requires registration within the first three months for a stay of more than three months in France.

Germany

Directive 2004/38/EC has been **almost entirely transposed** into German national law. Since 2008, improvements have been made concerning the transposition of Article 35 (abuse of rights of free movement), as well as the equal treatment of marriage and registered partnerships of same-sex couples. Despite recent amendments to the transposing legislation at national level⁶², some minor transposition gaps remain. In addition to the abovementioned problematic provisions, the second sentence of **Article 7(4)** of Directive 2004/38/EC has not been specifically transposed, meaning that there is no specific facilitation of entry and residence rights for dependent relatives of a student in the ascending line nor those of his/her spouse or registered partner.

Ireland

While most Articles of the Directive have been correctly and completely transposed, with transposition of the Directive estimated at 90% completion, some **transposition issues still remain**. In addition to the abovementioned issues, **Article 31** of the Directive concerning procedural safeguards has not been sufficiently transposed, as the the European Communities (Free Movement of Persons) Regulations 2015 (the 2015 Regulations) do not address the situation 'where the application for appeal against, or judicial review of, the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place' until the decision has been taken on the interim order except where the expulsion decision is based on a previous judicial decision, or where the persons concerned have had previous access to judicial review. Nor do the 2015 Regulations provide that an individual may not be prevented from submitting his/her defence in person except when the appeal or judicial review concerns a denial of entry to Ireland.

Italy

Directive 2004/38/EC was transposed, with some delay, through Legislative Decree 30/2007. Since 2008, a number of amendments have been introduced to rectify partially incorrect and incomplete transposition, including several provisions that were previously omitted. Most of the issues previously raised have been addressed, although certain provisions remain a source of concern. Italy does not appear to have addressed the concerns of the Commission in relation to **Article 7(3) of the Directive** on the retention of the status of worker.

⁶² Amending Law of 21 January 2013 (*Article 1 G zur Änderung des FreizügG/EU und weiterer aufenthaltsrechtlicher Vorschriften*), BGBl. I, p. 86; Amending Law of 2 December 2014 (*Article 1 G zur Änderung des FreizügG/EU und weiterer Vorschriften*), BGBl. I, p. 1922.

Poland

Poland transposed the Directive in a single measure, the Act of 14 July 2006⁶³, which was amended in 2014 to overcome some of the transposition problems identified in the 2008 Commission report. Poland seems to have transposed approximately 80% of the Directive, with some gaps remaining in Polish law that may hinder the free movement of EU citizens and their family members. In addition to the issues mentioned under section 3.1, Poland has still not fully transposed **Article 2(2)(b)** of the Directive, as no provision is made for the partners of the EU citizen. There are no provisions on facilitating entry and residence rights for a student's direct ascendants (**Article 7(4) of the Directive**). In addition, in the current legal status, reference is still made to the retention of the status of 'resident', rather than that of a 'worker' (**Article 7(3) of the Directive**). According to the legislation, the permanent residence card of an EU citizen's family member is not automatically renewed every 10 years (as required by **Article 20(1) of the Directive**).

Spain

Spain transposed the Directive late through a single measure: Royal Decree 240/2007⁶⁴. According to the 2008 Commission Report⁶⁵, transposition was incomplete, with some provisions transposed more favourably, some ambiguously and others incorrectly. In 2008, the Royal Decree was less restrictive than the Directive in certain respects⁶⁶. EU citizens were free to enter or reside in the country for an unlimited period, without the need to fulfil any condition in order to register as residents. In addition, EU citizens and their family members were entitled to permanent residence status once they had been legally resident for a continuous period of three years (instead of the prescribed period of five years as set out in the Directive). Since 2008, the transposing legislation has been amended to align it with the Directive and address the transposition issues raised. Transposition is currently considered 90% complete, as two main elements of incorrect transposition remain, i.e. **Article 3(2)** and **Article 27** as mentioned above.

Sweden

Following the 2014 amendments to the Swedish Aliens Act⁶⁷, transposition of the Directive can now be considered as **satisfactory**, and may be said to be above 90%. In some instances, the rules under the Aliens Act are **more favourable** than under the Directive itself, e.g. Sweden has chosen not to implement the exception allowing Member States to restrict free movement on grounds of public health.

⁶³Act of 14 July 2006 on the entry into, residence in and exit from the Republic of Poland of nationals of the European Union Member States and their family members (*Ustawa z 14 lipca 2006 roku o wjeździe na terytorium Rzeczypospolitej Polskiej, pobycie oraz wyjeździe z tego terytorium obywateli państw członkowskich Unii Europejskiej i członków ich rodzin*), Journal of Laws No. 144, item 1043.

⁶⁴ Royal Decree 240/2007 on the entry, free movement and residence in Spain of Union citizens and of citizens within the European Economic Area (*Real Decreto 240/2007, de 16 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo*), Spanish Official Journal, n. 51 of February 28, 2007.

⁶⁵ European Commission, 'Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', Brussels, 10.12.2008 COM(2008) 840 final, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0840:FIN:en:PDF>; European Parliament, 'Report on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', 23.3.2009, (2008/2184(INI)), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2009-0186+0+DOC+PDF+V0//EN>.

⁶⁶ Blázquez Peinado, M.D. 'Transposition into Spanish law of Community legislation on free movement and residence of Union citizens and their family members: Royal Decree 240/2007 of February 16' [2007] Review of European Community Law 27, 595-622 (*Blázquez Peinado, M.D., 'La transposición en Derecho español de la normativa comunitaria sobre libre circulación y residencia de ciudadanos de la Unión y miembros de su familia: el Real Decreto 240/2007 de 16 de febrero' [2007] Revista de Derecho Comunitario Europeo 27, 595-622*).

⁶⁷ Aliens Act (*Utlänningslag* (2005:716))2005-09-29.

UK

The 2008 Commission Report and the 2009 study commissioned by the European Parliament stated that the majority of Directive 2004/38/EC had been largely transposed into UK law, although with some problems. Some of these issues, such as the UK's implementation of the *Metock* and *Rahman* rulings, have now been resolved. Others, however, are yet to be addressed, such as the partial transposition of **Article 7(3)** on the retention of the status of a worker and the issues mentioned above. In particular, the UK continues to restrict opportunities for self-employed migrants to retain their rights as economically active individuals. Moreover, **Articles 30 and 31** on procedural safeguards have not been adequately transposed. In particular, the UK imposes a requirement that family members produce evidence that they are, *inter alia*, the family member of an EEA national before they are granted appeal rights⁶⁸. Certain appeals also cannot be made from within the UK⁶⁹.

2.2.4. Topical transposition issues

The analysis of the national legislation in the selected Member States demonstrates the challenges in the transposition of **certain concepts** contained in Directive 2004/38/EC and discussed below.

Sufficient resources

The Directive establishes as a condition for residence for more than three months that EU citizens and their family members have sufficient resources not to become a burden on the social assistance system of the host Member State⁷⁰. The notion of sufficient resources is broadly defined in Article 8(4) of the Directive as follows:

Article 8(4): sufficient resources

Member States may not lay down a fixed amount which they regard as "sufficient resources", but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.

While the concept of 'sufficient resources' is recognised in the transposing legislation of most Member States, it is **not always defined**, which causes difficulties with respect to entitlement to a registration certificate or residence card. Although the notion of 'sufficient resources' is not defined in the **Polish** Act transposing Directive 2004/38/EC, some guidance is contained in the Ordinance on application forms of 24 August 2006⁷¹ from the Ministry of the Interior and Administration. Accordingly, EU citizens and their family members are obliged to prove that they possess sufficient financial means to support themselves and their family members in Poland without the need for social assistance. This

⁶⁸ Reg 26(3) of the Immigration (European Economic Area) Regulations 2006, SI 2006/1003.

⁶⁹ Reg 27(1) of the Immigration (European Economic Area) Regulations 2006, SI 2006/1003.

⁷⁰ Article 7 of the Directive.

⁷¹ Ordinance of the Ministry of the Interior and Administration of 24 August 2006 on application forms and documents regarding the right of residence on the territory of the Republic of Poland of citizens of the EU Member States and their family members (*Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 24 sierpnia 2006 r. w sprawie wniosków i dokumentów w sprawach prawa pobytu na terytorium Rzeczypospolitej Polskiej obywateli Unii Europejskiej i członków ich rodzin*), Journal of Laws of 2006r, No 154, item. 1105, as amended.

Ordinance is then interpreted by the relevant Voivodeship offices⁷² (i.e. offices of the Department for Citizenship and Foreigners) and each case is considered individually on the basis of the documents presented⁷³. Some offices consider a person to have sufficient resources when his/her income is higher than the threshold for social assistance in Poland⁷⁴. Some offices require the EU citizen to specify the total of their resources⁷⁵, while others require only a statement from the person concerned or a document stating that he/she possesses sufficient resources to cover the costs of residence in Poland, signed and stamped by an authorised employee of a bank or the institution in the month prior to the application for registration of residence⁷⁶.

The notion of 'sufficient resources' has not been defined in the **German** legislation, the FreizügG/EU, and its scope remains unclear, in particular with respect to non-contributory benefits. The notion of 'resources' has been explained by the legislator⁷⁷, as well as in the **administrative guidelines** to the FreizügG/EU⁷⁸. In German law, resources comprise all legal sources of income and assets with a financial value, including alimony payments from family members or third parties, scholarships, grants for education or (re-)training, unemployment benefits, widow and orphan pensions, old-age pensions (including early retirement), disability pensions, or any other contributory benefits financed by public funds. This latter reference to contributory benefits is not reflected in Directive 2004/38/EC, and it is unclear whether or not the inclusion of non-contributory unemployment benefits under Social Code II (*Sozialgesetzbuch II*) and other non-contributory benefits as resources within the meaning of §4 FreizügG/EU complies with EU law⁷⁹. The **planned amendments** to the administrative guidelines of the FreizügG/EU will explicitly exclude non-contributory unemployment benefits under Social Code II (*Sozialgesetzbuch II*) as resources within the meaning of § 4 FreizügG/EU⁸⁰, which is considered to be in line with the CJEU interpretation of Article 24(2) of Directive 2004/38/EC (equal treatment) in the *Dano* case⁸¹.

In those Member States where the concept is **defined** (e.g. **BE, ES**) the transposing legislation generally refers to the revenue level under which citizens can benefit from social assistance, in line with the Directive. For example, **Sweden** has transposed the concept of 'sufficient resources' to cover students who are EEA citizens, as well as other EEA citizens who have 'sufficient resources' to acquire a right to stay in Sweden. The Migration Court of Appeal (*Migrationsöverdomstolen*) interpreted 'sufficient resources' to mean that

⁷² In Poland, the matters regulated by the Act on entry are within the competence of the Voivodeship offices - Department for Citizenship and Foreigners (*Urzędy Wojewódzkie – Wydziały Spraw Obywatelskich i Cudzoziemców*).

⁷³ Information obtained through consultation with stakeholder (the Office for Foreigners, March 2016).

⁷⁴ Information obtained through consultation with stakeholder (the Office for Foreigners (*Urząd do Spraw Cudzoziemców*); Wielkopolski Voivodeship Office; Silesian Voivodeship Office (*Śląski Urząd Wojewódzki*), March 2016).

⁷⁵ Information obtained through consultation with stakeholder (Silesian Voivodeship Office, March 2016).

⁷⁶ Information obtained through consultation with stakeholder (Wielkopolski Voivodeship Office; Kujawsko-Pomorski Voivodeship Office (*Kujawsko-Pomorski Urząd Wojewódzki*); Mazovian Voivodeship Office (*Mazowiecki Urząd Wojewódzki*); Office for Foreigners; Silesian Voivodeship Office; Warmińsko-Mazurski Voivodeship Office (*Warmińsko-Mazurski Urząd Wojewódzki*, March 2016).

⁷⁷ BR-Drs. 22/03.

⁷⁸ Draft law in order to control and restrict immigration and to regulate residence and integration of EU citizens and foreigners (Law on immigration), BT-Drs. 15/420, p. 103; General administrative guidelines to the FreizügG/EU, BR-Drs. 535/15, 5 March 2016., available at: http://dipbt.bundestag.de/dip21/brd/2015/0535-15.pdf_p.28.

⁷⁹ Brinkmann, G., in Huber, B. (ed.) Residence Act (*Aufenthaltsgesetz*) (1st edition 2010), § 4 para. 8; Oberhäuser, T., in Hofmann, R. (ed.) Immigration Law (*Ausländerrecht*) (2nd edition 2016) § 4 para. 6. Disagreeing: Hailbronner, K., in idem (ed.) Immigration Law (*Ausländerrecht*) (93th edition 01/2016) § 4 para. 5.

⁸⁰ General administrative guidelines to the FreizügG/EU, BR-Drs. 535/15, 5 March 2016, available at: http://dipbt.bundestag.de/dip21/brd/2015/0535-15.pdf_p.28.

⁸¹ Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* [2014] ECLI:EU:C:2014:2358., para. 63.

the EU citizen is required to have enough resources such that he or she does not become a burden on the social assistance system. In that case, the person in question was in receipt of some benefits under the Swedish social assistance system, which were not considered a burden significant enough to deprive her of the right to stay in Sweden⁸².

There are some cases where the definition of 'sufficient resources' in national legislation **does not fully comply** with the Directive. For example, **French law** requires an individual to prove both the amount of resources and their continuity over time with a degree of certainty, which is more restrictive than intended by the Directive. **UK** legislation has **introduced a 'minimum earning threshold' to define a 'worker'**. This risks denying Article 7 residence rights to low-wage or zero-hour workers, who may not meet this standard and **would be unlikely to be considered 'self-sufficient' since the UK does not recognise the National Health Service as comprehensive sickness insurance for the purposes of Article 7(1)(b) and (c) of the Directive.** The UK legislation also introduces the 'right to reside' test, which requires EU citizens to be **'qualified persons'** under the Directive, i.e. workers or self-employed migrants, in order to access social support. This is arguably discriminatory and contrary to the *Grzelczyk* decision conferring equality on all EU citizens, irrespective of their nationality. This test has been found lawful by national courts, despite numerous legal challenges. Similarly, following infringement proceedings brought by the Commission, the use of the 'right to reside' test for access to child benefit and child tax credit has been found to be lawful by the CJEU. Recent amendments also limit the residence rights of jobseekers to 91 days, except where they can show compelling evidence of future employment. Similarly, the notion of 'sufficient resources' has not been correctly defined in **Ireland**⁸³. While the 2015 Regulations do not define a fixed sum of money in relation to the notion of 'sufficient resources' – in line with Article 8(4) of the Directive - there is no mention of 'taking into account the personal situation of the person concerned', nor do they state that the amount of sufficient resources must not be higher than the threshold below which nationals of Ireland become eligible for social assistance, or higher than the minimum social security pension paid by Ireland, as stipulated in the Directive. The lack of any reference to these criteria in the legislation could be considered insufficient transposition of the Directive. In **Italy**, the transposition of the definition of 'sufficient resources' **cannot be considered correct, despite the requirement that the personal situation of the individual be taken into account in determining whether or not his/her economic resources are adequate.** The legislation requires submitting evidence of economic resources in accordance with certain benchmarks established by the national legislation⁸⁴ together with proof of the *legality* of the economic resources which go beyond the requirements of the Directive.

Unreasonable burden

The concept of unreasonable burden is set out in Article 14 of the Directive as a condition for the retention of the right of residence, according to which EU citizens and their family members retain their residence rights as long as they do not become an unreasonable burden on the social assistance system. This provision states:

⁸² Judgment by the Swedish Court of Appeal, MIG 2011:19, judgment delivered on 2011-06-16.

⁸³ Information obtained through consultation with stakeholder (Immigrant Council of Ireland, March 2016).

⁸⁴ Article 29(3) of Legislative Decree 286/1998 'Text regulating migration and rules concerning migrants' status', *Decreto Legislativo 25 luglio 1998, n. 286, (Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero)*, Government Journal 18/08/1998, n. 191.

Article 14: unreasonable burden

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

The notion has proved challenging in most Member States. While some Member States mirror the Directive's provision, they do not define the concept (e.g. **BE** and **ES**), leaving it up to the discretion of the competent authorities. Others transpose the concept incorrectly or limit its interpretation. These inconsistencies have led to expulsions on the grounds that an individual is deemed an unreasonable burden on the social assistance system of the host Member State.

For example, **France** has established that the concept of 'unreasonable burden on the social assistance system' must be assessed by considering the amount of non-contributory social security benefits that have been granted to the person concerned (whether the economic difficulties are temporary or not) and the length of his/her stay. However, French law does not exclude expulsion as an automatic consequence of recourse to the social assistance system, which is contrary to the Directive⁸⁵. The Council of State concluded that even if a person is not yet covered by the social assistance system in France, a lack of resources can mean that an EU citizen living in France for less than three years has no right of residence in France⁸⁶. In addition, according to this opinion from the Council of State, the administration may rely on data from organisations providing aid when it invokes the unreasonable burden rule, or on statements previously made by the person concerned. A high number of Bulgarian and Romanian nationals of Roma origin, in particular, have been expelled from France, as they were considered to represent an unreasonable burden on the French social assistance system.

The legislation in **Belgium** reflects the Directive's requirements when referring to the circumstances taken into account to assess whether a person has become an unreasonable burden on the social assistance system. These include the temporary nature of the difficulties, the length of residence in the State, the personal circumstances, the amount of social assistance provided⁸⁷, and a framework requiring that each situation is considered on a case-by-case basis with no automatic withdrawal of residence rights⁸⁸. The Alien Litigation Council has stated that benefiting from social assistance should not result in an automatic termination of a residence permit. While the transposing legislation presents no issue, the legislation provides considerable discretion to the Immigration Office in assessing whether or not a person is an unreasonable burden⁸⁹. This has translated into a strict interpretation of the Directive and a high number of EU citizens and their family members being expelled on the grounds of being an unreasonable burden on the social security system (see below). Similarly, **German** national law allows for withdrawal of the right of residence and, where applicable, the residence card if the residence criteria are no

⁸⁵ GISTI, Entry, stay and expulsion. What the law of 16 June 2011 changes (*Entrée, séjour et éloignement. Ce que change la loi du 16 juin 2011*), available at: http://www.gisti.org/IMG/pdf/2011-09_cj_entree_sejour_apres_loi_besson.pdf, p. 50.

⁸⁶ Conseil d'État, avis (Council of State, opinion) 26 November 2008, available at: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT00001983194_Q&fastReqlId=1501735865&fastPos=3.

⁸⁷ Article 42bis of the [Act of 15 December 1980 on access to territory, residence, settlement and removal of foreigners](#).

⁸⁸ CIRE, 'The right to residence of European citizens in Belgium (*Le droit de séjour des citoyens européens en Belgique*)', April 2014, p. 9; [Circular of 10 July 2013 on the Programme Act of 28 June 2013](#).

⁸⁹ CIRE, 'The right to residence of European citizens in Belgium (*Le droit de séjour des citoyens européens en Belgique*)', April 2014, p.8; Judicial Foreigners' Council [decision of 30 September 2013 No 111.076](#).

longer met. The legislation⁹⁰ leaves **considerable margin of discretion** to the administrative authorities in deciding **if a person's access to social assistance constitutes 'an unreasonable burden on the social assistance system'**⁹¹. German legal literature has **attempted to provide some guidance on the definition of 'unreasonable burden'**. In general, there is no harmonised view on whether the burden relates to the social assistance system as a whole, or whether the burden is caused, or likely to be caused, by the **claimant's** access to social benefits⁹².

In **Poland**, the notion of 'being an unreasonable burden on the social assistance system' is not defined. However, when a person is in receipt of social assistance, the Voivodeship offices are required to consider all relevant circumstances to assess whether or not the **use of social assistance constitutes 'an unreasonable burden on the social assistance system'**⁹³. The Polish Act transposing Directive 2004/38/EC does not provide for expulsion when a person becomes an unreasonable burden on the social assistance system, nor does it provide a procedure for expulsion on purely economic grounds.

The **Irish** 2015 Regulations on free movement allow EU citizens and their family members to reside in Ireland for a period of up to three months provided they can demonstrate that they are not an unreasonable burden on the social welfare system. This requirement seems to go beyond what is permitted by the Directive. In addition, the 2015 Regulations do not include any provision excluding expulsion as an automatic consequence of recourse to the social assistance system.

Dependent family members

Article 3(2) of the Directive requires Member States to facilitate entry and residence rights to other beneficiaries besides EU citizens and family members defined under Article 2 of the Directive. These other beneficiaries include, among others, **family members who are dependent on the EU citizen** having the primary right of residence. In its Recital 6, the Directive further details that national legislation must provide for a careful examination of the relevant personal circumstances of the applicants concerned, taking into consideration their **relationship with the EU citizen** or any other circumstances, such as their **financial or physical dependence**. In its case law, the CJEU added that the **status of 'dependent' family member is the result of a factual situation characterised by the fact that material support** for that family member is provided by the EU citizen or by his/her spouse/partner⁹⁴. In addition, the Court ruled that the ability of family members concerned to find employment in the host Member State is an irrelevant factor with regard to the interpretation of 'dependent'⁹⁵.

⁹⁰ § 5(4) FreizügG/EU.

⁹¹ Tewocht, H., in Kluth, W., Heusch, A. (eds) *Immigration Law (Ausländerrecht)* (9th edition 11/2015) § 4 FreizügG/EU, para. 10.

⁹² Raschka, J., 'The entitlement of EU citizens to access social services due to the recent CJEU case law' (*'Anspruch von Unionsbürgern auf Zugang zu Sozialleistungen nach der jüngsten Rechtsprechung des EuGH'*) ZAR 2015, 331, 333 f; In favour: Thym, D., 'The Return of the "market citizen"- regarding the exclusion of non-working age EU citizens from Hartz IV benefits' (*'Die Rückkehr des "Marktbürgers" - Zum Ausschluss nichterwerbsfähiger EU-Bürger von Hartz IV-Leistungen'*), NJW 2015, 130, 132.

⁹³ Information obtained through consultation with stakeholder (Wielkopolski Voivodeship Office; Kujawsko-Pomorski Voivodeship Office (*Kujawsko-Pomorski Urząd Wojewódzki*); Mazovian Voivodeship Office (*Mazowiecki Urząd Wojewódzki*); Office for Foreigners; Silesian Voivodeship Office; Warmińsko-Mazurski Voivodeship Office (*Warmińsko-Mazurski Urząd Wojewódzki*, March 2016).

⁹⁴ Case 316/85 *Courcelles v Lebon* [1987] ECR 2811, paragraph 22; Case C-1/05 *Jia v Migrationsverket* [2007] ECR I-1, paragraphs 36-37 and Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-9925, paragraph 43.

⁹⁵ Judgment of 16 January 2014 in Case C-423/12 *Flora May Reyes v Migrationsverket* [2013] ECLI:EU:C:2013:719 paragraph 25.

A certain degree of discretion is left to the Member States regarding the criteria they should take into account when deciding whether to grant the rights under the Directive to 'other dependent family members'. However, this leads to a **wide variety of interpretations** across the Member States and **issues of transparency**, especially in Member States where the definition of 'dependents' and the criteria of what constitutes 'dependency' is inexistent. In those states, the transposing measure gives leeway to the national authorities to apply very different interpretations of the term.

For instance, in **Italy**, the Directive has been literally transposed, but the Italian legislation does not provide a **clear definition of 'dependent'** and does not expressly include the notion of 'other family members' either, leaving up to Italian officials the opportunity to base their assessment of dependency on different considerations, such as socio-economic benchmarks⁹⁶. Another issue resides in the fact that the Italian law requires that the condition of dependent family members is included in the documents issued by the authorities of the country of origin but does not specify which kind of documentation can be accepted as evidence of dependency. As a consequence, the documentation usually required is not available in many countries and the Italian administration does not recognise the quality of a dependent family member⁹⁷.

In **Germany**, the notion of 'dependent' is not defined and has not been specifically transposed into German national law. However, the German Law on Residence gives German authorities the option to grant a residence permit in order to avoid a particular hardship⁹⁸. This text leads to a national debate as regards whether Article 3(2) should be considered as correctly transposed or not. While some academics claim that the strict conditions of this legislation mean that the right to residence/entry has not been facilitated⁹⁹, others argue that the transposition is correct¹⁰⁰. Similarly, **Poland** has failed to transpose the concept of 'dependent' into its national law with no residence rights facilitated for family members dependent on the EU citizen. However, a 2014 amendment of the Polish transposing legislation has added that the decision of refusal to register the right to residence is not applicable when the family member of the EU citizen joins him/her due to financial dependency¹⁰¹. Although this new provision does not transpose the Directive *per se*, it brings a certain protection against refusal decisions to these beneficiaries.

Since the amendment of its legislation in 2014, the notion of dependent is in line with the Directive in **Sweden** as it includes other family members who, in the country from which they came, were dependent on the EEA citizen for their means of support. Similarly, the

⁹⁶ Legislative Decree of 28 February 2008, n.32 'Modifications and integrations of legislative decree 6 February 2007 n.30' (*Modifiche e integrazioni al decreto legislativo 6 febbraio 2007, n. 30, recante attuazione della direttiva 2004/38/CE relativa al diritto dei cittadini dell'Unione e loro familiari di circolare e di soggiornare liberamente nel territorio degli Stati membri*), Official Journal n.52 of 1 March 2008.

⁹⁷ Citizens without Borders, Free Movement and Residence in the European Union: a Challenge for European Citizenship, 31 May 2013, available at: http://www.meltingpot.org/IMG/pdf/citizien_inglese.pdf_p_39.

⁹⁸ Tewocht, H., in Kluth, W., Heusch, A. (Eds), Immigration Law (*Ausländerrecht*) (2015) § 36 Residence Act (*Aufenthaltsgesetz*) para. 12 f. and § 3 FreizügG/EU paragraph 18.

⁹⁹ Case C-83/11 *Secretary of state for the home department v Muhammad sazzadur rahman and others* [2012] ECR I-4599, paragraph 21 f.; Tewocht, H., in Kluth, W., Heusch, A., Immigration Law (*Ausländerrecht*), 2015; Dienelt, K., in Bergmann, J., Dienelt, K. (Eds) Immigration Law (*Ausländerrecht*), 2016 ; Oberhäuser, T., in Hofmann, R. (Ed), Immigration Law (*Ausländerrecht*) (2016) § 2 FreizügG/EU para. 32 and § 3 FreizügG/EU paragraph 18.

¹⁰⁰ Schönberger, C., Thym, D., 'National Report on Germany' in Neergaard, U., Jacqueson, C., Holst-Christensen, N. (eds) *Union Citizenship – Congress publications of the XXVI FIDE Congress in Copenhagen Vol. 2*, 569.

¹⁰¹ Act of 14 July 2006 'on the entry into, residence in and exit from the Republic of Poland of nationals of the European Union Member States and their family members' (*Ustawa z 14 lipca 2006 roku o wjeździe na terytorium Rzeczypospolitej Polskiej, pobycie oraz wyjeździe z tego terytorium obywateli państwa członkowskich Unii Europejskiej i członków ich rodzin*), Journal of Laws No. 144, article 31.

recent provisions regarding dependent family members in the Belgian legislation now effectively provide the rights to entry and residence for the dependents of EU citizens in **Belgium**. However, these national provisions do not provide any criteria on the basis of which this dependency must be attested, leaving its application to the complete discretion of the Belgian administration. Similarly, the **Irish** law correctly transposed the provision of the Directive concerning dependent family members but there are interpretation issues about what constitutes dependency for third country nationals in obtaining entry visas¹⁰². In practice this results in a high number of refusals of residence cards because dependent family members are not able to prove that they are dependent on the EU citizen¹⁰³.

In **Spain**, dependency is proved if the family member can demonstrate 24 months of continuous cohabitation with the EU citizen in the country from which they have come. This could be considered a restricted approach to the notion of dependent family member¹⁰⁴. However, this is in line with the Directive as Member States may prescribe a minimum amount of time as long as personal circumstances are taken into account and any denial of entry or residence is fully justified¹⁰⁵.

Durable relationship duly attested

Article 3(2)(b) provides that to obtain the right of entry/residence the partner of an EU citizen must be in a durable relationship duly attested. This notion of durable relationship has led to a **wide variety of interpretations** across the Member States. While some Member States refer to a **minimum amount of time** as a criterion for whether a partnership can be considered as durable (**BE, ES, IE, UK**), others limited the interpretation of durability by requiring that partners share the **same household (FR, SE)**. Certain Member States also broadly interpret the concept by not including specific criteria and by allowing partners to demonstrate this durability by **different kinds of evidence (IT)**.

In **Italy**, the legislation only requires formal proof to 'duly attest' the durable relationship '*with any official documents*', also allowing evidence from the State where the individual was residing, and not necessarily the home Member State¹⁰⁶. Furthermore, **no other specific criteria** are set out in the national legislation. This has resulted in a broad interpretation of the Directive, favourable to the partners who can bring any means of proof as long as they are official documents. Nevertheless, this also provides for greater discretion for the administration and may result in a wide variety of interpretations of what constitutes a 'durable relationship'.

Article 3(2)(b) of the Directive has not been specifically transposed into **German** legislation. The national legislation does not provide any rule referring to the notion of durable relationships (other than registered partnerships) for the exercise of the right to entry and

¹⁰² Information obtained through consultation with stakeholder (Your Europe Advice Service, March 2016); Information obtained through consultation with stakeholder (Jeanne Boyle Solicitors, March 2016).

¹⁰³ Information obtained through consultation with stakeholder (Your Europe Advice Service, March 2016).

¹⁰⁴ Royal Decree '240/2007 on the entry, free movement and residence in Spain of Union citizens and of citizens within the European Economic Area' (*Real Decreto 240/2007, de 16 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo*) Spanish Official Journal n. 51 of 28 February 2007, article 2.

¹⁰⁵ European Commission, Communication on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Brussels 2009, COM(2009) 313 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009DC0313&from=EN>, p. 4.

¹⁰⁶ Law 97/2013 on the 'Measures for Italy to fulfill the obligations under EU membership – European Law 2013' (*Legge 6 agosto 2013, n. 97 'Disposizioni per l'adempimento degli obblighi derivanti dall'appartenenza dell'Italia all'Unione europea - Legge europea 2013'*), Government Journal 20/08/2013, n.194, Article 9.

residence. As a result, no facilitation of entry or residence for such durable relationships exists in Germany.

Poland does not legally recognise any form of partnerships. Hence, the concept of durable relationship duly attested does not exist in Polish legislation and there is no specific facilitation of entry and residence rights for partners of EU citizens¹⁰⁷. However, the Polish Administrative Courts have recently ruled that in the absence of the relevant Polish provisions obliging the authorities to facilitate the entry and residence of TCNs in a partnership with an EU citizen, the provision of the Directive is directly applicable¹⁰⁸. The Border Guards in Poland have adopted non-legally binding guidelines specifying how to determine whether such a person remains in a durable and duly attested relationship¹⁰⁹. **The guidelines include a broad interpretation of the concept of 'duly attested'**, favourable for the partners. They provide that the authorities must rely on the statement of the person and must verify the documents certifying the partnership, which is considered to be in line with the Directive.

In **France**, national rules include a clear notion of durable relationship duly attested. The French legislation specifies that the condition of durable relationship can be satisfied by the partner if he/she provides proof that either he/she is dependent on, or **part of the household** of, the EU citizen in the country of origin. **Household sharing** is also a criteria set out in the **Swedish** law which states that the durable relationship condition is fulfilled as long as the parties continuously live together as a couple and share a household¹¹⁰.

In **Irish** law the concept of durable relationship makes reference to a minimum amount of time. The right of residence for partners is granted if he/she can show that he/she is **in a relationship lasting at least two years** with the EU citizen¹¹¹. While such criteria does not contradict the wording of the Directive, the Commission Communication explicitly states that national administration cannot only base their decision on this criteria¹¹². National rules must foresee that other relevant aspects (such as, for example, a joint mortgage to buy a home) are also taken into account. Similarly, **UK** legislation defines a durable relationship as a relationship that has subsisted for at least two years. However, Home Office Guidance provides that the durability can also be evidenced by other elements, for example, by the presence of children¹¹³. The Home Office Guidance also set up a non-exhaustive list of the types of documents that partners might be required to provide, including: proof that any previous relationships have permanently broken down; evidence of cohabitation in the previous two years such as bank statements, rent agreements or mortgage payments; evidence of joint finances; evidence of joint responsibility for any children; and other **evidence demonstrating the applicants' commitment and relationship**¹¹⁴. The Commission

¹⁰⁷ Act of 14 July 2006 'on the entry into, residence in and exit from the Republic of Poland of nationals of the European Union Member States and their family members' (*Ustawa z 14 lipca 2006 roku o wjeździe na terytorium Rzeczypospolitej Polskiej, pobycie oraz wyjeździe z tego terytorium obywateli państwa członkowskich Unii Europejskiej i członków ich rodzin*), Journal of Laws No. 144, item 1043.

¹⁰⁸ Judgment by the Voivodeship Administrative Court of Warsaw, Case IV SA/Wa 154/13, judgment delivered 15.03.2013; Judgment by the Voivodeship Administrative Court of Warsaw, Case IV SA/Wa 2093/12, 22.05.2013.

¹⁰⁹ Information obtained through consultation with stakeholder (the Border Guards unit, April 2016).

¹¹⁰ 'Cohabitation Act' (*Sambolag*), Government Journal 2003:376, Section 1.

¹¹¹ Your Europe Advice, Quarterly Feedback Report No.13, Quarter 3/2015 (July-September), p 13.

¹¹² European Commission, Communication on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Brussels 2009, COM(2009) 313 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009DC0313&from=EN>, p.4.

¹¹³ Home Office Guidance, 'Extended Family Members of EEA nationals', 7 April 2015, available at: <https://www.gov.uk/government/publications/extended-family-members-of-eea-nationals>, p. 13-14.

¹¹⁴ Home Office Guidance, 'Extended Family Members of EEA nationals', 7 April 2015, available at: <https://www.gov.uk/government/publications/extended-family-members-of-eea-nationals>, p. 6.

reported in 2009 that the necessary documents required to attest the existence of a durable relationship were loosely regulated in **Spain**. However, since the 2015 legislative amendment, the national legislation calls for an extensive examination by the administration of the individual circumstances of durable relationships. **One year of cohabitation or the existence of common descendants** (provided that there is a stable cohabitation) is considered sufficient evidence to prove a durable relationship. Although these requirements are not in breach of the Directive, Spain made a strict interpretation of the concept of durability. In addition, clearer rules are needed on the possible means of proof of the existence of a durable relationship¹¹⁵. In **Belgium**, partners must show that they are in a durable relationship with the EU citizen, living together, not being in a durable relationship with someone else, and being over 21 years old. A relationship can be deemed durable where the two parties have lived together for at least one year, or have met three times amounting to 45 days in the past two years, or have a child together¹¹⁶.

Genuine chance of being engaged

Genuine chance of being engaged is set out under Article 14(2) and is a condition for the retention of the right of residence, according to which EU citizens and their family members retain their residence rights as long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged. The notion has proved challenging as **most Member States did not define the concept**. Furthermore, the Directive is silent on the types of documents that jobseekers should bring to prove that they have a 'genuine chance of being engaged' and the time after which Member States can require such proof. Certain Member States adopted very restrictive interpretations of this concept.

For example, **Belgium** does not define what should be understood under the notion of genuine chance of being engaged, leaving it up to the discretion of the administrative authorities. In addition, it requires jobseekers to provide evidence that they are continuing to seek employment and that they have a genuine chance of being employed without specifying from which point in time they must start providing evidence. Such legal uncertainty led the administration to give a strict interpretation of the Directive as it could require EU citizens and their family members to prove the continuity of employment and chance of being employed even before six months¹¹⁷. Such a requirement is not fully in line with the *Antonissen* case in which the CJEU held that a Member State may require an EU citizen to leave if (s)he has not found employment after six months, unless the person concerned provides evidence that (s)he is continuing to seek employment and that he has a genuine chance of being engaged¹¹⁸. The recently amended **German** and **Polish** law provide that jobseekers now enjoy an unconditional right to residence for six months, after which they are entitled to residence only if 'they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being employed'¹¹⁹. This transposition of the concept of 'genuine chance of being employed' has

¹¹⁵ Royal Decree 987/2015, (*Real Decreto 987/2015, de 30 de octubre, por el que se modifica el Real Decreto 240/2007, de 16 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo*) Spanish Official Journal n.269.

¹¹⁶ Act 8 July 2011 'amending the Act of 15 December 1980 on access to the territory, residence, settlement and removal of foreigners regarding family reunification requirements', Government Journal C – 2011/00547.

¹¹⁷ Coordination et Initiatives pour Réfugiés et Étrangers (CIRE), *Annual Report 2014*, (2015), p.16.

¹¹⁸ Case C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] ECR I-00745.

¹¹⁹ Law 'on General Freedom of Movement of EU Citizens of 30 July 2004' (*Gesetz über die allgemeine Freizügigkeit von Unionsbürgern*), BGBl. I, p. 1950, 1986, last modified by Amending Law of 22 December 2015

translated into a strict interpretation of the Directive as it could imply a systematic control of the fulfillment of the residence requirements for jobseekers after six months albeit it is in line with the Directive and the CJEU case law. Poland has broadly defined the concept of **'compelling evidence'**, which has an impact on how **'genuine chance of being engaged'** is assessed by the authorities. **'Compelling evidence'** covers any document or explanation made in the course of the procedure demonstrating that the person concerned is actively looking for a job, documents confirming job applications, acquired education and/or professional qualifications and/or experience.

Since a 2014 amendment of its national rules¹²⁰, the **UK** gives a very strict interpretation of the six-month period required by the CJEU in Case C-292/89 *Antonissen*. The national legislation takes into account the period of initial residence and reduced it from the six-month, leaving therefore only 91 days of job-seeking before the EU citizen must provide **'compelling evidence of job-seeking and of a genuine chance of being engaged'**¹²¹. Since such a rule also immediately applies to long-term residents who may already have exhausted their three-month initial residence rights and right to reside for 91 days as a jobseeker, this can result in the UK administration requiring them to provide evidence of future work straight away¹²². In addition, the UK definition of **'compelling evidence'** is very restrictive, covering only documentary evidence of a job offer or very recent material evidence of a change in circumstances, accompanied by pending outcomes of job interviews.

Italy did not introduce the notion of **'a genuine chance of being engaged'** as a condition of the retention of the right of residence in its national law. As a consequence, jobseekers are only required to prove that they have continued to seek employment. This is a more favourable transposing provision as in Italy, registration with the employment office constitutes evidence that an EU citizen is continuing to seek employment.

Imperative ground of public security

Public security is a ground set out under Article 27 of the Directive that Member States can invoke to restrict the freedom of movement and residence of EU citizens and their family members, irrespective of nationality. In accordance with Article 28, it is also a ground under which a Member State can expel EU citizens or their family members even if they have the right to permanent residence, have stayed in the country for the previous 10 years or is a child. Some Member States introduced provisions mirroring the wording of both Articles (**BE, DE, SE**) but other national rules have translated the notion of public security in unclear provisions, leaving a discretionary power to the administration.

The notion of public security is not defined in the Directive, leaving the freedom to define the protected interests of society and determine the requirements of public security to the Member States in accordance with their needs. However, the Commission has recalled in its Communication that the Member States must define clearly the protected interests of society, and make a clear distinction between public policy and public security. The latter cannot be extended to measures that should be covered by the former. Certain Member

(Article 6 G zur Änderung des Zwölften Buches Sozialgesetzbuch und weiterer Vorschriften), BGBl. I, p. 2557, Paragraph 2(2) no. 1a.

¹²⁰ The 'Immigration (European Economic Area) (Amendment) (No.3) Regulations 2014', Government Journal SI 2014/2761.

¹²¹ Ibid.

¹²² O'Brien, C., 'Politically Acceptable Poverty', (2014) *Journal of Child Poverty Action Group*, no. 149 Poverty, p. 15.

States such as **Poland** failed to define sufficiently what it covered under the ground of public security as its national law listing the grounds of expulsion does not make a clear distinction between what constitutes public security, national defence and national security¹²³.

In *Tsakouridis*¹²⁴, the CJEU clarified the concept of 'imperative grounds of public security' in that it presupposes that the threat to public security is of a particularly **high degree of seriousness**, which could be the case for trafficking in narcotics as part of an organised group. In addition, the conduct of the person concerned must represent a **genuine and present threat**: the expulsion measure cannot be based on the existence of previous criminal convictions or considerations of general prevention. The national authorities must undertake an **individual examination** of the specific case, in which they must assess whether the measure contemplated is proportionate to the aim pursued, in light of the nature and seriousness of the offence committed, the duration of residence in the host Member State, the period which has passed since the offence was committed and the conduct of the person concerned during that period, and the solidity of the social, cultural and family ties with the host Member State. In the case of an EU citizen who has lawfully spent most or even all of his childhood and youth in the host Member State, the expulsion has to be based on even more robust grounds.

Regarding the same issue, the Court stated that Member States may regard criminal **offences which are covered by the concept of 'particularly serious crime' referred to in the TFEU**¹²⁵, as justifying the deportation of EU citizens who have lived for more than 10 years in the host Member State. This is the case for sexual exploitation of children, for example. However, such offences may justify an expulsion measure only if the individual concerned represents a genuine and present threat affecting one of the fundamental interests of society or of the host Member State, which implies, in general, that the individual has a propensity to act in the same way in the future¹²⁶.

In **Spain**, the High Regional Court of Castilla-León ruled that a citizen who has been detained more than 69 times (26 of them in the last eight months¹²⁷) can be deemed as a direct threat to public security and be expelled on this basis. At the same time, Article 27(2) of the Directive and the Communication of the Commission state that 'even multiple convictions do not suffice without further evidence to show that the person's presence constitutes a continuing threat to public security'¹²⁸. In **France**, the legislation does not include a provision explicitly stating that previous criminal convictions cannot constitute a public security ground for taking measures to restrict a person's free movement and residence rights. As a consequence, previous convictions have been used to justify some expulsions.

¹²³ 'National defence, national or public security, by means of constituting a threat to peace, humanity, independence or defence of Poland, or due to terrorist activity', Act of 14 July 2006 'on the entry into, residence in and exit from the Republic of Poland of nationals of the European Union Member States and their family members' (*Ustawa z 14 lipca 2006 roku o wjeździe na terytorium Rzeczypospolitej Polskiej, pobycie oraz wyjeździe z tego terytorium obywateli państw członkowskich Unii Europejskiej i członków ich rodzin*), Journal of Laws No. 144, item 1043, Articles 67 and 68.

¹²⁴Case C-145/09 *Land Baden-Württemberg v Panagiotis Tsakouridis* [2010] ECLI:EU:C:2010:708.

¹²⁵ Article 83 TFEU.

¹²⁶Case C-348/09 *P.I. v Oberbürgermeisterin der Stadt Remscheid* [2012] ECLI:EU:C:2012:300.

¹²⁷ Judgment of the High Regional Court of Castilla-León (Administrative section), Case 164/2015, delivered on 30.07.2014.

¹²⁸European Commission, Communication on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Brussels 2009, COM(2009) 313 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009DC0313&from=EN>, p. 12.

UK regulations and administrative guidance on public security explicitly states previous criminal convictions must not be the sole justification for expelling an EU citizen from the UK. National courts accept that activity triggering public security grounds does not have to be criminal, they have held that it will rarely be permissible to refuse to admit an individual in relation to activity that is not even unlawful under UK law¹²⁹.

In **Belgium**, the law does not encompass a list of offences which constitute a threat to public security¹³⁰. However, it explicitly states that the existence of previous convictions cannot be the sole justification for deciding on an expulsion. In addition, since 2014 the authorities do not have complete discretion as they are required to take **into account specific criteria** - the length of stay in Belgium, age, health, family and economic situation, level of social and cultural integration in Belgium and strength of ties with the country of origin - when taking a decision to expel an EU citizen on grounds of public security¹³¹.

The **Italian** legislation in respect of expulsions has been considerably amended so that the imperative ground of public security has been better defined¹³². Furthermore, the **legislation clearly highlights that 'previous criminal convictions decided by Italian or foreign judges, for one or more intentional crimes, committed or attempted against the life or health of people, together with preventive measures or expulsion orders decided by foreign authorities, will be taken into account'**¹³³. However, the references made to a number of other provisions (contained in Laws, Decrees, Codes, Articles, etc.) make it difficult to identify the crimes for which an EU national may be expelled. Such legal uncertainty might have serious consequences as this may lead to arbitrary decisions.

2.3. CJEU interpretation of the Directive

The CJEU has developed a large body of case-law interpreting the provisions of Directive 2004/38/EC. A search of **the CJEU website of judgments including 'Directive 2004/38/EC'** in their texts yields 76 results, which shows how active the CJEU has been regarding the Directive. This section only reviews key cases of the CJEU interpreting the Directive, which have not been mentioned above under section 2.2.4 on topical transposition issues.

¹²⁹ *GW (Netherlands)* [2009] UKAIT 50, concerning the expression of views that Islam should not be tolerated or followed.

¹³⁰ Advokatfirmaet Simonsen Vogt Wigg AS, 'Legal study on Norway's obligations under the EU Citizenship Directive 2004/38/EC' (2016), p. 297.

¹³¹ Act of 15 December 1980 'on access to the territory, residence, settlement and removal of foreigners', Government Journal C- 14584, article 11 paragraph 2 a; Act of 19 March 2014 'amending the Act of 15 December 1980 concerning access to the territory, residence, settlement and removal of foreigners', Government Journal C- 14584, article 45.

¹³² 'Imperative grounds of public security exist where the behaviour of the person constitutes a genuine, effective, and serious threat affecting the fundamental human rights or public safety, making his/her expulsion urgent because his/her stay is incompatible with orderly society'. Act of 14 July 2006 'on the entry into, residence in and exit from the Republic of Poland of nationals of the European Union Member States and their family members' (*Ustawa z 14 lipca 2006 roku o wjeździe na terytorium Rzeczypospolitej Polskiej, pobycie oraz wyjeździe z tego terytorium obywateli państw członkowskich Unii Europejskiej i członków ich rodzin*), Journal of Laws No. 144, article 68.

¹³³ Legislative Decree 6 February 2007, n.30, Implementation of the European Directive in the rights of citizens of Union and their family members to move and reside freely within the territory of member states (*Attuazione della direttiva 2004/38/CE relativa al diritto dei cittadini dell'Unione e dei loro familiari di circolare e di soggiornare liberamente nel territorio degli Stati membri*), Official Journal n. 72 of 27 March 2007, article 20(3).

One of the CJEU key case is the *Metock* decision¹³⁴, which concerned four TCN married EU citizens resident in **Ireland**. The Irish national authorities rejected their applications for residence cards on the ground that they did not satisfy the condition of prior lawful residence in another Member State laid down in Irish law. In other words, Ireland, in this case, required TCN family members to have previously resided in another Member States. Other Member States have applied similar restrictions (e.g. **the UK**). The CJEU clarified that it makes no difference whether nationals of TCN countries who are family members of an EU citizen have entered the host Member State before or after becoming family members of that EU citizen. In fact, the refusal of the host Member State to grant family members a right of residence is equally liable to discourage the EU citizen from continuing to reside in that Member State¹³⁵. Therefore, there is **no requirement of prior lawful residence** in the host Member State for TCN family members¹³⁶.

On the other hand, the CJEU took a restrictive view of the obligation for Member States to facilitate entry and residence for: a) dependents or members of the household of EU citizens having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen; b) the partner with whom the Union citizen has a durable relationship, duly attested¹³⁷. The CJEU stated in the *Rahman* case¹³⁸ that **each Member State has wide discretion** as regards the selection of the factors to be taken into account to select the other beneficiaries of the Directive¹³⁹. Nonetheless, the host Member State must ensure that its legislation contains **criteria which are consistent with the normal meaning of the term 'facilitate' and of the words relating to dependence used in Article 3(2), and which do not deprive that provision of its effectiveness**¹⁴⁰.

However, this **discretion is not unlimited**. Even before the adoption of Directive 2004/38/EC, the CJEU stated that the right of the child of a migrant worker to pursue, under the best possible conditions, his/her education in the host Member State necessarily implies that the child has the right to be accompanied by his/her primary carer. **Accordingly, the child's carer should be able to reside with the child in that Member State during his/her studies**¹⁴¹. In the *Zambrano*¹⁴² case, the CJEU required Member States to account for the interests of EU citizens who are children even if they have not yet exercised their free movement rights. Accordingly, a Member State may not refuse a right of residence to a TCN upon whom his EU citizens children **are dependent, 'in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attached to the status of a European Union citizen'**¹⁴³.

In the *Iida* case¹⁴⁴, the TCN spouse of a German citizen was living in **Germany** while the EU citizen was residing in Austria, which raised residence rights issues. The Court found that the TCN separated spouse of an EU citizen cannot claim residence as a family member on the basis of the Directive if he/she has not accompanied or joined the EU citizen in a Member State other than that of which the citizen is a national¹⁴⁵. The CJEU later clarified

¹³⁴ Case C-127/08 *Metock* [2008] ECLI:EU:C:2008:449, at para. 30.

¹³⁵ *Ibid* at para. 92.

¹³⁶ *Ibid*, at para. 80.

¹³⁷ Article 3 (2) Directive 2004/38.

¹³⁸ Case C-83/11 *Rahman* [2012] ECLI:EU:C:2012:519.

¹³⁹ *Ibid*, at para. 24.

¹⁴⁰ *Ibid*.

¹⁴¹ Case C-413/99 *Baumbast* [2002] ECLI:EU:C:2002:493, at para 73.

¹⁴² Case C-34/09 *Ruiz Zambrano* [2011] ECLI:EU:C:2011:124.

¹⁴³ *Ibid*, para 45.

¹⁴⁴ Case C-40/11 *Iida* [2012] ECLI:EU:C:2012:691..

¹⁴⁵ *Ibid*.

in *O and B*¹⁴⁶ that where a Union citizen has created or strengthened a family life with a third-country national during genuine residence, pursuant to Article 7 and Article 16 of the Directive, in a Member State other than that of which he is a national, the provisions of that Directive apply by analogy where that Union citizen returns, with the family member in question, to his Member State of origin. However, the cumulative effect of various short periods of residence such as weekends or holidays spent in the host Member State may not create a derived right of residence for a TCN family member of an EU citizen¹⁴⁷.

With regard to the term 'legal residence' for the purpose of the acquisition of a right of permanent residence, the CJEU interpreted it as a period of residence which complies with the conditions laid down in the Directive¹⁴⁸. Consequently, a period of residence which complies with the law of a Member State but does not satisfy those conditions cannot be **regarded as a 'legal' period of residence within the meaning of the Directive**. On the other hand, the CJEU addressed the situation of EU citizens who are nationals of a Member State that acceded to the EU after they started residing in another Member State. The CJEU established that the period in which the EU citizen resided in another Member State before the accession of the Member State of their nationality must be taken into account in calculating the period required for the acquisition of a right of permanent residence¹⁴⁹. The opposite solution could be adopted only in the case of specific provisions in the Act of Accession.

For the purposes of obtaining permanent residence status, the Court also stated that a third-country national may only count the periods spent with the EU citizen for the purposes of the acquisition of a right of permanent residence. In this case, the periods during which he/she had not resided with the citizen because of the **TCN's imprisonment** in the host Member State could not be taken into account for that purpose. This is due to the fact that the EU legislature made the acquisition of the right of permanent residence subject to the integration of the person concerned in the host Member State. The imposition of a prison sentence by the national court shows that the person did not adhere to the values expressed by the host Member State in its criminal law. For the same reasons, the Court found that the continuity of residence of five years is **interrupted by periods of imprisonment** in the host Member State. As a consequence, the periods which precede and follow the periods of imprisonment may not be added up to reach the minimum period of five years required for the acquisition of a permanent residence permit. The same applies for the calculation of the 10-year period of residence necessary to acquire enhanced protection against expulsion¹⁵⁰.

In the *Ogieriakhi* case¹⁵¹, the Court held that periods spent in a Member State but not living with a Union citizen, because the couple, although not divorced, was separated, count for the purpose of a family member obtaining a permanent residence status. The Court stated that the marital relationship cannot be regarded as dissolved as long as it has not been terminated by the competent authority. Consequently, the spouse does not necessarily have to live permanently with the Union citizen in order to hold a derived right of residence¹⁵².

¹⁴⁶ Case C-456/12 *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B* [2014] ECLI:EU:C:2014:135.

¹⁴⁷ *Ibid*, para 59.

¹⁴⁸ C-424/10 *Ziolkowski and Szeja* [2011] ECLI:EU:C:2011:866.

¹⁴⁹ *Ibid*.

¹⁵⁰ C-378/12 and C-400/12 *Onuekwere* [2014] ECLI:EU:C:2014:13.

¹⁵¹ Case C-244/13 *Ogieriakhi* [2014] ECLI:EU:C:2014:2068.

¹⁵² *Ibid* at para. 37.

3. ANALYSIS OF THE PRIMARY BARRIERS TO THE RIGHT TO ENTRY

KEY FINDINGS

- **EU citizens** experienced few obstacles in exercising their entry rights within the EU. These include the obligation to report their presence in the Member State within an unreasonable period of time. Also, in some Member States as in the UK, ID cards have been rejected and passports have been required. There is also no appeals mechanism against refusal of entry in Ireland.
- **Family members**, in particular TCN family members, encounter a number of barriers in exercising their right of entry, particularly in relation to the issuance of visas. These include incorrect implementation of the facilities to issue visas (e.g. excessive delays and visas not being issued free of charge) and refusal of the accelerated procedure. Visas are also often refused on invalid grounds or without a justified reason. There are often also excessive documentation requirements to obtain a visa and scarce and confusing information is available regarding visas. Immigration authorities in some Member States are also unaware of Decision 565/2014 abolishing the visa requirement for TCN family members who hold a valid residence permit issued by certain Member States (e.g. Cyprus).

This section provides information on the recurring obstacles encountered in practice by EU citizens and/or their TCN family members in gaining entry to the EU Member States. The information collected is based on the research carried out in all the Member States. Complaints made to the Your Europe Advice Service, petitions made to the European Parliament, case law and existing literature were also reviewed for the purpose of this research. It is worth repeating here that the main challenge encountered in drafting this section relates to the difficulties in getting systematic data or information on the implementation of **certain aspects of Directive 2004/38/EC's implementation and in particular on decisions related to the right to entry or residence and their justification.** Access to publicly available sources of data and information on the abovementioned issues does not exist in most Member State so the information provided in this section has been obtained through complaints, petitions or stakeholder interviews.

3.1. EU Legislation

Article 5 of Directive 2004/38/EC sets out the right of entry for EU citizens and their TCN family members to enter an EU Member State. The right to entry covers:

Right of entry

EU citizens

- The right to enter a Member State **with a valid identity card** or passport. **No visa requirements** or equivalent may be imposed on them.
- Where an EU citizen does not have the necessary travel documents, the Member State must, before refusing entry, give them **every reasonable opportunity to obtain the necessary documents** or prove by other means that they are covered by the right of free movement and residence.

TCN family members of EU citizens

- TCN family members have the right to enter a Member State **with a valid passport**
- TCN family members can only be required to have an **entry visa** in accordance with Regulation 539/2001 (the Visa List Regulation as amended) or national law. Possession of a valid residence card exempts TCN family members from this visa requirement.
- Member States must provide **every opportunity** for TCN family members to obtain the necessary visas, including issuing visas **free of charge, as soon as possible** and through an **accelerated procedure**.
- An entry or exit stamp must not be put in the passport of TCN family members with a residence card.
- Where a TCN family member does not have the necessary travel documents or visa, the Member State must, before refusing entry, give them every reasonable opportunity to obtain the necessary documents or prove by other means that they are covered by the right of free movement and residence.

In addition, the host Member State may require the EU citizen and his/her family members to report their presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may result in proportionate and non-discriminatory sanctions.

The CJEU, in the case of *Commission v Spain*¹⁵³, held that TCN family members not only have the right to enter the territory of the Member State, but also have the right to obtain an entry visa¹⁵⁴. This distinguishes them from other third country nationals, who have no such right¹⁵⁵.

Moreover, in the case of *McCarthy and others*¹⁵⁶, the CJEU held that where TCNs hold a residence card of a family member of an EU citizen, the UK cannot make their right of entry subject to the requirement that they must first obtain a visa.

3.2. EU citizens

As mentioned above, the Directive stipulates that EU citizens only need a valid identity card or passport in order to enter a Member State and that no entry visa or equivalent formality is required, regardless of the purpose of their entry or their status as workers. There are very few reports of EU citizens experiencing obstacles in gaining entry to Member States. Most obstacles to entry rights occur in respect of visas for TCN family members (see Section 4.2.3 below for further discussion). The main recurring obstacle for EU

¹⁵³ Case C-503/03 *Commission v Spain* [2006] ECLI:EU:C:2006:74.

¹⁵⁴ Ibid at para 42; Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final, 2 July 2009, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52009DC0313>.

¹⁵⁵ Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final, 2 July 2009, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52009DC0313>.

¹⁵⁶ Case C-202/13 *McCarthy and others* [2014] ECLI:EU:C:2014:2450.

citizens in exercising their right of entry to some EU Member States is the obligation to report their presence to the authorities, as described below.

3.2.1. Obligation to report their presence in the Member State within an unreasonable period of time

Article 5(5) of the Directive states that Member States may require an individual to report his/her presence within its territory within a reasonable and non-discriminatory period of time. In practice, some Member States provide unreasonably short periods of time for EU citizens to report, with failure to do so entailing a sanction. Such practices are not in line with the Directive's requirements of reasonableness and proportionality. This issue has been reported in at least two Member States (**RO** and **LT**).

Relevant examples: obligation to report their presence

- In **Romania**, EU citizens must report their presence on the territory **within 15 days** of arrival. EU citizens who do not comply within the prescribed period are deemed guilty of an offence and **fined**. These measures might not comply with the Directive as they appear disproportionate and involve the penal system in what is essentially an administrative matter¹⁵⁷. For example, an Italian citizen was **threatened to be highly fined (€10,000) for not having reported his presence in Romania**¹⁵⁸.
- **Lithuania** requires individuals to report their presence on the territory **within seven days** of arrival. This timeframe may not be considered reasonable according to the Directive¹⁵⁹. While this issue was already raised in 2009, no changes have been adopted and the requirement is still compulsory.

3.2.2. Others

Some other obstacles were experienced by EU citizens in exercising their right of entry in the Member States. While these are not recurrent issues across several Member States, they are nevertheless important obstacles that EU citizens are facing.

For example, some reports showed that the **UK** authorities have refused to recognize identity cards from other Member States. Such has been the case with Greek ID Cards, which were rejected by the UK authorities and a passport was required¹⁶⁰. This is in breach of Article 5(1) of the Directive, which stipulates that EU citizens have the right to enter a Member State with a valid identity card or passport.

¹⁵⁷ European Parliament, 'Comparative study on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', 2009, PE 410.650, available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET\(2009\)410650_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET(2009)410650_EN.pdf), p.174.

¹⁵⁸ Your Europe Advice, Quarterly Feedback Report No. 7, Quarter 1/2014, (January-March), p.38.

¹⁵⁹ European Parliament, 'Comparative study on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', 2009, PE 410.650, available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET\(2009\)410650_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET(2009)410650_EN.pdf), p.174.

¹⁶⁰ Your Europe Advice, Quarterly Feedback Report No. 12, Quarter 2/2015 (April-June) p.19; Your Europe Advice, Quarterly Feedback Report No. 14, Quarter 4/2015 (October-December) p. 22.

There is no appeals mechanism against refusal of entry of EU citizens at an airport, ferry port or at the land border in **Ireland**¹⁶¹. While there is an obligation to provide, in writing, the reasons for refusing entry, the decision of an immigration officer is not subject to appeal¹⁶². A person seeking to challenge such a refusal would have to resort to judicial review proceedings before the High Court, which would have to be initiated from abroad and could not result in a wrongful decision being replaced by a lawful one. In cases where the High Court quashes a wrongful refusal of entry, the matter is referred back to the original decision maker for a new decision, without any guarantee that the second decision would permit entry to the State¹⁶³. These elements raise serious doubts about compliance with Article 30(3) (the notification of the decision refusing entry must specify the appeal court or administrative authority) and Article 31(1) (the person concerned must have access to judicial and/or administrative redress procedures of any refusal of entry decision) of the Directive.

3.3. Family members of EU citizens

Family members encounter a number of barriers in exercising their right of entry. TCN family members of EU citizens, in particular, face obstacles in having their visas issued. The main points of concern here are the correct implementation of the facilities to issue visas and the accelerated procedure. In addition, many TCN family members face bureaucratic restrictions in the form of excessive formalities or lack of correct application of EU law by immigration authorities. In a number of cases, this has led to visas being refused on invalid grounds or without a justified reason. Such obstacles have been persistently reported in a large number of Member States.

3.3.1. Accelerated procedure for entry visas refused

The right to an accelerated procedure for visas has been refused to TCN family members in at least nine Member States (e.g. **BE, EE, ES, IE, IT, MT, PT, SK, SI**)¹⁶⁴. This is not only in breach of the right to an accelerated procedure but also may result in numerous consequences for TCN family members at risk of being refused entry to a Member State. The barriers identified either reflect a systematic lack of application of the accelerated procedure or persistent refusals to apply the accelerated procedure.

Relevant examples: Accelerated procedure for entry visas refused

- In **Ireland**, there is a failure to provide visa processing facilities at airports¹⁶⁵. For example, the procedures employed at Dublin Airport for family members of EU nationals lack any facility whereby a visa, if actually necessary, could be issued immediately. The High Court determined that the failure to provide such visas at Dublin Airport, meaning that a TCN spouse could only apply for a visa online from **abroad 'clearly is a manifest breach of Article 5(2), since it could hardly be said that the State has afforded such persons every facility to obtain the necessary**

¹⁶¹Groenendijk, K., et al., European Report on the Free Movement of Workers in Europe in 2012-2013, 2014, p. 8.

¹⁶² S. Mullaly, F. O'Reagan, H. Bekker, 'Report on the Free Movement of Workers in Ireland in 2012-2013', July 2013, p. 31.

¹⁶³ibid.

¹⁶⁴Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

¹⁶⁵Your Europe Advice, Quarterly Feedback Report No. 6, Quarter 4/2013 (October-December), p. 22.

visas¹⁶⁶. The State was also found to be in breach of the obligation in Article 5(4) of the Directive to afford every reasonable opportunity to such persons to obtain the necessary documents to corroborate or prove by other means that he or she was covered by the right of free movement and residence provided for by the Directive¹⁶⁷. The visa regime has remained unchanged since the above judgment was delivered on 3 June 2011, with Ireland, thus, remaining in breach of the Directive in this instance¹⁶⁸.

- In **Malta**, the Maltese embassy does not allow family members of EU citizens to use the accelerated procedure even though they fulfil the conditions¹⁶⁹.
- In **Portugal**, a case has been reported of a South African citizen married to a Portuguese national who wanted to travel to Portugal with her husband. The Portuguese Consulate in South Africa did not adhere to the requirements laid down in the Directive for accelerated visa application procedures for EU family members¹⁷⁰
- The **Slovak** embassy in London refused to issue a Schengen visa under the accelerated procedure for a short-term visit to family, to the TCN spouse of a Slovak citizen returning home¹⁷¹.

In some cases, the issues related to the lack of accelerated procedures have been resolved following action from the **European Commission**. In 2013, for example, the European Commission launched infringement proceedings against Belgium for its failure to provide a facility for the entry and residence of TCN family members of Union citizens¹⁷². Belgium adopted new legislation in 2014 to incorporate the requirement to grant TCN family members every facility to obtain visas, including issuing them free of charge and granted under an accelerated procedure.

3.3.2. Excessive delays in obtaining a visa

TCN family members have frequently experienced excessive delays in obtaining a visa in at least 11 Member States (e.g. **BE, CZ, DE, EL, HU, IE, IT, MT, NL, SE, UK**)¹⁷³, with reported delays from 12 weeks to several months¹⁷⁴. While the Directive stipulates that these visas must be issued as soon as possible, this allows for a margin of interpretation. In practice, the accelerated timeframe set in national legislation may start from the moment the application is complete. However, between the first step in the application process and the moment the application is complete, a few weeks or months may pass while the visa applicant obtains all the requisite documentation, depending on the

¹⁶⁶ Raducan v Minister for Justice, Equality and Law Reform [2011] IEHC 224, 3 June 2011; S. Mullaly, F. O'Reagan, H. Bekker, 'Report on the Free Movement of Workers in Ireland in 2012-2013', July 2013, p. 32.

¹⁶⁷ See, e.g., Hilka Becker 'Immigrants and the Law in Ireland', address to the Burren Law School, 4 June 2013.

¹⁶⁸ Raducan v Minister for Justice, Equality and Law Reform [2011] IEHC 224, 3 June 2011; S. Mullaly, F. O'Reagan, H. Bekker, 'Report on the Free Movement of Workers in Ireland in 2012-2013', July 2013, p. 32.

¹⁶⁹ Your Europe Advice, Quarterly Feedback Report No. 7, Quarter 1/2014, (January-March), p 10; Your Europe Advice, Quarterly Feedback Report No. 14, Quarter 4/2015 (October-December), p 27.

¹⁷⁰ European Parliament, 'Comparative study on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', 2009, PE 410.650, available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET\(2009\)410650_EN.pdf.p.197](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET(2009)410650_EN.pdf.p.197).

¹⁷¹ Your Europe Advice, Quarterly Feedback Report No. 13, Quarter 3/2015 (July-September), p.53.

¹⁷² European Commission, [February infringements package: main decisions](#), 21 February 2013.

¹⁷³ Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

¹⁷⁴ Your Europe Advice, Quarterly Feedback Report No. 14, Quarter 4/2015 (October-December), p. 18.

administrative and judicial procedures they need to engage with. This can entail a very long process for these families¹⁷⁵.

3.3.3. Visas not issued free of charge

In at least seven Member States (e.g. **CY, DE, ES, IT, MT, NL, UK**)¹⁷⁶, TCN have been required to pay for their visas. For example, in **Malta**, TCN family members were not allowed to apply for a visa free of charge on the basis that the right of family members to obtain a visa free of charge only applies to EU citizens who were married within the EU¹⁷⁷.

3.3.4. Refusal of visa on invalid grounds or without a justified reason

TCN family members have been denied a visa on invalid grounds, or without a justified reason, in at least 11 Member States (e.g. **BE, CY, DE, EL, ES, FI, IE, IT, NL, SI, UK**)¹⁷⁸. The case studies below demonstrate that these refusals are in breach of Article 27 of the Directive according to which the freedom of movement of EU citizens and their family members may only be restricted on grounds of public policy, public security or public health.

Relevant examples: Refusal of visa on invalid grounds or without a justified reason

- In **Belgium**, in 2014, the TCN registered partner of a British citizen was refused a visa on the incorrect basis that Belgium does not recognise registered partnerships from the UK because it does not issue an apostille¹⁷⁹.
- In **Ireland**, refusals to process visa applications without a justified reason were also reported¹⁸⁰. For example, one complaint concerned the TCN family member of a British citizen who travelled to Ireland with his British spouse and was refused entry without a justified reason, despite his exemption from entry visa requirements under the Directive. As a result, he was sent back to the country of departure without his family, incurring a loss of more than EUR 3,000¹⁸¹.
- In **the Netherlands**, visas have been refused on invalid grounds (e.g. for non-recognition of documents and for other reasons, with one visa refused on the suspicion that the TCN wife of a German citizen had no intention of leaving the Netherlands¹⁸²).
- In **Spain**, in many cases a visa is denied without a transparent procedure, as the decision is made at the discretion of the individual civil servant in charge of each case¹⁸³.

¹⁷⁵ Myria, '2015 Migration in numbers and in rights' (2016), p. 101.

¹⁷⁶ Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

¹⁷⁷ Your Europe Advice, Quarterly Feedback Report No. 11, Quarter 1/2015 (January-March), p. 17.

¹⁷⁸ Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

¹⁷⁹ Your Europe Advice, Quarterly Feedback Report No. 9, Quarter 3/2014 (July-September), p. 18.

¹⁸⁰ Your Europe Advice, Quarterly Feedback Report No. 14, Quarter 4/2015 (October-December), p. 10; Your Europe Advice, Quarterly Feedback Report No.2, Quarter 3/2012 (July-September), p. 11.

¹⁸¹ Your Europe Advice, Quarterly Feedback Report No. 10, Quarter 4/2014 (October-December), p. 20.

¹⁸² Your Europe Advice, Quarterly Feedback Report No.8, Quarter 2/2014 (April-June), p.18.

¹⁸³ Citizens without Borders, Free Movement and Residence in the European Union: a Challenge for European Citizenship, 31 May 2013, available at: http://www.meltingpot.org/IMG/pdf/citizien_inglese.pdf.

3.3.5. Excessive documentation required to obtain a visa

In a large number of Member States (e.g. **AT, BE, BG, CZ, DE, EE, ES, EL, FI, FR, IE, IT, MT, NL, PL, PT, UK**) it was reported¹⁸⁴ that TCN family members encounter frequent obstacles in obtaining a visa as a result of the national authorities asking for excessive documentation in order to issue the visa. Such requirements are at odds with the Directive's requirement to facilitate entry of EU citizens' family members.

Relevant examples: Excessive documentation required to obtain a visa

- In **Belgium, in 2014**, specific travel booking details were required of a couple to prove that they were travelling together in order to obtain a visa¹⁸⁵. Also in Belgium, a TCN family member applying for a visa was required to provide proof of resources for the duration of a trip in addition to the letter of support from her husband in which he stated that he would fund the trip¹⁸⁶.
- In **Italy**, numerous documents and information are requested in order for a family member to obtain an entry visa, e.g. healthcare insurance¹⁸⁷, proof of accommodation¹⁸⁸, invitation from a national of the country concerned¹⁸⁹, flight details¹⁹⁰, a hotel reservation¹⁹¹, a sum of money available in a bank account or other sufficient resources¹⁹², residence card¹⁹³, or other documents (sometimes even for short visits to family or for holidays)¹⁹⁴. Family members are also asked to have a passport with at least three months validity after the intended date of return¹⁹⁵.
- There are frequent complaints that **Maltese** authorities demand significant amounts of documentation from people applying for visas. One complainant stated that he had to provide proof of return flights, travel insurance and accommodation receipts¹⁹⁶.
- A petition was made to the European Parliament concerning the fact that his Colombian wife was unable to obtain a visa to travel with him to **Spain** for a holiday. The Spanish embassy in Bogotá required additional documentation that the petitioner believes would only apply for a non-family member visa application.

¹⁸⁴ Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

¹⁸⁵ Your Europe Advice, Quarterly Feedback Report No. 9, Quarter 3/2014 (July-September), p. 18.

¹⁸⁶ Ibid.

¹⁸⁷ Your Europe Advice, Quarterly Feedback Report No. 4, Quarter 2/2013 (April-June), p.18; Your Europe Advice, Quarterly Feedback Report No. 5, Quarter 3/2013 (July-September), p.20.

¹⁸⁸ Your Europe Advice, Quarterly Feedback Report No. 6, Quarter 4/2013 (October-December), p.22; Your Europe Advice, Quarterly Feedback Report No. 4, Quarter 2/2013 (April-June), p.18-19.

¹⁸⁹ Your Europe Advice, Quarterly Feedback Report No. 6, Quarter 4/2013 (October-December), p.22; Your Europe Advice, Quarterly Feedback Report No. 4, Quarter 2/2013 (April-June), p.18.

¹⁹⁰ Your Europe Advice, Quarterly Feedback Report No. 6, Quarter 4/2013 (October-December), p.22; Your Europe Advice, Quarterly Feedback Report No. 5, Quarter 3/2013 (July-September), p.20; Your Europe Advice, Quarterly Feedback Report No. 4, Quarter 2/2013 (April-June), p.18-19.

¹⁹¹ Your Europe Advice, Quarterly Feedback Report No. 5, Quarter 3/2013 (July-September), p.20.

¹⁹² Your Europe Advice, Quarterly Feedback Report No. 6, Quarter 4/2013 (October-December), p.22; Your Europe Advice, Quarterly Feedback Report No. 4, Quarter 2/2013 (April-June), p.18.

¹⁹³ Your Europe Advice, Quarterly Feedback Report No. 5, Quarter 3/2013 (July-September), p.20.

¹⁹⁴ Your Europe Advice, Quarterly Feedback Report, Quarter 3/2015 (July-September), p.18; Your Europe Advice, Quarterly Feedback Report No. 12, Quarter 2/2015 (April-June), p.16; Your Europe Advice, Quarterly Feedback Report No. 6, Quarter 4/2013 (October-December), p.22-23; Your Europe Advice, Quarterly Feedback Report No. 4, Quarter 2/2013 (April-June), p.16 and 18.

¹⁹⁵ Your Europe Advice, Quarterly Feedback Report No. 8, Quarter 2/2014 (April-June), p.19.

¹⁹⁶ Your Europe Advice, Quarterly Feedback Report No. 7, Quarter 1/2014, (January-March), p.10; Your Europe Advice, Quarterly Feedback Report No. 14, Quarter 4/2015 (October-December), p. 10.

The petitioner sought assistance from SOLVIT but this was to no avail. The European Commission examined the case and advised that the petitioner should take any necessary legal routes on a national level in order to protect the rights he believes have been infringed¹⁹⁷.

3.3.6. Scarce and confusing information regarding visas

At least 11 Member States (e.g. **CY, CZ, DE, ES, EL, FI, IE, IT, PL, PT, RO**)¹⁹⁸ reported a lack of available information about visas, or that confusing information was provided to TCN family members. This barrier is key as providing incorrect or confusing information can effectively lead family members to decide not to exercise their rights or to be prevented from exercising their rights to entry as a result of incorrect information. Examples are provided in the box below.

Relevant examples: Lack of information or confusing information

- In **Portugal**, it seems that citizens are still receiving confusing information from the embassies or consulates abroad on the type of entry visa needed by their TCN spouses/family members. In particular, information about visa exemptions is withheld¹⁹⁹.
- In **Romania**, some national authorities wrongly informed citizens that TCN family members do not need an entry visa. They were then denied boarding onto a flight to Romania²⁰⁰.
- A Nepali petitioner, who cohabits with his Polish partner, was informed by authorities at the German embassy in London that he would need to obtain a visa in order to travel to **Germany**. He was told that for visa-free access, he would need a document attesting to their relationship, such as a marriage certificate. The European Commission held that the information provided to the petitioner by the German authorities does not correctly reflect the provisions made both in Directive 2004/38/EC and German law²⁰¹.

3.3.7. Others

One important issue concerning **Cyprus** is that Cypriot immigration police are not aware of Decision 565/2014²⁰², which abolishes the visa requirement for TCN family members who hold a valid residence permit issued by Bulgaria, Romania or Croatia and who wish to travel to Cyprus²⁰³. It is, therefore, an obstacle for these individuals who wish to enter Cyprus. It is also in breach of Article 5(2) of the Directive, which states that possession of a valid residence card exempts TCN family members from the visa requirement. This had been reported as an issue also in Romania, though it appears to have been resolved.

¹⁹⁷ Petition No 0259/2012 to the European Parliament.

¹⁹⁸ Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

¹⁹⁹ Your Europe Advice, Quarterly Feedback Report No.4, Quarter 2/2013, (April-June), p.16.

²⁰⁰ Your Europe Advice, Quarterly Feedback Report, No. 7, Quarter 1/2014, (January-March), p.25.

²⁰¹ Petition No 1623/2014 to the European Parliament.

²⁰² Decision No 565/2014 of the European Parliament and of the Council of 15 May 2014 introducing a simplified regime for the control of persons at the external borders based on the unilateral recognition by Bulgaria, Croatia, Cyprus and Romania of certain documents as equivalent to their national visas for transit through, or intended stays on, their territories not exceeding 90 days in an 180-day period and repealing Decisions No 895/2006/EC and No 582/2008/EC, OJ L 157, 27 May 2014, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L.2014.157.01.0023.01.ENG>.

²⁰³ Your Europe Advice, Quarterly Feedback Report No. 9, Quarter 3/2014 (July-September), p. 21.

4. ANALYSIS OF THE PRIMARY BARRIERS TO THE RIGHT TO RESIDENCE

KEY FINDINGS

- EU citizens and their TCN family members experience a number of **bureaucratic issues** in obtaining residence cards/registration certificates. For example, excessive delays have been reported in a number of Member States to obtain a residence card/registration certificate. National authorities also often demand excessive documentation in order to issue a residence card/registration certificate.
- Another significant issue reported in a number of Member States is that **invalid grounds** are often used **to justify denials** of the right to reside. This is particularly the case for permanent residency applications. For example, Romanian and Polish citizens who have lived in **Italy** for more than five years are frequently refused permanent residency status on the basis that they are unemployed.
- There is also a **lack of sufficient information** available regarding the right of residence in a number of Member States. A specific issue concerns inadequate and contradictory information provided by national authorities regarding long-term resident status.
- A few Member States adopt a restrictive interpretation of the proof of health insurance necessary to obtain a residence card.
- TCN family members can also face a number of **other obstacles**, namely the **obligation to 'legalise' marriage** certificates in order to obtain a residence card; complications with the renewal of residence permits; language requirements in order to obtain a residence certificate and the retention of passports when an application is being processed for a residence card.
- For as long as the right of residence is not fully recognised, EU citizens and their TCN family members are often denied access to social benefits and to employment. They may also face problems in accessing certain services (e.g. opening a bank account).

This section provides information on the recurring practical obstacles EU citizens and their family members experience in exercising their right of residence in the Member States.

4.1. EU Legislation

Directive 2004/38 sets out the following rules concerning the right of residence in its Articles 6 and 7, as well as in others:

Right of residence

- **Up to three months:** EU citizens and their family members enjoy the right to reside in another Member State without any conditions or formalities²⁰⁴.
- **More than three months:** The right of residence is subject to certain conditions, depending on the status of the EU citizens and their family members in the host Member States. Those who are **employed or self-employed** do not need to meet

²⁰⁴ Article 6 of Directive 2004/38/EC.

any other conditions. **Students** and other people **not working for payment**, such as those in retirement, must have **sufficient resources** for themselves and their **family members, so as not to become a burden on the host State's social assistance system**, and must also have comprehensive sickness insurance cover²⁰⁵. An EU citizen who is no longer a worker or self-employed person **retains the status of worker** or self-employed person under certain circumstances such as if he/she were temporarily unable to work as the result of an illness or accident²⁰⁶. The host Member State may require Union citizens to register with the relevant authorities²⁰⁷. On the other hand, TCN family members must apply for a residence card²⁰⁸. A residence card is issued on the presentation of certain documents by the family member. These documents are exhaustively listed by Directive 2004/38/EC²⁰⁹. Family members may, under certain conditions, retain the right to live in the country concerned if the EU citizen dies or leaves the country²¹⁰.

- **Five years of continuous residence:** EU citizens and their family members who have legally resided for a continuous period of five years in the host Member State are entitled to the **right of permanent residence** there. The conditions mentioned above are no longer applicable to them²¹¹. The right of permanent residence is lost only in the event of more than two successive years of absence from the host Member State²¹². When issuing a document certifying permanent residence, the Member State must only verify the duration of residence²¹³.

A number of cases have been brought to the CJEU regarding the right of residence and the interpretation of such residence rights provisions of the Directive. For example, the CJEU concluded in the cases of *Antonissen*²¹⁴, *Collins*²¹⁵ and *Ioannidis*²¹⁶, that **jobseekers** have a right of residence in another Member State during the periods in which they seek work. However, in *Antonissen*, the CJEU held that it is not contrary to the provisions of Community law governing the free movement of workers for the legislation of a Member State to provide that a national of another Member State who entered the first State in order to seek employment may be required to leave the territory of that State (subject to appeal) if he has not found employment there after six months, unless the person concerned provides evidence that he is continuing to seek employment and that he has a genuine chance of being engaged²¹⁷.

In relation to **retention of the right of residence**, the CJEU in *Ogieriakhi*²¹⁸ and *Diatta*²¹⁹ held that where a marriage breaks down and the parties separate but do not divorce, if the EU citizen remains in the country of residence then the right of residence

²⁰⁵ Article 7 (1) of Directive 2004/38/EC.

²⁰⁶ Article 7 (3) of Directive 2004/38/EC.

²⁰⁷ Article 8 of Directive 2004/38/EC.

²⁰⁸ Article 9 of Directive 2004/38/EC.

²⁰⁹ Article 10 of Directive 2004/38/EC.

²¹⁰ Article 12 of Directive 2004/38/EC.

²¹¹ Article 16 (1) of Directive 2004/38/EC.

²¹² Article 16 (4) of Directive 2004/38/EC.

²¹³ Article 19 of Directive 2004/38/EC.

²¹⁴ Case C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] ECLI:EU:C:1991:80.

²¹⁵ Case C-138/02 *Collins v Secretary of State for Work and Pensions* [2004] ECLI:EU:C:2004:172, at para 18.

²¹⁶ Case C-258/04 *Office national de l'emploi v Ioannis Ioannidis* [2005] ECLI:EU:C:2005:559, at para 38.

²¹⁷ Case C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] ECLI:EU:C:1991:80.

²¹⁸ Case C-244/13 *Ewaen Fred Ogieriakhi v Minister for Justice and Equality and Others* [2014] ECLI:EU:C:2014:2068.

²¹⁹ Case C-267/83 *Aissatou Diatta v Land Berlin* [1985] ECLI:EU:C:1985:67.

for the third country national continues: i.e. the spouses need not cohabit for the right of residence to exist. Moreover, in the recent 2016 CJEU judgment in *Secretary of State for the Home Department v NA*²²⁰ it was held that in the case of divorce due to domestic violence, if the EU citizen leaves the host State before the divorce is finalised that **departure immediately ends the TCN citizen's status under the Directive, trumping the retention of their right of residence that would otherwise apply during their separation and (probably) their subsequent divorce from their spouse.**

With regard to the **right of permanent residence**, the CJEU held in *Onuekwere*²²¹ and *G*²²² that periods spent in prison cannot be taken into account for the completion of the five-year period.

4.2. Recurring obstacles

From the research, the most widespread types of obstacles are:

- Excessive delays;
- Excessive documentation requirements;
- Denial of the right of residence on invalid grounds;
- Lack of information concerning the right of residence;
- Restrictive interpretation of proof of health insurance.

These obstacles could lead, in the worst-case scenario, to the denial of residence rights and of the rights which are connected to residence, such as access to social benefits. Even when they do not lead to such a denial of rights, these obstacles impair the swift recognition of residence rights. This leads to extra costs and time invested in administrative procedures. Moreover, for as long as the right of residence is not fully recognised, EU citizens and their family members are often denied access to social benefits, and, in certain cases, access to employment. As a consequence of these delays, they could also face problems in accessing services such as bank accounts or healthcare. In general, this creates a situation of legal uncertainty which affects the lives of EU citizens and their family members.

4.2.1. Excessive delays

EU citizens and their family members report **excessive delays in obtaining a residence card/registration certificates** in at least twelve Member States: (e.g. **AT, BE, CY, CZ, DK, FR, IE, IT, MT, NL, SE and the UK**)²²³.

²²⁰ Case C-115/15 *Secretary of State for the Home Department v NA* [2016] ECLI:EU:C:2016:487.

²²¹ Case C-378/12 *Nnamdi Onuekwere v Secretary of State for the Home Department* [2014] ECLI:EU:C:2014:13.

²²² Case C-400/12 *G* [2014] ECLI:EU:C:2014:9.

²²³ Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

Relevant examples: Excessive delays

- In **Cyprus**, applications for residence cards by TCN family members of EU citizens can still take up to six months to be processed²²⁴. Moreover, considerable backlogs as a result of the implementation of the Directive manifest in delays in making appointments to obtain a registration certificate (delays close to 12 months)²²⁵.
- A similar issue is reported for **Belgium**, where EU citizens and their family members are sometimes required to make an **appointment** with the appropriate local authority in order to register their residence and to apply for a residence card²²⁶. The Integration and Civil Integration Agency of the Flemish Government (*Agentschap Integratie en Inburgering*) confirms that this procedure generated problems for EU citizens in 2015. Because of a **six-month backlog** of appointments, EU citizens residing in Belgium for longer than three months did not have proof of registration²²⁷.
- In the **Czech Republic**, excessive delays are due to an insufficient number of state officials dealing with residence permit applications. The problem of delays in issuing residence permits for TCN family members²²⁸ also lies with a transfer of competence between ministries for issuing the residence card²²⁹. The situation has been repeatedly criticised by the Czech Ombudsman²³⁰. In general, bureaucracy represents a heavy burden for EU citizens and their family members.
- EU citizens have complained that local authorities in **France** recurrently either fail to issue, or issue with a significant delay, a certificate of registration. This has been identified as a large-scale and systematic problem in France²³¹.
- A **petitioner's application** for a permanent residence permit in the **UK** has taken longer than six months to issue. The European Commission acknowledged that delays in this process would cause distress but informed the petitioner that it believed the problem of delays had been resolved²³². Another petitioner complained about the length of time it takes to be granted residency in the UK, despite fulfilling all of the requirements. The petitioner needed to leave the UK as a matter of urgency but could not as a result of the delay. The European Commission made enquiries with the British authorities and according to available information were later satisfied that the issue of delays had been resolved²³³.

4.2.2. Excessive documentation requirements

National authorities demand excessive documentation in order to exercise the right of residence in at least twelve Member States (e.g. **AT, BE, CY, ES, FR, HU, IE, IT, MT, PT,**

²²⁴Carrera, S. and Faurer Atger, A., Implementation of Directive 2004/38 in the context of EU enlargement, April 2009, Centre for European Policy Studies, Brussels, 2009, available at: <http://aei.pitt.edu/10758/1/1827.pdf>, p 9; Groenendijk, K., et al., European Report on the Free Movement of Workers in Europe in 2012-2013, 2014, p. 27.

²²⁵ Neergaard, C. Jacqueson, N. Holst-Christensen, Union Citizenship : development, impact and challenges, XXVI FIDE Congress in Copenhagen 2014, Congress Publications vol. 2, DJØF Publishing, Denmark, 2014, p 392.

²²⁶Your Europe Advice, Quarterly Feedback Report No. 4, Quarter 2/2013 (April-June), p. 25.

²²⁷ Information obtained from the Flemish Integration and Civil Integration Agency, May 2016.

²²⁸Your Europe Advice, Quarterly Feedback Report No. 3, Quarter 1/2013 (January-March), p. 4.

²²⁹ Ibid, p. 21.

²³⁰Citizens without Borders, Free Movement and Residence in the European Union: a Challenge for European Citizenship, 31 May 2013, available at: http://www.meltingpot.org/IMG/pdf/citizien_inglese.pdf, p 23.

²³¹Your Europe Advice, Quarterly Feedback Report No. 5, Quarter 3/2013 (July-September).

²³² Petition No 2168/2013 to the European Parliament.

²³³ Petition No 1908/2012 to the European Parliament.

SK and the UK)²³⁴. The documents requested in several cases go beyond the documentation that is needed to prove the EU citizen complies with the Directive's requirements.

Relevant examples: Excessive documentation required

- **Spain** imposes an obligation for EU citizens and their family members to obtain, in addition to the registration certificate, a Foreigner Identity Number²³⁵, which can take up to six weeks to be issued. This is necessary to work, open a bank account or register with the Spanish social security authorities. This requirement does not seem in line with the Directive, which eliminated the requirement for residence cards. Moreover, it seems to go against the provision that a registration certificate or residence permit for members of the family cannot be made a precondition for the exercise of a right or the completion of an administrative formality²³⁶.
- To issue a residence card, **Irish** authorities require extra documents than those listed by the Directive²³⁷: details of the occupation of the applicant, the Personal Public Service (PPS) number²³⁸, the declaration of any criminal record and the immigration history²³⁹.
- In **Slovakia**, a 2013 amendment to the Foreigners Act has introduced an obligation for job seekers to submit a health insurance document in order to be registered. This does not seem in line with Directive 2004/38/EC²⁴⁰. Moreover, a case was reported where a TCN family member of an EU citizen encountered difficulties with the authorities because they refused to recognise the marriage certificate from Italy. In particular, they insisted on the need to get a document apostille in a court in Slovakia. The court has alleged that it only does this for Slovakian documents²⁴¹.
- In **France**, concerns have been raised that self-employed persons encounter difficulties for the recognition of their right to stay. In fact, they are required to prove their income²⁴². **In addition, one petitioner's spouse, a Singaporean citizen, had her application for a French residence permit rejected twice. When it was accepted, the petitioner claimed that the couple were asked for excessive documentation and were also charged €106, with his spouse only receiving a residence permit for one year. The European Commission contacted the French authorities and it was found that, initially, there was a lack of information confirming the petitioner's own residence in France. When the application was accepted, the authorities charged €106 in error and due to technical difficulties, the residence permit was issued for only one year when it should have been for five years. The Commission was satisfied with the French authorities' response that the situation would be remedied**²⁴³.

²³⁴ Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

²³⁵ Número de Identificación de Extranjero or NIE.

²³⁶ Article 25 of Directive 2004/38.

²³⁷ Article 10 of Directive 2004/38.

²³⁸ The Personal Public Service Number (PPS number) is a unique reference number that helps citizens to access social welfare benefits, public services and information in Ireland, see: http://www.citizensinformation.ie/en/social_welfare/irish_social_welfare_system/personal_public_service_number.html.

²³⁹ Your Europe Advice, Quarterly Feedback Report No. 11, Quarter 1/2015 (January-March), p.32.

²⁴⁰ Groenendijk, K., et al., European Report on the Free Movement of Workers in Europe in 2012-2013, 2014, p.24.

²⁴¹Your Europe Advice, Quarterly Feedback Report No. 8, Quarter 2/2014 (April-June)., p.59.

²⁴²ibid atp.21..

²⁴³ Petition No 1541/2012 to the European Parliament.

4.2.3. Denial of the right of residence on invalid grounds

In nine Member States, invalid grounds are used to justify denials of the right to reside. This problem is reported in at least nine Member States (e.g. **AT, BE, HR, ES, EL, FI, FR, PL and PT**)²⁴⁴. The grounds to refuse residence either relate to conditions that are not recognised by the Directive, and therefore are not in line with the Directive, or in interpreting the Directive's requirements in a manner that is at odds with the Directive.

For example, in **Austria**, EU pensioners could lose their right of residence due to a lack of resources when applying for supplementary pension benefits²⁴⁵.

In **Belgium**, refusals on invalid grounds appears to be a recurrent problem. This regards in particular refusals of residence applications based on employment status (jobseeker, temporary worker, and researcher) or on a lack of sufficient resources. Several cases have been reported where EU jobseekers who have worked face problems with their right of residence, such as temporary workers. An incident has been reported where an EU citizen was refused registration of residence for failing to speak Flemish to the local authority. Several cases have been reported where EU citizens looking for employment and employed persons face problems with their right of residence. For example, an EU citizen temporary worker was not allowed to stay unless a three-month contract could be presented. An EU-citizen was told he could not stay in Belgium if he did not find permanent full-time employment in a Dutch-speaking company within three months.

Regarding economic resources, a case has been reported where the Belgian authorities refused to issue substitute registration papers to a British mother and her daughter (both registered in Belgium) who had lost their papers unless they could prove that they had at least EUR 10,000 in their bank account²⁴⁶.

In **Spain**, the concept of sufficient resources has been interpreted in an arbitrary manner. Spanish Ombudsman reports over recent years have referred to several complaints from EU citizens against a requirement for fixed and regular economic resources. EU citizens are not in a position to obtain information beforehand on the level of resources needed to register as residents and the amount that is considered as sufficient resources may change from one case to another²⁴⁷. This adds to the situation where the right to residence is linked to the obligation for Union citizens and family members in Spain to obtain, in addition to the registration certificate, a **Foreigner Identity Number** (Número de Identificación de Extranjero or NIE). The NIE is necessary for Union citizens to work, open a bank account or register with the Spanish Social Security, which can take up to six weeks to be issued. The problem is that in some cases, the requirements for getting the NIE relate to having sufficient resources include having a job. This goes against the spirit of the Directive to eradicate the requirement of residence cards and, more particularly, against Article 25 of the Directive which provides that holding a registration certificate or residence permit for family members cannot be made a precondition for the exercise of a right or the completion of an administrative formality.

²⁴⁴ Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

²⁴⁵ Juravle, C. et al. 'A fact-finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence', 2013, p. 154 European Commission, available at: <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=1980>.

²⁴⁶ Your Europe Advice, Quarterly Feedback Report No. 10, Quarter 4/2014 (October-December), p. 28.

²⁴⁷ Spanish Ombudsman. 2013 Annual Report (*Informe Anual 2013*) p. 209-210.

In **France**, some complaints have been lodged regarding residence permits being denied to TCN family members of EU citizen frontier workers on the grounds that these EU citizens are not residents.

In **Greece**, a case was reported of an EU citizen who legally resided, worked, was insured, and paid taxes in Greece for over ten years. Although he lost his job in 2010, he found another job in November 2013 and started working again. However, the renewal of his residence permit was refused²⁴⁸. In another case, a citizen was refused a residence permit because he applied after his five-year permit had expired²⁴⁹.

A specific issue concerns the **refusal of permanent residence status** on invalid grounds. This problem is reported in at least four Member States (e.g. DE, FI, IE and IT)²⁵⁰. In particular, Romanian and Polish citizens who have lived in **Italy** for more than five years are frequently refused registration as permanent residents on the basis that they are unemployed²⁵¹.

Relevant examples: Refusal of permanent residence status

- **Croatia** limits the validity of student registration certificates to duration of their studies, while it should be unlimited²⁵².
- In addition, a case is reported where a UK citizen in **Portugal** failed to obtain his certificate of registration due to a lack of fixed accommodation in Portugal. Estate agencies request a Portuguese tax number to execute a tenancy agreement and Portuguese tax authorities refuse to issue a tax number without a certificate of registration²⁵³.

4.2.4. Lack of information concerning the right of residence

In at least five Member States (**FI, FR, IT, LV and SI**)²⁵⁴ issues exist concerning the lack of sufficient information necessary for EU citizens and their family members to exercise their free movement rights. The lack of access to the information or incorrect information can effectively result in preventing EU citizens from exercising their rights to residence.

Relevant examples: Lack of sufficient information

- In **Finland** and **Slovenia**, on several occasions the authorities appeared to be of the mistaken belief that only an employment relationship or enrolment at an educational establishment confers on an EU citizen a right of residence for a period exceeding three months. Consequently, they fail to inform people about the right of residence solely based on having sufficient funds and comprehensive insurance cover²⁵⁵.

²⁴⁸Your Europe Advice, Quarterly Feedback Report No. 7, Quarter 1/2014, (January-March), p.41.

²⁴⁹Your Europe Advice, Quarterly Feedback Report No. 3, Quarter 1/2013 (January-March), p. 23.

²⁵⁰Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

²⁵¹Your Europe Advice, Quarterly Feedback Report No. 10, Quarter 4/2014 (October-December),p.28; Your Europe Advice, Quarterly Feedback Report No. 8, Quarter 2/2014 (April-June), p.27.

²⁵²Your Europe Advice, Quarterly Feedback Report No. 11, Quarter 1/2015 (January-March), p.27.

²⁵³Ibid at p.26.

²⁵⁴Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

²⁵⁵Your Europe Advice, Quarterly Feedback. Quarter 1/2013 (January-March), p. 18.

- In **France**, information on the application procedures is easily accessible only to French-speaking people. Otherwise, the information is hard to find for the individual concerned²⁵⁶.
- Similarly, in **Latvia**, documents by the Office of Citizenship and Migration Affairs can only be taken into consideration if they are drawn up in Latvian, Russian, French, English or German. However, this information is not provided in English on the website of the Office of Citizenship and Migration Affairs. It is also not specified (even in the law) whether documents in other languages can be translated by the applicants themselves or should be certified by professional translators or notaries²⁵⁷.

A specific issue concerns inadequate or contradictory information provided by national authorities regarding long-term resident status. This represents an issue in at least three Member States (**FI, MT and SI**)²⁵⁸.

4.2.5. Restrictive interpretation of proof of health insurance

Finally, three Member States adopt a restrictive interpretation of the proof of health insurance necessary to obtain a residence card, which can result in EU citizens' access to healthcare being denied. This is the case in **Croatia, Italy**, and **the UK**²⁵⁹.

Relevant examples: Restrictive interpretation of the proof of health insurance

- In **Italy**, the European Health Insurance Card (EHIC) is often not accepted as proof of comprehensive insurance. Private health insurance and other insurance coverage in the country of origin also appear to be refused²⁶⁰.

The issue is particularly serious in the **UK**, as the UK Home Office, supported by national courts, continues to refuse considering access to its National Health Service in its definition of 'comprehensive sickness insurance' for the purposes of securing residence rights for non-economically active individuals. Home Office Guidance to EEA caseworkers explicitly rejects access to the NHS as proof of comprehensive sickness insurance²⁶¹ and this approach has been held to be permissible by the Court of Appeal²⁶². This continues to impose barriers on the residence rights of EU citizens and is a consistent source of complaint, particularly by students²⁶³. Moreover, UK courts have allowed administrative

²⁵⁶ Henningsen, A., et. al, Evaluation of EU rules on free movement of EU citizens and their family members and their practical implementation, Brussels, 2013, available at: http://ec.europa.eu/justice/citizen/document/files/evaluation_of_eu_rules_on_free_movement-final_report.pdf.

²⁵⁷ See Article 22 (4) of the Immigration Law (*Imigrācijas likums*), OP: "LV", 169 (2744), 20.11.2002., available at: <http://likumi.lv/doc.php?id=68522:Groenendijk>, K., et al., European Report on the Free Movement of Workers in Europe in 2012-2013, 2014, p.54.

²⁵⁸ Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

²⁵⁹ Ibid.

²⁶⁰ Your Europe Advice, Quarterly Feedback Report No. 7, Quarter 1/2014, (January-March), p.34 and 46.

²⁶¹ Home Office Guidance, 'European Economic Area national qualified persons', 7 April 2015, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/488449/Qualified_Persons_v3_0_ext_clean.pdf, p. 41.

²⁶² *Ahmad v Secretary of State for the Home Department* [2014] EWCA Civ 988.

²⁶³ Home Office Guidance, 'European Economic Area national qualified persons', 7 April 2015, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/488449/Qualified_Persons_v3_0_ext_clean.pdf, p. 41; *Ahmad v Secretary of State for the Home Department* [2014] EWCA Civ 988; Your Europe Advice, Quarterly Feedback Report No. 11, Quarter 1/2015 (January-March), p. 25; Your Europe Advice, Quarterly Feedback Report No. 12, Quarter 2/2015 (April-June), p. 27; Your Europe Advice, Quarterly Feedback

rejections of applications for permanent residence on the basis that an applicant's sickness insurance only complemented rather than replaced all services provided by the NHS²⁶⁴.

4.2.6. The situation of TCN family members of EU citizens

The issues identified are broadly similar for EU citizens and TCN family members. The latter, in particular, face issues in obtaining a residence card. In this regard, certain Member States, such as **Spain**²⁶⁵ and **Italy**²⁶⁶, impose an obligation to 'legalise' marriage certificates. This procedure could be cumbersome and delay the issuing of the residence card. Moreover, TCN family members are reported to encounter complications with the renewal of residence permits in **Germany**²⁶⁷ and **Croatia**²⁶⁸.

Another obstacle to the right of residence is the language requirement imposed on TCN family members in order to obtain a residence certificate. This issue has been reported for **Austria** where TCN family members have to provide evidence of their knowledge of the German language by submitting a specific certificate in order to obtain a residence certificate²⁶⁹.

One other obstacle specifically affecting TCN family members is that, in **Ireland**, authorities **retain passports** for a period of four to six weeks when an application is being made for a residence card²⁷⁰. This prevents such applicants from travelling during this period²⁷¹.

Report No. 13, Quarter 3/2015 (July-September), p. 23; Your Europe Advice, Quarter Feedback Report No. 14, Quarter 4/2015 (October-December), p. 20.

²⁶⁴ *FK (Kenya) v Secretary of State for the Home Department* [2010] EWCA Civ 1302.

²⁶⁵ Spanish Ombudsman, Annual Report 2010 (*Informe Anual 2010*), p. 435; Spanish Ombudsman, Annual Report 2012 (*Informe Anual 2012*), p. 165.

²⁶⁶ Your Europe Advice, Quarterly Feedback Report No. 6, Quarter 4/2013 (October-December), p.33; Your Europe Advice, Quarterly Feedback Report No. 10, Quarter 4/2014 (October-December), p.27.

²⁶⁷Your Europe Advice, Quarterly Feedback Report No. 11, Quarter 1/2015 (January-March), p. 25.

²⁶⁸Your Europe Advice, Quarterly Feedback Report No. 3, Quarter 1/2013 (January-March), p.30 and 31.

²⁶⁹Groenendijk, K., et al., European Report on the Free Movement of Workers in Europe in 2012-2013, 2014, p.54.

²⁷⁰ Your Europe Advice, Quarterly Feedback Report No. 12, Quarter 2/2015 (April-June), p. 30.

²⁷¹ Your Europe Advice, Quarterly Feedback Report No. 13, Quarter 3/2015 (July-September), p. 18.

5. ANALYSIS OF THE PRIMARY BARRIERS RELATED TO SOCIAL SECURITY

KEY FINDINGS

- EU citizens and their family members have experienced numerous obstacles in accessing old age pensions, healthcare, family benefits and unemployment benefits in the Member States.
- Most of the problems reported in accessing social benefits concern **old age pensions**. The main problems linked to access to old age pensions are: lack of coordination between national authorities for the calculation of the contribution periods; imposition of a residence requirement for EU citizens and their family members in order to be entitled to old age pensions and ignorance of the aggregation rules for old age pensions. Other obstacles relate to problems of double-taxation of pensions and the obligation to terminate a pension contract on departure abroad and to reimburse the state contributions.
- Obstacles have also been reported concerning accessing **healthcare** namely: issues with the recognition and coverage of the EHIC; lack of knowledge of the applicable legal framework and difficulties in obtaining the S1 form²⁷² when moving to another Member State.
- Delays, refusals to pay and other obstacles in obtaining **family benefits** have been reported in a number of Member States. The most frequent issues are: the imposition of a residence requirement and bureaucratic problems in obtaining necessary documents.
- Substantial barriers to receiving **unemployment benefits** have also been frequently reported.
- The most widespread problem relating to access to social security is the **lack of coordination and communication** between national authorities of different Member States. This leads to the non-recognition of rights to which the EU citizens and their family members are entitled to under the Directive. It also leads to excessive delays in accessing free movement rights.
- Issues relating to **social security contributions** mainly relate to difficulties in demonstrating payment of such contributions in another Member State. Ignorance of rules determining the applicable legislation also often leads to the refusal of social benefits.

5.1. Directive 2004/38 and other EU acts

Access to social benefits is a precondition for the exercise of free movement rights. Under Directive 2004/38, EU citizens and their family members therefore enjoy the right to equal treatment with nationals of the host Member State with respect to access to social benefits²⁷³. The coordination of social security is regulated by EU law²⁷⁴, under four main principles²⁷⁵:

²⁷² The S1 form (formerly E106, E109 and E121) is a certificate of entitlement to healthcare if you do not live in the country where you are insured.

²⁷³ Article 24 of Directive 2004/38; CJEU C-22/08 *Vatsouras and Koupatantze* [2009] ECLI:EU:C:2009:344, at para. 45.

²⁷⁴ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p.1.

²⁷⁵ Ibid.; see also: <http://ec.europa.eu/social/main.jsp?langId=en&catId=849>.

- 1) Non-duplication:** mobile EU citizens and mobile TCNs legally residing in the EU are covered by the legislation of one country at a time.
- 2) Non-discrimination:** mobile EU citizens and mobile TCNs legally residing in the EU have the same rights and obligations as the nationals of the host Member State.
- 3) Aggregation:** periods of insurance, work or residence in another EU Member State count towards contributory benefits.
- 4) Exportability:** mobile EU citizens and mobile TCNs legally residing in the EU, who are entitled to a cash benefit from one Member State, may generally receive it even when they are living in a different Member State.

In addition, specific rules have been drawn up for the acquisition and preservation of supplementary pension rights by workers²⁷⁶, as well as for measures facilitating the exercise of rights conferred on workers in the context of freedom of movement²⁷⁷.

Within the context of these rules, this section describes the most common obstacles in accessing social security, which hinder free movement rights in the Member States. An **assessment of the compatibility of the Member States' legislation and practices** with the relevant rules on the coordination of social security is outside the scope of this study.

The obstacles faced by EU citizens and their family members have been categorised according to the social benefit in question. These obstacles most commonly relate to:

- Old age pensions
- Healthcare
- Family benefits
- Unemployment benefits

An overview of the most frequent obstacles is also presented, including:

- Lack of coordination and communication between national authorities of different Member States.
- Failure to give information.
- Wrongful imposition of social security contributions.
- Ignorance of the rules determining the applicable legislation.

5.2. Types of benefit

5.2.1. Old age pensions

Most of the problems reported in accessing social benefits concern **old age pensions**. This type of issue has been reported in at least eight Member States (i.e. **CZ, EL, IE, IT, MT, NL, PL and RO**)²⁷⁸.

²⁷⁶ Directive 2014/50/EU of the European Parliament and of the Council of 16 April 2014 on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights (Text with EEA relevance), OJ L 128, 30.4.2014, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.128.01.0001.01.ENG&toc=OJ:L:2014:128:TOC.p.1.

²⁷⁷ Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers (Text with EEA relevance), OJ L 128, 30.4.2014, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.128.01.0008.01.ENG&toc=OJ:L:2014:128:TOC.p.8.

²⁷⁸ Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

The main problems linked to access to old age pensions are:

- Lack of **coordination** between national authorities for the calculation of the contribution periods.
- Setting a **residence requirement** for EU citizens and their family members in order to be entitled to old age pensions.
- Ignorance of the **aggregation rules** for old-age pensions.

A good example of setting **residence requirements** comes from **Greece**, where, reportedly, the old age pension is not paid by Greek social insurance organisations to pensioners, unless they reside permanently in Greece²⁷⁹.

Certain Member States, such as **Italy**²⁸⁰ and **Malta**²⁸¹, often overlook the principle of the aggregation of periods, which guarantees that periods of insurance, employment or residence in an EU country are taken into account in all other EU countries. It is reported that, in Malta, the method of calculating pensions for the transfer of pension rights de facto deprives the worker of his right to aggregate periods completed under the legislation of several Member States²⁸².

In addition, one petitioner has claimed that he is unable to obtain his pension entitlements from **France** and the **UK** as he has worked in the two countries. His pension entitlement has been calculated, but he has not received the outstanding balance²⁸³.

Other obstacles concerning access to old age pension relate to problems of double-taxation of pensions (e.g. between **the Netherlands** and **Sweden**)²⁸⁴, and the obligation to terminate a pension contract on departure abroad and to reimburse the state contributions, reported in the **Czech Republic**²⁸⁵.

Moreover, in CJEU case of *European Commission v Republic of Cyprus*²⁸⁶ it was held that Cypriot legislation²⁸⁷ introduces a difference in treatment between officials of the national administration and officials who work in another Member State in international bodies or in the EU, since only workers who have engaged in activity exclusively in **Cyprus** can, in the event of leaving the State service, make use of Cypriot legislation²⁸⁸ and retain their pension rights even if they do not fulfil the age criterion of 45 or 48 years. On the other hand, workers who have exercised their right to freedom of movement do not have the possibility of relying on Cypriot law, with the consequence of loss of their pension rights. It also impedes the free movement of workers as it denies the worker the possibility of relying on aggregation of all insurance periods and does not guarantee the migrant worker a unified career for social security purposes. Application of the Cypriot Law on Pensions²⁸⁹ means that an official who resigns voluntarily from the State service of Cyprus in order to work in another Member State in international bodies, and who does not fulfil the age

²⁷⁹Groenendijk, K., et al., European Report on the Free Movement of Workers in Europe in 2012-2013, 2014, p 90.

²⁸⁰Your Europe Advice, Quarterly Feedback Report No. 2, Quarter 3/2012 (July-September), p. 19 and 21; Your Europe Advice, Quarterly Feedback Report No. 4, Quarter 2/2013 (April-June), p. 33.

²⁸¹Your European Advice, Quarterly Feedback Report No. 5, Quarter 3/2013 (July-September), p. 39.

²⁸²Ibid.

²⁸³Petition No 0237/2014 to the European Parliament.

²⁸⁴Your Europe Advice, Quarterly Feedback Report No. 9, Quarter 3/2014 (July-September), p. 51.

²⁸⁵Your Europe Advice, Quarterly Feedback Report No. 7, Quarter 1/2014 (January-March), p. 3.

²⁸⁶Case C-515/14 *European Commission v Republic of Cyprus* [2016] ECLI:EU:C:2016:30

²⁸⁷Article 27 of the Law on Pensions (Law 97(I)97).

²⁸⁸Articles 24 and 25 of the Law on Pensions.

²⁸⁹Article 27(1)(b) of the Law on Pensions.

criterion of having reached 45 or 48, receives only the lump sum and loses the pension rights, even if he has completed the minimum period of insurance of five years.

5.2.2. Health care

In accordance with Regulation (EEC) No 1408/71, EU citizens and family members may receive reimbursement of health care costs during a temporary stay in another Member State. Decision 2003/751/EC introduced the European Health Insurance Card (EHIC), which enables EU citizens to effectively access health care in other Member States.

Issues with the **recognition and coverage of the EHIC** are common in at least nine Member States (i.e. **BE, BG, DE, DK, EL, FR, IT, LU and LV**)²⁹⁰.

Relevant examples: Barriers related to lack of recognition of the EHIC

- In 2013, a Belgian public hospital refused to accept the EHIC of a Spanish citizen who needed unforeseen medical treatment whilst in **Belgium**, or to treat him until he had first paid for the treatment²⁹¹.
- This recognition issue is serious in **Bulgaria**, where doctors do not have access to a system to identify or read the card. There are also reports of doctors frequently classifying a health problem as a non-emergency, in order to refuse to accept the EHIC²⁹². Issuing of the EHIC is also refused on unjustifiable grounds²⁹³.
- One petitioner reported problems in getting healthcare in the **Czech Republic** when using the EHIC. The petitioner reported its refusal. The European Commission investigated the implementation of EU law with regard to the EHIC. It did not find elements that would justify any infringements committed by the Czech Republic²⁹⁴.
- In **Denmark**, health insurance is lost when the person changes or cancels his/her permanent residence address in Denmark. The EHIC from Denmark does not, therefore, cover the first months after an EU citizen moves to another Member State, as he/she is no longer entitled to Danish health insurance²⁹⁵.

A **lack of knowledge of the applicable legal framework** also presents a problem in certain Member States. For instance, an Italian pensioner living in Portugal, on attempting to renew her EHIC, was told by the Portuguese authorities that she must request a new EHIC from the country that pays her pension (**IT**). The Italian social security office stated that they were unaware of this new rule and refused to issue the card²⁹⁶.

Difficulties in obtaining the S1 form (the certificate of entitlement to healthcare required when moving to another Member State) have been reported in at least four Member States (i.e. **DK, HR, IT and RO**)²⁹⁷.

In **Croatia**, the Health Insurance Fund, the semi-public body that administers the universal healthcare system, has reportedly refused to issue the S1 form to a Croatian citizen living in Austria and working as cross-border worker in Croatia. The Health

²⁹⁰ Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

²⁹¹ Your Europe Advice, Quarterly Feedback Report No. 6, Quarter 4/2013 (October-December), p. 46.

²⁹² Your Europe Advice, Quarterly Feedback Report No. 1, Quarter 2/2012 (April-June).

²⁹³ Your Europe Advice, Quarterly Feedback Report No. 14, Quarter 4/2015 (October-December), p.34.

²⁹⁴ Petition No 1038/2012 to the European Parliament.

²⁹⁵ Your Europe Advice, Quarterly Feedback Report, Quarter No.5, Quarter 3/2013 (July- September), p. 35.

²⁹⁶ Your Europe Advice, Quarterly Feedback Report No. 11, Quarter 1/2015 (January-March), p.17-18; Your Europe Advice, Quarterly Feedback Report No. 5, Quarter 3/2013 (July-September), p.40.

²⁹⁷ Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

Insurance Fund insisted that the individual provide proof that he/she had moved out of the country, although this is not a requirement to qualify as a cross-border worker under EU law. The right to benefit from healthcare in both countries, anchored in Articles 17 and 18 of Regulation (EC) No. 883/2004, was not respected²⁹⁸.

5.2.3. Family benefits

Delays, refusals to pay and other obstacles to family benefits have been reported in at least six Member States (i.e. **AT, CZ, DE, DK, HR and SK**)²⁹⁹. The most frequent issues are the imposition of a **residence requirement** and **bureaucratic problems** in accessing necessary documents.

A residence requirement is imposed in certain Member States, such as the **Czech Republic** and **Slovakia**. The **Czech Republic** does not grant family benefits to people falling under the Czech social security rules who are living abroad. This is in contrast with the principle of exportability of family benefits³⁰⁰.

In **Slovakia**, some social benefits (i.e. child allowance and parental allowance) are subject to a permanent residence permit, while family benefits (designed for families with three or more children, or where twins are born in the course of two consecutive years) are limited to family members who reside with the EU worker in Slovakia³⁰¹.

Bureaucratic problems arise from the form required to apply for family allowance (Form E401), as this does not exist in **Croatia**, leading to the denial of family benefits. An example is the case of a Croatian citizen who lives in Austria but whose children are in Croatia. To apply for the family allowance in Austria for his children, he would need to submit the completed E401 form to the Austrian tax authorities. However, the Croatian authorities do not issue this type of form³⁰².

Furthermore, as a result of the CJEU's recent 2016 findings in *Commission v UK*³⁰³ and *García-Nieto*³⁰⁴ jobseekers will only be entitled to three months' jobseekers' allowance, child benefit and child tax credit after demonstrating 'compelling evidence' of a 'genuine prospect of work' in the **UK**. 'Compelling evidence' is very restrictively defined, covering documentary evidence of a job offer or very recent material evidence of a change in circumstances, accompanied by pending outcomes of job interviews. Moreover, since the rule applies not just to new jobseekers but to non-national EU citizens who have recently lost employment in the UK (but who do not retain worker status), new jobseekers appear to receive more favourable treatment under the amendments than the formerly employed. This is because longer-term residents in the UK may have already exhausted their three-

²⁹⁸ Your Europe Advice, Quarterly Feedback Report No.11, Quarter 1/2015 (January-March), p.35.

²⁹⁹ Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

³⁰⁰ 'Employment', Association for integration and migration, available at: http://www.migrace.com/cs/poradna/informace-pro-cizince-obcane-eu-a-jejich-rodinni-prislusnici/zamestnani_p_29-30.

³⁰¹ Groenendijk, K., et al., European Report on the Free Movement of Workers in Europe in 2012-2013, 2014, p.90.

³⁰² Your Europe Advice, Quarterly Feedback Report No.11, Quarter 1/2015 (January-March), p.40.

³⁰³ Case C-308/14 *Commission v UK* [2016] ECLI:EU:C:2016:436.

³⁰⁴ Case C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto and Others* [2016] ECLI:EU:C:2016:114.

month initial residence rights and right to reside for 91 days as a jobseeker, with the result that they are required to provide 'compelling evidence' of future work straight away³⁰⁵.

5.2.4. Unemployment benefits

Substantial **barriers to receiving unemployment benefits** were reported in a number of Member States (e.g. **AT, BE, BG, DE and LT**)³⁰⁶.

An EU citizen residing in France and working in **Belgium** could not obtain unemployment benefits from either country, as neither would recognise his right to the benefits³⁰⁷.

In **Bulgaria**, the authorities continue to refuse to take into account Bulgarian workers' social security records and incomes in another Member State for the purposes of calculating their unemployment benefits in Bulgaria³⁰⁸.

To become a beneficiary of an unemployment fund in **Denmark**, a certain number of job applications must be submitted by the unemployed person in order to be considered an active jobseeker and thus to be entitled to benefits. Job applications for roles abroad, however, do not count towards the requirements³⁰⁹. In general, employment support is only provided to nationals and lawfully resident foreigners, implying the exclusion of EU jobseekers, who are unlikely to be deemed resident, and who, therefore, have access to only basic health services. EU jobseekers are likely to experience difficulties in accessing social security benefits, particularly if they have not been contributing to such benefits or are not permanent residents³¹⁰. In addition, it appears that some job centres require EU citizens to hold a Danish personal identification number (CPR), thereby recording them in the Civil Registration System, before they can claim entitlement to courses, internships and salaried employment.

Lack of knowledge of the applicable rules also constitutes a problem in **Denmark**. EU citizens encounter difficulties applying for social assistance as jobseekers following dismissal from long-term employment. This is claimed to stem from some municipalities lack of familiarity with the applicable rules³¹¹.

5.3. Main types of obstacles

5.3.1. Lack of coordination and communication between national authorities of different Member States

The most widespread problem relating to access to social security for mobile EU citizens and their family members is the **lack of coordination and communication between national authorities of different Member States**. Issues have been reported in a significant number of Member States (i.e. **BE, BG, CZ, DE, DK, EL, FI, FR, HU, IE, IT,**

³⁰⁵ O'Brien, C., 'The Pillory, the Precipice and the Slippery Slope : the profound effects of the UK's legal reform programme targeting EU migrants' (2015) 37(1) JSWFL, 111-136, 117.

³⁰⁶ Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

³⁰⁷ Your Europe Advice, Quarterly Feedback Report No. 8, Quarter 2/2014 (April-June), p.31.

³⁰⁸Your Europe Advice, Quarterly Feedback Report No. 4, Quarter 2/2013 (April-June).

³⁰⁹Groenendijk, K., et al., European Report on the Free Movement of Workers in Europe in 2012-2013, 2014, p. 7.

³¹⁰Ibid, p.24.

³¹¹Ibid, p. 95.

LU, LV, NL, PL and RO)³¹². This lack of cooperation actively hinders the free movement rights of EU citizens and their family members.

In the most serious cases, the lack of efficient communication between Member States leads to the non-recognition of rights to which the EU citizens and their family members are entitled under Directive 2004/38. For instance, in **Ireland**, the social security authorities reportedly refused to engage with their UK counterparts to exchange information required to deal **with a citizen's applications for child benefits in Ireland, as required under Regulation 987/2009/EC**³¹³. As a result, the citizen has not been paid child benefits³¹⁴.

In other cases, these problems lead to excessive delays in accessing free movement rights. **Bulgaria** is a case in point. Its citizens often complain about excessive delays in exchanging information for confirming insurance periods from abroad in order to process pension benefits. Bulgarian citizens frequently wait for years (three or four years, sometimes more) to obtain their P1 form³¹⁵ from **Greece**, containing a summary of the pension decisions that concern them, and often cannot obtain any information on when, or whether, they will obtain their Greek pension³¹⁶.

One case relates to a Bulgarian citizen who, in 2009, applied for his Greek retirement pension. At the beginning of 2015, he started to receive his pension, though without back-payments. Following a request to the Greek authorities (IKA), he was advised that the back-pay had been sent to Bulgaria, but he did not receive it³¹⁷.

As illustrated by these examples, the lack of coordination between national authorities hinders access to social benefits both in the host Member State *and* in the home Member State. In fact, EU citizens and their family members also face problems when they return to their home Member State after having exercised their free movement rights in another Member State.

In **Italy**, problems of coordination between Italian and other authorities cause difficulties with the right to unemployment benefits³¹⁸. The communication between national authorities for confirmation of employment periods is insufficient, with citizens complaining about misinformation, delays and burdensome administrative formalities³¹⁹. An example is the case of an Italian citizen who went to France for seasonal work, before coming back to Italy and registering for unemployment benefits. In Italy, the competent authority asked him for the U1 form³²⁰. However, when he contacted the French competent authority, they indicated that the request come directly from the Italian authority, resulting in a four-

³¹² Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

³¹³ Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, 30 October 2009, OJ L 284/1, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:284:0001:0042:en:PDF>.

³¹⁴ Your Europe Advice, Quarterly Feedback Report No. 11, Quarter 1/2015 (January-March), p. 38.

³¹⁵ The P1 form is a summary of pension decisions which provides an overview of the decisions taken in a **particular person's case by the various institutions in the EU Member States from which that person has claimed** an old age, survivors or invalidity pension.

³¹⁶ *Ibid*, p. 41.

³¹⁷ Your Europe Advice, Quarterly Feedback Report No. 14, Quarter 4/2015 (October-December). p.39.

³¹⁸ Your Europe Advice, Quarterly Feedback Report No. 2, Quarter 3/2012 (July-September), p.19-20.

³¹⁹ Your Europe Advice, Quarterly Feedback Report No. 6, Quarter 4/2013 (October-December), p.42.

³²⁰ The U1 form (formerly E 301) is a statement of insurance periods to be taken into account when calculating an unemployment benefit. The form is issued by the competent social security institution in the last country where a person worked. The person submits it to the national employment service in the country where he/she wishes to receive unemployment benefits.

month delay to his unemployment benefit³²¹. A similar case occurred between Italy and Belgium for an Italian citizen unemployed in Belgium. The competent Belgian authorities refused to request the U1 form from the Italian authorities, claiming that it is the responsibility of the citizen to obtain the form, while the Italian authorities would only provide it directly to the Belgian authorities at their request. As a result, the citizen could not access unemployment benefits³²².

An Italian pensioner residing in **Belgium** had health problems during a trip to Italy, which required care and prevented her return to Belgium. Neither the Belgian nor the Italian social security authorities would reimburse the health expenses, as they were unable to **agree on the citizen's residence**³²³.

5.3.2. Social security contributions

Issues relating to **social security contributions** are reported in at least four Member States (i.e. **BG, DK, HU and RO**)³²⁴. They mainly relate to difficulties for EU citizens and their family members in demonstrating their payment of contributions in another Member State.

For instance, **Bulgaria** only accepts a limited range of portable documents as proof of insurance in another Member State. These are issued by the respective national administrations, such as S1, U1 or A1 forms. If Bulgarian and other EU citizens cannot produce these documents, they are asked to pay back health insurance contributions in Bulgaria for the period during which they were away³²⁵.

A similar issue is reported in **Romania**, where EU citizens have been asked to produce documents proving that they paid health insurance contributions in Romania for the same period during which they were subject to another **Member State's legislation**. In addition, the Romanian authority does not accept portable documents issued in other Member States. In practice, this means that some Romanian citizens are obliged to pay their health insurance contributions twice³²⁶.

In **Hungary**, the social security authority is reported to systematically contact persons with a registered address in Hungary and request payment of social security contributions.

5.3.3. Ignorance of the rules determining the applicable legislation

In general, the **ignorance of rules determining the applicable legislation** often leads to the refusal of social benefit in at four Member States: (**FR, IT, NL and PL**)³²⁷.

In **France**, the application of taxes earmarked for social security (CSG "Contribution sociale généralisée" and CRDS "Contribution pour le remboursement de la dette sociale")

³²¹ Your Europe Advice, Quarterly Feedback Report No. 6, Quarter 4/2013 (October-December), p.42.

³²² Your Europe Advice, Quarterly Feedback Report No. 8, Quarter 2/2014 (April-June), p.32.

³²³ Your Europe Advice, Quarterly Feedback Report No. 10, Quarter 4/2014 (October-December), p. 31-32.

³²⁴ Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

³²⁵Your Europe Advice, Quarterly Feedback Report No. 3, Quarter 1/2013 (January-March).

³²⁶ Your Europe Advice, Quarterly Feedback Report No. 9, Quarter 3/2014 (July-September), p. 33.

³²⁷ Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

affected the real estate revenue of an Italian citizen who resided in Italy despite the fact that the citizen was not affiliated to the French social security system³²⁸.

In **the Netherlands**, an Austrian citizen working as a civil servant for the University of Maastricht cannot have any social security cover, because the social security institute in the Netherlands told him that it is not possible to be covered in the Netherlands. According to Regulation 883/2004, civil servants shall be subject to the legislation of the Member State to which the administration employing him is subject³²⁹.

³²⁸ Your Europe Advice, Quarterly Feedback Report No. 7, Quarter 1/2014, (January-March), p.42.

³²⁹ *Ibid*, p.43.

6. OTHER RECURRING BARRIERS

KEY FINDINGS

- EU citizens and their family members experience other recurring obstacles in exercising their free movement and residence rights in the Member States. These include:
- **Accessing employment** (e.g. the **non-recognition of professional qualifications** and **academic diplomas** obtained from another Member State);
- **Barriers to living in another Member State (e.g. using vehicles** in another Member State and additional requirements for EU citizens seeking to **register to vote/stand as a candidate** in European and municipal elections in another Member State) ;
- **Administration issues (e.g. poor administrative services** (difficulties in obtaining information and the poor quality of the information available) and **double taxation** of salaries and pensions);

This section provides information on other recurring practical obstacles EU citizens and their family members experience in exercising their free movement and residence rights in the Member States.

6.1. Accessing employment in other Member States

EU citizens and their **family members** have faced a number of obstacles in accessing employment in EU Member States. Such issues concern the fact that some Member States do not recognise professional qualifications obtained in another Member State.

6.1.1. Non-recognition of professional qualifications from other Member States

There are rules at EU level that are set out in Directive 2005/36/EC³³⁰ on the recognition of professional qualifications as last amended by Directive 2013/55/EC³³¹. It seems however that due to some implementation related difficulties **EU citizens** have faced obstacles in getting their professional qualifications recognised in another Member State. This has been reported as an issue in at least 11 Member States (e.g. **AT, DE, DK, FR, HR, IE, IT, LU, NL, RO and the UK**)³³².

³³⁰ Article 2(2) of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications OJ L 255/22, 30 September 2005, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:255:0022:0142:en:PDF>.

³³¹ Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') OJ L 354/132, 28 December 2013, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:354:0132:0170:en:PDF>.

³³² Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

Relevant examples: Non-recognition of professional qualifications

- An experienced radiographer moved to **Ireland** and sent a detailed application for the professional recognition of her qualifications to the competent authority, with the intention of undertaking work in her professional field. Two years after receiving the receipt of acknowledgement of her file, among other correspondence, the Irish competent authority continues to refuse to make any decision on the application³³³.
- In **Luxembourg**, a case was brought before the Ombudsman about a Romanian with physiotherapy qualifications where the relevant body refused to recognise the qualification making it impossible for the individual to obtain an internship necessary to meet the national registration requirements³³⁴.
- One petitioner's mountain biking instructor's qualification from the UK was not recognised in **France**, preventing him from working there during the summer of 2014. He claimed that, in general, outdoor professional qualifications are not recognised in France³³⁵.

6.2. Using vehicles in another Member State

EU citizens have encountered persistent obstacles in using their vehicles in another Member State. They are frequently required to register their foreign vehicles in another Member State and they are often taxed for using a foreign car in another Member State.

6.2.1. Requirement to register vehicles in another Member State

EU citizens have frequently been required to register their vehicles in another Member State. This has been reported as an issue in at least 13 Member States (e.g. **AT, BE, DE, DK, FI, FR, HU, IE, IT, LV, LU, NL, PT**)³³⁶. For example, there is often a requirement to register company cars even though they belong to a company based in another Member State and are registered in that other Member State. The CJEU has, however, confirmed that if one's car is essentially used on a permanent basis in another Member State, for example the Member State where the company is established, then it must be registered there³³⁷. Moreover, Recital 89 of Directive 2006/123/EC³³⁸ indicates that the case law of the Court of Justice has recognised that a Member State may impose such an obligation, in accordance with proportionate conditions, in the case of vehicles used on its territory. That exclusion does not cover occasional or temporary rental³³⁹. Therefore, such a requirement is not necessarily in breach of EU law.

³³³ Your Europe Advice, Quarterly Feedback Report No. 7, Quarter 1/2014 (January-March), p. 57.

³³⁴ Groenendijk, K., et al., European Report on the Free Movement of Workers in Europe in 2011-2012, Brussels, 2012, p. 74.

³³⁵ Petition No 1736/2014 to the European Parliament.

³³⁶ Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

³³⁷ C-464/02, *Commission v Denmark*, [2005] ECLI:EU:C:2005:546

³³⁸ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market OJ L 376/36, 27 December 2006, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0123&from=EN>.

³³⁹ Recital 89 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27 December 2006, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32006L0123>.

Relevant examples: Requirement to register vehicles in another Member State

- Students have been required to register their vehicle in **Austria**, although they should be exempted from this provision³⁴⁰. There have also been requests to register company cars in Austria even though they belong to a company based in another Member State and only travel through Austria³⁴¹.
- Two cases were reported of Belgian citizens with residence in both **Belgium** and France, who were fined for driving French-registered cars not registered in Belgium. Foreign students have been repeatedly fined in Belgium for not registering their cars there³⁴². In 2014, a German citizen was told to register his car in Belgium, where he had a second home³⁴³.
- A Slovak student studying in **Denmark** had problems with his car. The Danish tax authority ordered him to register his car in Denmark. However, it is registered under the name of his parents in Slovakia, therefore there is no obligation to register it. The police took his plates and will not return them to him until he pays and registers the car in Denmark³⁴⁴.
- The Finnish authorities often demand the registration of company cars used privately in **Finland (the citizens' country of residence)**³⁴⁵. For example, the Finnish authorities demanded the registration of company cars registered to an Estonian company and used only occasionally in Finland by a Finnish resident.
- Where an EU citizen is temporarily resident in Hungary but maintains residence in another Member State and works partially outside Hungary, the Hungarian authorities require the car to be registered in **Hungary**³⁴⁶.
- A Belgian teacher worked in **the Netherlands** but lived in Belgium and travelled back home for the weekends. The Dutch police unduly requested that this citizen register her car in the Netherlands³⁴⁷.

6.2.2. Vehicle taxation for use of a foreign car

Vehicle taxation for use of a foreign car has been reported as an issue by some **EU citizens** in at least three Member States³⁴⁸. For example, in **Ireland**, complaints have been made by EU citizens that they have paid double vehicle taxes for the same period, as a result of differences in national taxation systems³⁴⁹. People have also been taxed for the use of a foreign car in **the Netherlands**³⁵⁰. Moreover, **Romania** continues to demand unusual taxes (Pollution Tax, Luxury Tax) when citizens try to register their vehicles³⁵¹.

³⁴⁰Your Europe Advice, Quarterly Feedback Report No. 9, Quarter 3/2014 (July-September), p.46.

³⁴¹Your Europe Advice, Quarterly Feedback Report No. 4, Quarter 2/2013 (April-June), p.45; Your Europe Advice, Quarterly Feedback Report No. 2, Quarter 3/2012 (July-September), p.31

³⁴²Your Europe Advice, Quarterly Feedback Report No. 3, Quarter 1/2013 (January-March), p. 36.

³⁴³Your Europe Advice, Quarterly Feedback Report No. 8, Quarter 2/2014 (April-June)), p. 45.

³⁴⁴Your Europe Advice, Quarterly Feedback Report No. 4, Quarter 2/2013 (April-June), p. 44.

³⁴⁵Your Europe Advice, Quarterly Feedback Report No. 8, Quarter 2/2014 (April-June),p. 46.

³⁴⁶Case C 583/14, *Benjámín Dávid Nagy v. Vas Megyei Rendőr-főkapitányság* [2015] ECLI:EU:C:2015:737.

³⁴⁷Your Europe Advice, Quarterly Feedback Report No. 10, Quarter 4/2014 (October-December), p.52.

³⁴⁸Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

³⁴⁹Your Europe Advice, Quarterly Feedback Report No.13, Quarter 3/2015 (July-September), p. 54.

³⁵⁰<http://www.minbuza.nl/ecer/nieuws/2010/11/hoge-raad-stelt-prejudiciële-vragen-over-vrij-verkeer-binnen-nederland.html>

³⁵¹Your Europe Advice, Quarterly Feedback Report No. 7, Quarter 1/2014, (January-March), p.21.

While these examples are interesting and constitute barriers for EU citizens in exercising their free movement and residence rights within the EU, there is no EU rule which prohibits the imposition of such taxes on motor vehicles³⁵². Article 110 TFEU only stipulates that Member States should not impose any internal taxation of any kind on the products of other Member States that is in excess of that imposed on similar domestic products. **Therefore, according to the CJEU's judgment in C-365/02, *Lindfors*** double taxation of car registration or pollution taxes on motor vehicles is not, as such, contrary to EU law³⁵³.

6.3. Double taxation

Double taxation of salaries and pensions has been reported as an issue for **EU citizens** and their **TCN family members** in at least eight Member States (e.g. **DE, DK, FR, IE, IT, LU, NL and SE**)³⁵⁴. There is no general EU measure to eliminate double taxation. Most EU countries have bilateral tax treaties in place to relieve double taxation³⁵⁵.

Relevant examples: Double taxation

- The Treaty on Avoidance of Double Taxation between **Denmark** and **France** has not been applicable since 2009. Taxpayers, such as pensioners, who derive their income from Denmark but are resident in France, are liable for taxes on their Danish income in both countries³⁵⁶.
- Cases of double taxation of salaries involving **Italy, France** and the **UK** have been reported³⁵⁷. For example, the Italian widow of a British worker returned to Italy, where she lived on the income from the rental of UK properties inherited by her husband, in addition to a UK pension. All of her income was taxed in the UK. Your Europe Advice reports that the competent Italian tax authorities did not make allowances for this, deciding that her income should be taxed in Italy as well, despite the double taxation avoidance agreement operating between Italy and the UK³⁵⁸.
- There is a problem of double taxation of pensions between **the Netherlands** and **Sweden** due to a lack of exchange of information between the tax authorities and the social security administrations³⁵⁹.

6.4. Administrative Services

Administrative services provided by the Member State authorities have frequently been reported as poor by **EU citizens** and their **TCN family members**. Difficulties have been frequently encountered in obtaining information on free movement and residence rights and the quality of the information available is often very poor.

³⁵² European Commission website, 'Frequently Asked Questions on Passenger car related taxation', available at: http://ec.europa.eu/taxation_customs/common/faq/taxation/faq_cartax_en.htm.

³⁵³ Ibid.

³⁵⁴ Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

³⁵⁵ European Commission website, 'Double taxation', available at: http://ec.europa.eu/taxation_customs/taxation/individuals/double_taxation_en.htm.

³⁵⁶ Your Europe Advice, Quarter Feedback Report No. 14, Quarter 4/2015 (October-December), p. 66.

³⁵⁷ Your Europe Advice, Quarterly Feedback Report No. 9, Quarter 3/2014 (July-September), p.51.

³⁵⁸ Your Europe Advice, Quarterly Feedback Report No. 5, Quarter 3/2013 (April-June).

³⁵⁹ Your Europe Advice, Quarterly Feedback Report No. 9, Quarter 3/2014 (July-September), p.51.

6.4.1. Difficulties in obtaining information

EU citizens and their **TCN family members** have frequently experienced difficulties in obtaining information regarding their free movement and residence rights. This has been reported as an issue in at least six Member States (e.g. **CY, CZ, EL, IE, IT and RO**)³⁶⁰.

Relevant example: Difficulties in obtaining information

- Those seeking help and advice from the **Irish** Naturalisation & Immigration Service (INIS) in relation to their applications for residence cards find it difficult to contact the organisation. The telephone contact details for INIS provided on the website are a lo-call number (i.e. a number prefixed by 1850 or 1890), which can only be used within Ireland, and a general contact number, linked to an automated system with a considerable waiting period to talk to an operator³⁶¹. Frequently, the automated system will advise that the helpline operators are so busy they cannot deal with the call and advise the caller to 'try again later'. In addition, telephone call hours are limited to between 10am and 12.30pm on Tuesdays and Thursdays³⁶².

³⁶³.

6.4.2. Poor quality of the information available

The information regarding free movement and residence rights that is available to **EU citizens** and their **TCN family members** is often of a very poor quality. This has been reported in at least seven Member States (e.g. **CY, CZ, DK, FI, IE, IT, LV**)³⁶⁴.

Relevant examples: Poor quality of the information available

- In **Cyprus and the Czech Republic**, experts have highlighted that information is not systematically updated, is not easy to understand or is 'superficial'³⁶⁵.
- In **Finland**, several clients have received inaccurate information regarding the enquiries which they made to the Citizen's Signpost Service³⁶⁶.
- In **Italy**, no information is available on the registration certificate and permanent residence on the migration portal, with only poor and insufficient information available on the regional/local websites. Moreover, limited information is available

³⁶⁰ Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

³⁶¹ Irish Naturalisation & Immigration Service, available at : <http://www.inis.gov.ie/>.

³⁶² European Parliament, 'Comparative study on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', 2009, PE 410.650, available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2009/410650/IPOL-JURI_ET\(2009\)410650_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2009/410650/IPOL-JURI_ET(2009)410650_EN.pdf), p. 119.

³⁶³ www.latvija.lv website: <https://epakalpojumi.latvija.lv/Help/index.html>.

³⁶⁴ Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

³⁶⁵ European Parliament, 'Comparative study on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', 2009, PE 410.650, available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2009/410650/IPOL-JURI_ET\(2009\)410650_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2009/410650/IPOL-JURI_ET(2009)410650_EN.pdf), p225.

³⁶⁶ Ibid, p 226.

on the main police website about residence cards and permanent residence, despite this being the website to which the local and regional websites refer³⁶⁷.

- In **Latvia**, while there is a one-stop-shop information service available on all public services provided both in Latvian and English (www.latvija.lv), it does not distinguish between the different groups of people living in Latvia and therefore does not facilitate access to information of specific interest and relevance to EU citizens and their TCN family members wishing to move and reside in Latvia. Moreover, information on registration and residence of EU citizens and their families in Latvia is provided on the website of the relevant authority (i.e. the Office of Citizenship and Migration Affairs). However, this information is rather limited. In particular, it does not explain how to challenge refusal of registration or a visa or the possibility of making a complaint to the Ombudsman in the case of administrative difficulties³⁶⁸.

6.5. Additional requirements for EU citizens seeking to register to vote/stand as a candidate in European and municipal elections in another Member State

EU citizens have encountered difficulties with registering to vote and to stand as a candidate in European and municipal elections in some Member States (e.g. EE, IT, LV)³⁶⁹. Obstacles for EU citizens in exercising their electoral rights in another Member State contravenes a number of provisions set out in the EU Treaties. For example, the TFEU and the Charter of Fundamental Rights provide that EU citizens have the right to vote and to stand as candidates in European Parliament and municipal elections in their Member State of residence, under the same conditions as nationals of that State³⁷⁰.

In **Latvia**, there are additional administrative requirements for EU citizens seeking to register to vote or to stand as a candidate, such as the requirement to provide a registration document for proving residence or the obligation to renew registration for each European election³⁷¹. In **Italy**, cases have been reported where EU citizens were **denied the right to vote in European elections**. A German citizen resident in Rome was informed of the obligation to present a request for voting for the European elections only after the deadline for submitting the request had passed. He was subsequently denied the right to vote for those elections³⁷². In addition, a Romanian citizen, resident in Italy, complained that she was incorrectly informed by the local Italian authorities that she could only vote in local elections, but not for regional or European elections³⁷³.

³⁶⁷ Henningsen, A., et. al, Evaluation of EU rules on free movement of EU citizens and their family members and their practical implementation, Brussels, 2013, available at: http://ec.europa.eu/justice/citizen/document/files/evaluation_of_eu_rules_on_free_movement-final_report.pdf.p.41.

³⁶⁸ <http://www.pmlp.gov.lv/en/home/services/registration-cards.html>.

³⁶⁹ Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

³⁷⁰ Articles 20(2), 22 and 223(1) TFEU; Articles 39(1) and 40 of the Charter of Fundamental Rights.

³⁷¹ Union citizenship: developments, impact and challenges, The XXVI FIDE Congress in Copenhagen 2014] Congress Publications Vol. 2, DJØF Publishing, Copenhagen, 2014, p.296.

³⁷² Your Europe Advice, Quarterly Feedback Report No. 7, Quarter 1/2014, (January-March), p.72.

³⁷³ Your Europe Advice, Quarterly Feedback Report No. 8, Quarter 2/2014 (April-June), p.55 and 58.

6.6. Issues with the recognition of diplomas from another Member State

Many **EU citizens** have encountered difficulties with the recognition of their academic diplomas from another Member State. This has been reported as an issue in at least eight Member States (e.g. **BE, DK, ES, FI, IT, NL, SE and UK**)³⁷⁴. For example, the Your Europe Advice Service indicated that there are frequent complaints (in Belgium, Spain, Italy, Denmark, Finland and Sweden) about the handling of citizens' applications to get their diplomas recognised, which could be due to the absence of EU harmonisation as it creates uncertainties and false expectations for citizens³⁷⁵. Therefore, no EU legislation has been adopted yet regarding the mutual recognition of academic diplomas despite the fact that the TFEU requires the European Parliament and the Council to issue Directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications³⁷⁶.

Relevant examples: Issues with the recognition of diplomas from another Member State

- Barriers have been reported regarding the recognition of diplomas from outside **Belgium**, such as excessive documentation being required³⁷⁷. For example, an Italian citizen had problems regarding the equivalence of her Italian diploma in Archaeology. The administration asked for many documents and the descriptions and marks of all 60 exams she had taken³⁷⁸.
- A Lithuanian citizen was not allowed to graduate from his Master's studies in archaeology in the **UK** without taking the ARB Part 1 qualification exam³⁷⁹. This exam is obligatory in order to receive academic recognition of the Lithuanian bachelor degree in the UK. However, if you get a Bachelor's degree in the UK and continue to postgraduate level after, you do not have to take this exam³⁸⁰.
- A Bulgarian citizen has lived in **Spain** since 2004, where she is trying to receive the recognition of her diploma and Master's on Orthodox Theology obtained in Bulgaria. She first contacted the Ministry of Education and thereafter the Central Nunciature in Madrid, but they said that they cannot recognise her degree as it is not one in Catholic Theology. Consequently, she cannot use her diplomas to work in the educational field or engage in further training³⁸¹.

³⁷⁴ Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

³⁷⁵Your Europe Advice, Quarterly Feedback Report No. 8, Quarter 2/2014 (April-June),p. 11.

³⁷⁶ Article 53(1) TFEU.

³⁷⁷Your Europe Advice, Quarterly Feedback Report No. 8, Quarter 2/2014 (April-June),p. 11; Your Europe Advice, Quarterly Feedback Report No. 7, Quarter 1/2014, (January-March), p. 20.

³⁷⁸Your Europe Advice, Quarterly Feedback Report No. 8, Quarter 2/2014 (April-June), p.38.

³⁷⁹ **The UK Architects Registration Board's qualification examination.**

³⁸⁰ Your Europe Advice, Quarterly Feedback Report No. 8, Quarter 2/2014 (April-June), p.38.

³⁸¹ Ibid p.38-39.

7. REVIEW OF LEGAL OR PRACTICAL INSTANCES OF DISCRIMINATION

KEY FINDINGS

- Overall not many cases of discrimination of EU citizens and their family members in the exercise of their free movements rights to entry and residence established by Directive 2004/38/EC have been identified. Data is relatively scarce and it is therefore difficult to assess the extent of the issues. Most discriminations appear to occur once the EU citizens and family members reside in the Member States and wish to access a number of services or market (employment, housing, education, etc.).
- Recurrent cases of **discrimination on grounds of nationality** concerning EU citizens and their family members have been identified. These include: accessing employment, including obstacles in accessing employment for Romanian and Bulgarian nationals despite the end of the transitional measures on 1 January 2014, and civil service employment positions being reserved for nationals in several Member States. In addition, recurring issues have been reported of EU citizens and their TCN family members being inhibited from accessing education/schools on grounds of their nationality, as well as different tuition fees being imposed on nationals and non-nationals. Other recurring issues are different fees being applied to EU citizens compared to nationals (from residence cards and car insurance premiums to marathon entry fees and dormitory fees), banks discriminating against non-nationals, and price discrimination for EU citizens/their TCN family members for using public transport.
- Only a limited number of complaints and petitions have been made concerning discriminations of EU citizens and their family members on grounds of **their civil status/sexual orientation**. However, one particular obstacle experienced is that **EU citizens' civil partnerships** are not recognised for the purposes of entry or residence in some Member States (e.g. **CY** and **SI**) although the Member State recognises civil partnerships. A number of discriminatory obstacles to free movement have been encountered by same-sex couples in registered partnerships in **Slovakia** and **Poland**, including: refusal of the right of permanent residence status; non-recognition of residence cards issued by another Member State leading to refusal of entry; refusal to grant a residence card or work permit; uninsured persons being excluded from the health insurance of their partner; refusal to issue a birth certificate to children of same-sex partners and non-eligibility for financial compensation in the case of death of one of the partners.
- Little information is available on EU citizens and their family members being discriminated against on **grounds of their racial or ethnic origin** in exercising their free movement and residence rights. However, **Roma** have faced discrimination regarding access to employment, education, financial services, accommodation and social protection. They are also prevented from registering in another Member State; prevention from living in caravans; subjected to evictions, expulsions and deportations as a result.

7.1. EU non-discrimination requirements in the context of free movement

Directive 2004/38/EC established the right to equal treatment between EU citizens and family members with residence rights and nationals of the host Member State³⁸². In accordance with the prohibition of discrimination contained in the Charter of Fundamental Rights of the EU (the Charter), Member States must implement the Directive without discriminating between its beneficiaries on grounds such as sex, **race, colour, ethnic or social origin**, genetic characteristics, language, religion or beliefs, political or other opinion, **membership of an ethnic minority**, property, birth, disability, age or **sexual orientation**³⁸³. In addition, Article 18 of the TFEU prohibits discrimination on grounds of nationality.

The Directive contains two **derogations** to equal treatment in respect of social assistance:

- No entitlement to social assistance during the first three months of residence or, where appropriate, for as long as the citizen, who entered the Member State to seek employment, is continuing to seek employment³⁸⁴.
- No obligation to grant maintenance aid for studies prior to acquisition of the right to permanent residence, including vocational training³⁸⁵.

Much case law of the CJEU has interpreted the obligation to ensure equal treatment between nationals and EU citizens and their family members when exercising their free movement rights provided for by Article 24 of the Directive. In particular, the case law has focused on the **interpretation of the permitted derogations** to the right to equal treatment concerning entitlement to social assistance during the first three months of residence or, where appropriate, the period during which jobseekers retain their right to residence because they are seeking employment and have a genuine chance of being engaged. It should be noted that social assistance, social advantages and social benefits are not defined in the Directive or in any other piece of EU legislation. Such terms are interpreted through CJEU case law.

Firstly, the CJEU has stated that the derogations **must be interpreted narrowly** insofar as they constitute an exception to the general principle of equal treatment provided for in Article 24 of the Directive and in Article 18 of the TFEU³⁸⁶.

In applying this narrow interpretation, the CJEU has drawn **a line between social assistance and social advantages or social benefits**: the latter include financial and non-financial benefits, such as childcare allowances and jobseekers' allowance, which are not intended to facilitate access to the labour market³⁸⁷. As such, derogations to equal treatment may not apply to social advantages or social benefits. The host State is obliged to grant equal treatment during the first three months or, for jobseekers, during the period in which they can provide evidence that they are seeking employment and have a genuine chance of being engaged³⁸⁸.

³⁸² Article 24 of Directive 2004/38/EC.

³⁸³ Article 21(1) of the Charter of Fundamental Rights of the EU.

³⁸⁴ Article 24(2) of Directive 2004/38/EC.

³⁸⁵ Ibid.

³⁸⁶ Case C-46/12 *L.N* [2013] ECLI:EU:C:2013:97, at para. 33.

³⁸⁷ Case C-22/08 *Vatsouras and Koupatantze* [2009] ECLI:EU:C:2009:344, at para. 45.

³⁸⁸ Ibid.

Access to benefits for economically inactive EU citizens can be made dependent on their being legally resident, which in itself presupposes sufficient financial means. The CJEU held in the *Brey* judgment³⁸⁹ that the **mere fact of claiming a benefit is not sufficient to prove that a person is not self-sufficient**, and that the **particular circumstances of each case** need to be considered when assessing the burden that granting the benefit would place on the social assistance system.

The CJEU took a more restrictive approach in *Dano*³⁹⁰, where it found that, for the purpose of access to certain social benefits, nationals of other Member States can claim equal treatment with nationals of the host Member State **only if their residence complies** with the conditions of the Directive on free movement of EU citizens. Where the period of residence is longer than three months but less than five years, one of the conditions laid down by the Directive for a right of residence is that economically inactive persons must have sufficient resources of their own. Therefore, Member States may reject claims for social assistance by **economically inactive** EU citizens who go to another Member State with no intention of finding employment there.

In *Alimanovic*³⁹¹ the CJEU further clarified the requirement of a **real link** between the jobseeker and the labour market of the Member State in question for the purposes of entitlement to social assistance. The Court noted that the benefits at issue were intended to cover **subsistence costs** for persons who could not cover those costs themselves and were not financed through contributions, but through tax revenue. Those benefits are thus **to be regarded as 'social assistance'**. The Court also clarified that **where an EU citizen has not yet worked in the host Member State or where a period of six months has elapsed, a jobseeker cannot be expelled from that Member State for as long as he can provide evidence that he is continuing to seek employment and that he has a genuine chance of being engaged**. However, in this case the host Member State may refuse to grant any social assistance. In contrast to its earlier *Brey* judgment³⁹², the CJEU stated that **no individual assessment** is necessary when it comes to access to social assistance.

Finally, in *Förster*³⁹³, the CJEU specified the conditions under which **students** from other Member States are entitled to a **maintenance grant**. The Court observed that Member States may grant students maintenance only to those students who have demonstrated a **certain degree of integration** into the society of that State, and that the existence of a sufficient degree of integration may be inferred where the student in question has resided in the host Member State for a certain length of time. The CJEU held that **five years' uninterrupted residence** is appropriate in this context.

While there is a lot of information on discrimination on grounds of nationality, racial/ethnic origin and sexual orientation/civil status in general, there is limited information available on instances of discrimination on these grounds in relation to free movement and residence rights. Requests for such information made to the national equality bodies and/or the ombudsman in each of the nine selected Member States met with little success, with only limited information provided by most. The information collected is, therefore, largely based on complaints made to the Your Europe Advice Service, petitions made to the European Parliament, case law and existing literature.

³⁸⁹ Case C-140/12 *Brey* [2013] ECLI:EU:C:2013:565.

³⁹⁰ Case C-333/13 *Dano* [2014] ECLI:EU:C:2014:2358.

³⁹¹ Case C-67/14 *Alimanovic* [2015] ECLI:EU:C:2015:597.

³⁹² Case C-140/12 *Brey* [2013] ECLI:EU:C:2013:565.

³⁹³ Case C-158/07 *Förster* [2008] ECLI:EU:C:2008:630.

7.2. Discrimination on grounds of nationality

Discrimination on grounds of nationality in this context refers to differences of treatment between nationals of the host Member State on the one hand and EU citizens and their TCN family members on the other. As indicated above, all EU citizens residing in an EU Member State enjoy equal treatment with the nationals of that Member State. This right also applies to TCN family members who have the right of residence or who have acquired permanent residence.

The review of all Member State questionnaires, together with the detailed country reports for the nine selected Member States, have highlighted some recurring instances of discrimination on grounds of nationality experienced by EU citizens and/or their TCN family members in exercising their free movement rights. However, most cases do not stem **directly from the implementation of Directive 2004/38/EC's rights of entry and residence**, but rather to the application of other EU legislation, such as Regulation 495/2011 on the freedom of workers. They are, nevertheless, important to highlight since they constitute barriers to the free movement of EU citizens and family members.

Cases of discrimination have been identified in **accessing employment**, including for Romanian and Bulgarian nationals despite the end of the transitional measures on 1 January 2014, and civil service employment positions being reserved for nationals in several Member States. In addition, recurring issues have been reported of EU citizens and/or their TCN family members in **accessing education/schools** on grounds of their nationality, as well as different tuition fees being imposed on nationals and non-nationals. Other recurring issues are **different fees** applied to EU citizens compared to nationals, **banks discriminating against non-nationals**, and **price discrimination** for EU citizens/their TCN family members in **accessing public transport**.

7.2.1. Discrimination on grounds of nationality in accessing employment:

Regulation 492/2011³⁹⁴ on the freedom of movement of workers provides that any national of a Member State, irrespective of his place of residence, has the right to take up available employment and pursue such employment in another Member State with the same rights as the nationals of that State.

Article 45 of the TFEU establishes the freedom of movement for workers within the EU and **prohibits any discrimination based on nationality`between workers of the Member States as regards employment, remuneration and other conditions of work and employment**³⁹⁵.

Instances of discrimination on grounds of nationality in accessing employment have been reported in several Member States (e.g. **BE, IE** and the **UK**)³⁹⁶. These include discriminatory barriers to accessing certain professions or jobs, barriers to accessing civil service employment positions, obstacles in observing the necessary formalities to work legally in the Member State (e.g. obtaining a personal identity number). In addition, EU citizens and their family members face discriminatory treatment in the workplace.

³⁹⁴ Article 1 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ L 151, 27 May 2011, available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32011R0492>

³⁹⁵ Article 45(2) of the TFEU.

³⁹⁶ Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

One recurring discriminatory obstacle relates to access to certain professions or jobs. **Access to certain national professions** has been, in some cases, restricted to nationals, such as notary or government/civil service positions (e.g. **BE, BG, CY, EL, IT and PT**), despite the fact that the roles did not involve the exercise of public authority. Posts in certain ministries are also often reserved for nationals. These restrictions infringe EU legislation and constitute discrimination on grounds of nationality. While Article 45(4) of the TFEU allows Member State authorities to restrict access to certain posts in the public service to their own nationals, Articles 50 and 51 of the TFEU limit such restrictions to those activities which require the exercise of official authority. This exception is to be interpreted restrictively. The CJEU has consistently held that this exception covers posts involving direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities³⁹⁷. **The CJEU has also held that the assessment of the concept of 'the exercise of public authority' must take account of EU law and, in particular, the principle of freedom of establishment. It added that 'acting in pursuit of an objective in the public interest is not, in itself, sufficient for a particular activity to be regarded as directly and specifically connected with the exercise of official authority'**³⁹⁸. Restricting national professions not connected to the exercise of official authority would, therefore, be deemed a breach of EU law.

The Irish education system has also led to discrimination against non-nationals in obtaining internships as part of their university studies in **Ireland**. This contravenes Regulation 492/2011, which provides that the recruitment of an EU citizen for a post in another Member State is not dependent on vocational or other criteria that are discriminatory on the grounds of nationality when compared to the criteria applied to nationals of the Member State who wish to pursue the same activity³⁹⁹.

Relevant examples: discrimination in accessing employment

- In 2011, the CJEU ruled that the requirement to hold Belgian nationality in order to be appointed as a notary was an infringement of EU legislation by **Belgium** because the activities of a notary are not connected with the exercise of official authority⁴⁰⁰. Belgium has since amended the law such that candidates must hold either Belgian nationality or the nationality of an EU Member State⁴⁰¹.
- In 2012, the **Belgian** equality body (Unia) reported that some job openings at governmental level, although not involving the exercise of public authority, prohibited non-nationals from applying in violation with EU law⁴⁰².

³⁹⁷ Recital 8 of Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers OJ L 128/8 30 April 2014, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0054>; Case C-290/94 *Commission of the European Communities v Hellenic Republic* [1989] ECLI:EU:C:1989:339.

³⁹⁸ Case C-47/08 *European Commission v Belgium* [2011] ECLI:EU:C:2011:334.

³⁹⁹ Article 6 of Regulation 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ L 151, 27 May 2011, available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32011R0492>.

⁴⁰⁰ Case C-47/08 *European Commission v Belgium* [2011] ECLI:EU:C:2011:334.

⁴⁰¹ The amendment entered into force on 20 February 2012. Law of 14 November 2011 'Amending the law of 25 venôse year XI on the notary office concerning the requirements to be appointed notary' (*Wijziging van de wet van 25 ventôse jaar XI op het notarisambt wat de vereisten om tot notaris benoemd te worden betreft*), Official Journal 10 February 2012.

⁴⁰² Unia, 'Annual Report on Discrimination/Diversity 2012' (*Jaarverslag Discriminatie/Diversiteit 2012*), 2013, available at: http://www.unia.be/nl/publicaties-statistieken/publicaties/jaarverslag-discriminatie-diversiteit-2012_p_159.

- In certain ministries in **Bulgaria** (e.g. Ministry of the Interior) all posts are reserved for Bulgarian nationals irrespective of whether the activities are performed as a civil servant or on the basis of an employment contract⁴⁰³. For example, a qualified lawyer was prevented from applying to work in the Bulgarian Ministry of the Interior on the basis that he is a Greek national⁴⁰⁴.
- A British/Canadian student living and studying in **Ireland** sought to apply for an internship to complete his medical training in Ireland. He discovered, however, that students who applied to study medicine in Ireland through the national third-level entrance system (the Central Applications Office (CAO)) were prioritised for internships compared with other non-CAO students, thereby indirectly discriminating against non-Irish students⁴⁰⁵.
- In **Ireland**, EU citizens (especially British citizens) who are of Middle Eastern origin experience considerable difficulty in getting a Personal Public Service number (PPS) in order to work, as the authorities request evidence of an offer of work before issuing the number⁴⁰⁶.

Indirect discrimination against EU workers has been raised as an issue. For example, the **UK's Trade Union Congress has voiced its concern about the treatment of EU**⁴⁰⁷ workers in the workplace. As a result, it staged a campaign to inform these workers of their rights under UK labour law, which was translated into various European languages⁴⁰⁸.

Bulgarian and Romanian nationals continue to face discrimination in accessing employment in some EU Member States (i.e. **CY, DE, FI and FR**) despite the fact that the transitional measures imposed on both countries ended on 1 January 2014. Examples of such discrimination include employment agencies refusing to register Bulgarians, both Bulgarian and Romanian workers being prevented from accessing certain jobs, taking up employment and enjoying the same treatment and rights with regard to employment as other EU workers. As the transitional measures have now been lifted, these practices are **in breach of Article 45(2) of the TFEU which entails 'the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'**. However, after the lifting of the transitional measures, the majority of Member States now do not impose any restrictions on Bulgarians and Romanians in accessing their labour markets.

One discriminatory obstacle is the **refusal of employment agencies to register** Bulgarian jobseekers. For example, the husband of a Bulgarian citizen living in **Germany** since September 2012 joined her in January 2014 to look for a job. The German employment agency refused to register him as a jobseeker on the grounds that he was not registered in an equivalent agency in Bulgaria. He was told to come back in a few **months when he had learned some German**⁴⁰⁹. This contravenes Article 5 of Regulation 495/2011, which provides that an EU citizen who is a jobseeker in another Member State

⁴⁰³Groenendijk, K., et al., European Report on the Free Movement of Workers in Europe in 2012-2013, 2014, p.9 and 75; **Law on the Ministry of Internal Affairs, ('Закон за Министерството на вътрешните работи')**, State Gazette No. 53 of 27 June 2014, Article 155.

⁴⁰⁴European Commission, Free movement of workers: Commission improves the application of worker's rights – frequently asked questions, 26 April 2013, available at: http://europa.eu/rapid/press-release_MEMO-13-384_nl.htm.

⁴⁰⁵Your Europe Advice, Quarter Feedback Report No. 14, Quarter 4/2015 (October-December), p. 45.

⁴⁰⁶ Information obtained through consultation with stakeholder (KOD Lyons Solicitors, March 2016).

⁴⁰⁷ Central and Eastern European Countries joining the EU as part of the 2004 accession, including CZ, EE, HU, LV, LT, PO, SK and SI.

⁴⁰⁸Groenendijk, K., et al., European Report on the Free Movement of Workers in Europe in 2012-2013, 2014, p.82.

⁴⁰⁹Your Europe Advice, Quarterly Feedback Report No. 7, Quarter 1/2014, (January-March), p. 54.

shall receive the same assistance from the employment offices in that Member State as its national jobseekers.

Moreover, Shaw et al have also remarked upon the way in which Romanian and Bulgarian nationals are presented by the **UK** media and have commented, more broadly, on the fact that immigration issues and **EU issues** were both **identified** as **problematic** areas in terms of **press coverage** by the 2012 Leveson Inquiry on the Culture, Practices and Ethics of the Press⁴¹⁰. In the UK a moral panic broke out over 'tidal floods of new immigrants' from Romania and Bulgaria⁴¹¹. The Telegraph warned that 'Britain is powerless to stop tens of thousands of Bulgarians and Romanians moving to the UK'⁴¹². The Sun lamented about 'Romanian and Bulgarian immigrants threatening to swamp Britain-and flood our overstretched jobs market'⁴¹³. In a desperate move, politicians considered a negative image campaign to deter migrants from coming⁴¹⁴.

Relevant examples: discrimination against Bulgarians and Romanians in accessing employment

- Despite the end of the transition period, Bulgarian and Romanian workers are still excluded from certain jobs in **France**, including certain public function jobs (police, tax, justice, defence). Bulgarians and Romanians find it more difficult to secure employment because of their nationality⁴¹⁵.
- Some French employers are unaware of the end of the transitional measures for Bulgarian and Romanian citizens. For example, a Romanian citizen found a job in **France** but the French employer said on 1 July 2014 that he cannot sign an employment contract because rules exist preventing Romanian citizens taking up employment in France⁴¹⁶.
- A Bulgarian citizen was working in **Finland** and his employer withdrew €700 from his pay for taxes. However, the Finnish employer did not provide the citizen with any documents to prove that he had made the payment⁴¹⁷.
- A Bulgarian citizen who has lived and worked in **Cyprus** since 2012 as a waitress complained that her employer had not paid her social security since March 2014, and also that she worked full-time plus extra hours but is "insured" as a part time

⁴¹⁰ Shaw, J. et al, 'Getting to grips with EU citizenship: Understanding the friction between UK immigration law and EU free movement law', (2013) Edinburgh Law School Citizenship Studies, xii, 27-28.

⁴¹¹ Franck Düvell, 'Romanian and Bulgarian migration to Britain: facts behind the fear', 28 March 2013, available at: <https://www.opendemocracy.net/ourkingdom/franck-d%C3%BCvell/romanian-and-bulgarian-migration-to-britain-facts-behind-fear>.

⁴¹² Christopher Hope, 'Britain powerless to stop tens of thousands of Bulgarians and Romanians moving to UK next year, Theresa May admits', 11 November 2012, available at: <http://www.telegraph.co.uk/news/uknews/immigration/9670141/Britain-powerless-to-stop-tens-of-thousands-of-Bulgarians-and-Romanians-moving-to-UK-next-year-Theresa-May-admits.html>.

⁴¹³ Nick Francis, 'The UK is much better than Romania. All my mates will come in 2014', 11 November 2012, available at: <https://www.thesun.co.uk/archives/news/1036548/the-uk-is-much-better-than-romania-all-my-mates-will-come-in-2014/>.

⁴¹⁴ Franck Düvell, 'Romanian and Bulgarian migration to Britain: facts behind the fear', 28 March 2013, available at: <https://www.opendemocracy.net/ourkingdom/franck-d%C3%bcvell/romanian-and-bulgarian-migration-to-britain-facts-behind-fear>.

⁴¹⁵ L'OBS, 'Bulgarian and Romanian workers, what will change on 1 January 2014?' ('*Travailleurs bulgares et roumains: qu'est-ce qui change le 1er janvier?*'), 31 December 2013, available at: <http://tempsreel.nouvelobs.com/monde/20131230.OBS0941/travailleurs-bulgares-et-roumains-qu-est-ce-qui-change-le-1er-janvier.html>.

⁴¹⁶Your Europe Advice, Quarterly Feedback Report No. 8, Quarter 2/2014 (April-June), p.42.

⁴¹⁷Your Europe Advice, Quarterly Feedback Report No. 10, Quarter 4/2014 (October-December), p. 45-46.

worker. She asked her employer why he had not insured her and he responded that he had no money⁴¹⁸.

7.2.2. Discrimination on grounds of nationality in accessing education

Instances of EU citizens encountering difficulties in accessing education due to discrimination on grounds of their nationality have been reported in Ireland. One particular obstacle concerns the lack of equality in **access to vocational training** for non-nationals. This infringes EU legislation, which protects individuals from being refused access to training or education in another EU Member State on grounds of their nationality⁴¹⁹. In particular, it breaches Article 7 of Regulation (EEC) No 1612/68⁴²⁰, which stipulates that EU citizens have the same right as national workers to access training in vocational schools and retraining centres, and under the same conditions.

Relevant example: Discrimination in accessing education

- The Council of Europe Committee of Social Rights found a lack of equality in access to vocational training for nationals of other Member States in **Ireland**⁴²¹. The report states that the length of residence condition applying to access to vocational training amounts to indirect discrimination, as EU citizens lawfully residing or working in Ireland are more often affected by this condition than are Irish nationals⁴²².

In addition, a number of complaints have been made to the Your Europe Advice Service about **higher tuition fees** being applied to non-nationals in accessing education in **BG, DK, EE, EL, MT, PL and RO**. There are several reports of discrimination in the charging of university fees, with non-nationals and EU citizens who have not acquired permanent residency status or are not migrant workers being charged more than nationals. This is in breach of Article 18 of the TFEU.

Relevant examples: Higher tuition fees for non-nationals

- A Greek citizen enrolled at a university in **Bulgaria** was initially told that the annual fees were EUR 560, but it was subsequently raised to EUR 3,000, despite the university website statement that the annual fees for Bulgarian nationals are approximately EUR 290⁴²³.
- **Poland** applies higher university tuition fees to EU citizens who have not acquired permanent residency status, or who are not migrant workers⁴²⁴.

⁴¹⁸ Ibid.

⁴¹⁹ Your Europe Advice Service, 'Admission and entry to university', 24 May 2016, available at: http://europa.eu/youreurope/citizens/education/university/admission-entry-conditions/index_en.htm

⁴²⁰ Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257/2, 19 October 1968, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31968R1612&from=EN>.

⁴²¹ European Committee of Social Rights, Conclusions 2012 (IRELAND) Articles 1, 9, 10, 15, 18, 20, 24 and 25 of the Revised Charter (January 2013), available at: http://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/State/Ireland2012_en.pdf; Groenendijk, K., et al., European Report on the Free Movement of Workers in Europe in 2012-2013, 2014, p 69.

⁴²² Groenendijk, K., et al., European Report on the Free Movement of Workers in Europe in 2012-2013, 2014, p 69.

⁴²³ Your Europe Advice, Quarterly Feedback Report No. 9, Quarter 3/2014 (July-September), p.39.

⁴²⁴ Act of 17 July 2005 – Law on Higher Education (*Ustawa – Prawo o szkolnictwie wyższym*), Journal of Laws of 2005, No.164, item 1365, as amended.

- A British student studying medicine in **Romania** realised that he was paying EUR 5,000 in tuition fees, while Romanian students are paying EUR 1,000⁴²⁵.

The University of **Malta** offers scholarships only to students who are Maltese citizens, or who have at least one Maltese parent, who have resided in Malta for a period of not less than five years before their course of study, who have completed their term of compulsory education, and who are attending their classes regularly and making satisfactory progress⁴²⁶. This goes beyond the requirements stipulated in Article 24(2) of Directive 2004/38/EC, which states that prior to the acquisition of the right of permanent residence, Member States are not obliged to grant maintenance aid for studies, including student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

7.2.3. Discrimination due to fees/price differences and discrimination in access to services

Different fees apply to EU citizens than to nationals of that Member State, with examples reported in **BE, IE, IT, PL and SI**⁴²⁷. Higher fees (and sometimes additional costs) have been applied to EU citizens for **residence cards, car insurance** premiums, marathon entry fees, dormitory fees, etc. This breaches Article 18 of the TFEU. The charging of higher fees for residence cards also breaches the Directive, which states that all residence documents 'shall be issued free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents'⁴²⁸.

Another example is an EU citizen who was unable to display his identity card at a border control and was fined more than a national would have been. This is in breach of the Directive in that non-nationals who have been checked by a Member State authority and are not carrying their registration certificate or residence card should be penalised with **the same sanctions as those imposed on that country's nationals for failing to carry their identity card**⁴²⁹.

Relevant examples: Different fees

- There have been cases where EU citizens were charged more to have **their residence cards issued** compared to **Belgian** citizens⁴³⁰. Foreigners also pay a range of other additional costs, such as **consular taxes, bank transfers and municipal taxes**⁴³¹.
- Insurance companies charge EU citizens higher fees than they do **Irish** citizens. A number of complaints and petitions have been made in this regard. For example, one petitioner claimed that he was charged 44% more on his **car insurance premium** because he did not have an Irish driving licence⁴³².

⁴²⁵Your Europe Advice, Quarterly Feedback Report No. 8, Quarter 2/2014 (April-June) , p. 37.

⁴²⁶Your Europe Advice, Quarterly Feedback Report No. 11, Quarter 1/2015 (January-March) , p 42.

⁴²⁷Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

⁴²⁸Article 25(2) of Directive 2004/38/EC.

⁴²⁹Article 26 of Directive 2004/38/EC.

⁴³⁰Your Europe Advice, Quarterly Feedback Report No. 10, Quarter 4/2014 (October-December) , p. 26.

⁴³¹Council of State (*Raad van State*), Advice 57.000/4 of 4 February 2015, Official Journal 20 February 2015; Myria, '2015 Migration in numbers and in rights' (2015 *Migratie in cijfers en in rechten*), 2016, available at: http://www.myria.be/files/Migratie-verslag_2015-LR.pdf, p. 210-211.

⁴³²Petition No. 1819/2014 to the European Parliament.

- Your Europe Advice was notified of a situation where the organisers of the **Warsaw Marathon** on 28 September 2014 provided a reduced fee for those either resident in **Poland** or of Polish nationality. While the first ground (residence) can be justified, applying different rates to Polish nationals and other EU nationals living in a Member State other than Poland contravenes Article 18 of the TFEU and constitutes discrimination on the ground of nationality⁴³³.
- One complainant reported that he travelled by car to Croatia via **Slovenia**. When he was **unable to produce his identity card** at the border control, he was **fined** EUR 500. The police officers told him that, had he been Slovenian, the fine would have been EUR 400⁴³⁴. Another example is that of a Spanish citizen who studied in a Slovenian university under the Erasmus+ programme. He complained about the different **dormitory fees** for Slovenian and EU students, with EU students being charged EUR 20 more⁴³⁵.

A number of complaints have been made to the Your Europe Advice Service about banks which discriminate against non-nationals in **BG, DK, FI, MT and PL** by **refusing them services** and imposing more restrictive conditions than those imposed on nationals⁴³⁶. These discriminatory practices are in breach of Article 18 of the TFEU.

Relevant examples: Banks discriminating against non-nationals

- A **Bulgarian** bank (CCB) has a policy **not to issue credit cards** to foreigners, including EU nationals residing permanently in Bulgaria⁴³⁷.
- A **Danish** bank provided different conditions for a loan to a Dutch citizen than it does to Danish citizens, despite him being legally resident there for eleven years. This is discrimination based on nationality⁴³⁸.
- A recurring issue in **Finland** is that of discriminatory behaviour of Finnish financial service providers who either require **excessive documentation** from citizens of **other EU Member States**, or **refuse to provide services on grounds of the applicant's nationality**⁴³⁹. In 2014, an Estonian client was denied online banking access codes because he used his Estonian passport as a form of identification. The **Administrative Court of Eastern Finland recognised the bank's practice as illegal discrimination** and the bank changed its identification policy⁴⁴⁰.
- Polish banks sometimes require higher security for repayment from non-Polish residents who wish to take out a mortgage in **Poland**⁴⁴¹.

Finally, another recurring issue of discrimination on grounds of nationality is **price discrimination** experienced by non-nationals when using public transport in another Member State. For example, non-nationals have been charged higher rates for bus fares

⁴³³ Your Europe Advice, Quarterly Feedback Report No. 9, Quarter 3/2014 (July-September), p.54.

⁴³⁴ Your Europe Advice, Quarterly Feedback Report No.10, Quarter 4/2014 (October-December), p.21.

⁴³⁵ Ibid, p.41.

⁴³⁶ Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

⁴³⁷ Your Europe Advice, Quarterly Feedback Report No. 13, Quarter 3/2015 (July-September), p.65.

⁴³⁸ Ibid, p. 71.

⁴³⁹ Your Europe Advice, Quarterly Feedback Report No. 4, Quarter 2/2013 (April-June), p. 53.

⁴⁴⁰ Pimiä, K. (Non-Discrimination Ombudsman), Administrative Court confirmed that S-Pankki had discriminatory identification principles (18.8.2015), Hallinto-oikeus totesi S-Pankilla olleen syrjivät tunnistusperiaatteet (päivitetty 18.8.2015), 18 August 2015, available at: <http://www.syrjinta.fi/web/fi/-/hallinto-oikeus-totesi-s-pankilla-olleen-syrjivat-tunnistusperiaatteet>.

⁴⁴¹ Your Europe Advice, Quarterly Feedback Report No. 9, Quarter 3/2014 (July-September), p. 59.

compared to nationals and often do not benefit from free public transport like nationals do. These issues have been reported in **DK, MT, NL and SK**⁴⁴², and are in breach of Article 18 of the TFEU.

Relevant examples: Price discrimination for using public transport

- Non-national EU citizens have faced direct discrimination on the basis of their nationality when using bus services in **Malta**⁴⁴³, **paying higher rates** for their bus fares than do Maltese citizens. The EU Commission launched infringement proceedings against Malta for discriminatory bus transport tariffs. As a result, an amendment to the Maltese Regulations removed the discrimination⁴⁴⁴. A complainant also argued that the new carrier which took control of the national transport company (Malta Public Transport) introduced electronic tickets encoded on the transport card to which only nationals were entitled. Persons from other EU Member States were required to buy the card at a higher price⁴⁴⁵.
- One petitioner claimed that his daughter, a German national studying in **the Netherlands**, cannot use public transport free of charge, as Dutch students do⁴⁴⁶.
- In Bratislava, **Slovak** nationals over a certain age are entitled to free public transport. An Austrian citizen was informed, however, that nationals of other Member States must continue to pay for public transport, irrespective of their age⁴⁴⁷.

7.3. Discrimination on grounds of civil status/sexual orientation

Equal treatment regardless of civil status and sexual orientation in the context of free movement means that, once a civil partnership is recognised in the host Member State, EU citizens and their family members are entitled to the same treatment as married EU families when exercising their free movement rights (Article 2 (b)). A civil partnership would also in any case fall under the remit of Article 3(2) (a) or (b) of the Directive and activate the duty of facilitation of the entry and residence rights of partners as members of the household or as partners **in a durable relationship, duly attested. 'Partnership' includes both 'civil partnerships' and 'registered partnerships'**. Issues of discrimination could occur when additional barriers exist for same-sex partners in comparison to different-sex partners, such as when a **EU citizens' partnership** or marriage is not recognised for the purposes of entry or residence in the country.

There are very few complaints which have been made to the Your Europe Advice Service or petitions which have been made to the European Parliament on reported instances of discrimination against EU citizens and/or their TCN family members on grounds of civil status/sexual orientation. However, information on such instances of discrimination is available through other means as some national NGOs and ILGA Europe collect this information. Moreover, academic literature and press articles often mention or report on these issues, and some cases have also been brought to court.

⁴⁴² Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

⁴⁴³ Carabott, S. (Times of Malta), 'Expats put adverts on 'discriminatory' buses', 19 August 2013, available at: <http://www.timesofmalta.com/articles/view/20130819/local/Expats-put-adverts-on-discriminatory-buses.482392>; Your Europe Advice, Quarterly Feedback Report No. 7, Quarter 1/2014, (January-March), p. 68.

⁴⁴⁴ Petition No 1391/2013 to the European Parliament.

⁴⁴⁵ Your Europe Advice, Quarterly Feedback Report No. 12, Quarter 2/2015 (April-June), p.55.

⁴⁴⁶ Petition No 2545/2013 to the European Parliament.

⁴⁴⁷ Your Europe Advice, Quarterly Feedback Report No. 5, Quarter 3/2013 (July-September), p.51.

7.3.1. Recognition of same-sex partnerships in Member States' legislation

Same-sex partnerships are recognised in the national legislation of 22 Member States⁴⁴⁸. For example, the **Finnish** Registered Partnership Act 2001 (*Laki rekisteröidystä parisuhteesta*) introduced registered partnerships for same-sex partners only and grants a similar set of rights and responsibilities to those obtained by different-sex partners through marriage⁴⁴⁹. In **Ireland**, civil partnerships between same-sex couples are permitted under the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010⁴⁵⁰. This Act grants entry and residence rights to registered partners⁴⁵¹. The Act allows for the recognition of same-sex unions, either marriages or civil unions, entered into abroad⁴⁵².

Some Member States do not recognise same-sex partnerships in their legislation⁴⁵³. Interestingly, while **the UK recognises same-sex civil partnerships, it does not recognise opposite-sex civil partnerships**⁴⁵⁴, even after the introduction of marriage for same-sex couples into UK law⁴⁵⁵.

Table 3: Member States legal recognition of civil partnerships, same-sex marriage and adoption by same-sex partners

Member State	Civil Partnership	Marriage
AT	Yes	No (pending)
BE	Yes	Yes
BG	No	Constitutional ban
CY	Yes	No
CZ	Yes	No
DE	Yes	No (pending)
DK	Yes	Yes
EE	Yes	No
EL	Yes	No
ES	Yes/No ⁴⁵⁶	Yes
FI	Yes	Yes
FR	Yes	Yes
HR	Yes	Constitutional ban
HU	Yes	No (pending) Constitutional ban
IE	Yes	Yes
IT	Yes	No

⁴⁴⁸ AT, BE, HR, CZ, DE, DK, FI, FR, HU, IE, IT, LU, MT, PT, NL, CY, EE, EL, ES, SI, SE, UK

⁴⁴⁹ *Union citizenship: developments, impact and challenges*, The XXVI FIDE Congress in Copenhagen 2014, Congress Publications Vol. 2, DJØF Publishing, Copenhagen, 2014, p. 72, and p. 251.

⁴⁵⁰ The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (No. 24 of 2010), available at: <http://www.irishstatutebook.ie/eli/2010/act/24/enacted/en/html>.

⁴⁵¹ FRA, 'Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU: Comparative legal analysis Update 2015', 2015, available at: http://fra.europa.eu/sites/default/files/fra_uploads/protection_against_discrimination_legal_update_2015.pdf, p. 84.

⁴⁵² Article 5 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (No. 24 of 2010), available at: <http://www.irishstatutebook.ie/eli/2010/act/24/enacted/en/html>.

⁴⁵³ BG, LV, LT, PL, RO, SK.

⁴⁵⁴ S.216(1) Civil Partnership Act 2004.

⁴⁵⁵ Via the Marriage (Same Sex Couples) Act 2013.

⁴⁵⁶ Civil partnerships are recognised in 16 out of 17 regions and both autonomous cities.

Member State	Civil Partnership	Marriage
LT	No	Constitutional ban
LU	Yes	Yes
LV	No	Constitutional ban
MT	Yes	Recognition of marriage undertaken abroad
NL	Yes	Yes
PL	No	Constitutional ban
PT	Yes	Yes
RO	No	No
SE	Yes	Yes
SI	Yes	No
SK	No	Constitutional ban
UK	Yes	Yes/No ⁴⁵⁷

If a Member State recognises civil partnerships and same-sex marriages in their legislation, they normally also guarantee such EU citizens/TCNs in civil partnerships/same-sex marriages free movement rights (except **BE, CY, CZ** and **SI**). In addition, all of the Member States except **Slovakia** and **Poland** which do not legally recognise civil partnerships and same-sex marriages still guarantee such EU citizens/TCNs in civil partnerships/same-sex marriages free movement rights.

7.3.2. Recognition of same-sex couples in a civil partnership and free movement rights

Of the six Member States which do not recognise same-sex partnerships in their legislation, four recognise same-sex couples in a civil partnership for the purposes of free movement rights (i.e. **BG, LV, LT** and **RO**). These Member States consider same-sex partners as **family members** under Article 3(2)(a) of the Directive. Partnerships are not recognised under Article 2(2)(a) of the Directive⁴⁵⁸. **Latvia** does not have special clauses on partners and partnership in its legislation, and same-sex marriage has been banned by the Latvian Constitution since 2005⁴⁵⁹. Latvia, however, considers **partners as household members** under Article 3(2)(a) of the Directive, thereby granting them the 'facilitated' entry and residence rights conferred by the Directive⁴⁶⁰. Although **Bulgaria** does not legally recognise registered partnerships, and same-sex marriages are not considered 'equivalent' to heterosexual marriage, the transposing legislation allows same-sex couples full rights of free movement and residence by considering registered partners as **family members**⁴⁶¹. Similarly, same-sex marriages and partnerships are not

⁴⁵⁷ Since 2014 in England and Wales and Scotland; not in Northern Ireland and Gibraltar.

⁴⁵⁸ European Parliament, 'Comparative study on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', 2009, PE 410.650, available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET\(2009\)410650_EN.pdf.p.212.and.p.216](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET(2009)410650_EN.pdf.p.212.and.p.216).

⁴⁵⁹ Sheeter L. (BBC News), Latvia cements gay marriage ban, 15 December 2005, available at: <http://news.bbc.co.uk/2/hi/europe/4531560.stm>.

⁴⁶⁰ European Parliament, 'Comparative study on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', 2009, PE 410.650, available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET\(2009\)410650_EN.pdf.p.212.and.p.216](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET(2009)410650_EN.pdf.p.212.and.p.216).

⁴⁶¹ European Parliament, 'Comparative study on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States',

recognised by Lithuanian law, although non-national **same-sex couples have full rights of free movement** and residence in **Lithuania**. This is because the Lithuanian Law on the Legal Status of Aliens accords the status of family members to couples in a registered partnership, thereby granting them free movement and residence rights⁴⁶².

Overall, same-sex couples in a civil partnership are legally entitled to full rights of free movement and residence in most EU Member States.

7.3.3. Discrimination against same-sex couples in a civil partnership in exercising their free movement and residence rights

Some instances have been reported of EU citizens in same-sex registered partnerships being discriminated against in exercising their free movement and residence rights in some Member States.

- **Civil partnership is recognised in the host Member State**

One particular issue is **the fact that EU citizens' civil partnership is not recognised for the purposes of entry or residence** in some Member States **although the Member State recognises civil partnerships**. This is in breach of the Directive, according to which partners in a registered partnership have the right to entry and residence if the legislation of the host Member State treats registered partnerships as equivalent to marriage⁴⁶³. For example, **Slovenia** has recognised same-sex registered partnerships in its legislation since 2005⁴⁶⁴. Its Aliens Act, however, does not recognise same-sex registered partnerships contracted abroad, even though registered partnerships are permitted in Slovenia under the Registration of a Same-Sex Civil Partnership Act⁴⁶⁵. For example, in 2011 the Human Rights Ombudsman of the Republic of Slovenia examined a complaint of a same-sex couple (EU national –TCN) who registered their same sex civil partnership abroad but were not considered family members under the Aliens Act and therefore the partner of Serbian nationality was not able to acquire temporary residence in Slovenia⁴⁶⁶.

In addition, there have been some reports of refusal to recognise registered partnerships in **Belgium**. For example, a TCN registered partner of a UK citizen was refused a visa because Belgium does not recognise registered partnerships from the UK and because it did not bear apostille⁴⁶⁷. Another example is that of a TCN who had registered a civil partnership in the UK with a UK national, but whose application was rejected by the **Cypriot** immigration authorities despite the fact that Cyprus recognises same-sex civil

2009, PE 410.650, available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET\(2009\)410650_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET(2009)410650_EN.pdf); European Commission, Report on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2008) 840 final.

⁴⁶²Article 2, para 4 of the Law on the Legal Status of Aliens of the Republic of Lithuania No. IX-2206.

⁴⁶³ Article 2 of Directive 2004/38/EC.

⁴⁶⁴ Registered Partnership (2005) (*Zakon o registraciji istospolne partnerske skupnosti*) (*ZRIPS*) *Ur.l. RS, št. 65/2005*; European Parliament, 'Comparative study on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', 2009, PE 410.650, available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET\(2009\)410650_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET(2009)410650_EN.pdf), p. 191.

⁴⁶⁵Carrera, S. and Faurer Atger, A., Implementation of Directive 2004/38 in the context of EU enlargement, April 2009, Centre for European Policy Studies, Brussels, 2009, available at: <http://aei.pitt.edu/10758/1/1827.pdf>, p. 5.

⁴⁶⁶ Human Rights Ombudman of the Republic of Slovenia, Annual Report 2011, p 190.

⁴⁶⁷ Your Europe Advice, Quarterly Feedback No. 9, Quarter 3/2014 (July-September), p. 18.

partnerships in its own legislation⁴⁶⁸. The rejection was issued on the basis that the national legislative framework does not recognise same-sex marriages⁴⁶⁹. The Cypriot Equality Body found that the decision of the immigration authority was found to be unjustifiable discrimination on the grounds of sexual orientation⁴⁷⁰.

Other discriminatory obstacles have been encountered by same-sex partners in the **Czech Republic**, such as being barred from acquiring a **residence card or work permit** and being ineligible for **financial compensation** in the case of **death** of one of the **partners**⁴⁷¹. As the Czech Republic recognises same-sex civil partnerships in its legislation, these obstacles breach a number of provisions of Directive 2004/38/EC, namely Article 3(2)(b) which grants the right of entry and residence in the EU to partners with whom an EU citizen has a durable relationship, and Article 12 concerning retention of the right of residence by family members in the event of death or departure of the Union citizen.

In **Cyprus**, discrimination against a spouse in a **same-sex marriage** was reported. A Cypriot citizen and his Canadian spouse⁴⁷² were married in Canada and moved permanently to Cyprus, where they requested a **residence permit** for the Canadian spouse as family member, in accordance with the Directive⁴⁷³. The request was **rejected** on the grounds that he was not considered a family member of a Cypriot citizen because their **marriage** was not recognised by Cypriot legislation⁴⁷⁴. Instead, the partner was granted a temporary residence permit as a visitor for one year⁴⁷⁵. As a visitor, the partner did not have the right to work or to open his own bank account (he could only have a special bank account for visitors), which created numerous problems in his daily life. The Ombudsman held that the complainant did not receive equal treatment because his right to work was directly linked with the non-recognition of same-sex marriage under Cypriot law⁴⁷⁶. Consequently, the Ombudsman held that the denial of **the spouse's** right to work constituted unjustified adverse treatment directly linked to his sexual orientation, and recommended that the Cypriot authorities re-examine his request with a view to granting him the right to work⁴⁷⁷.

Notably, in June 2016, the European Court of Human Rights condemned **Italy** because of its **refusal to grant a residence permit to a same-sex couple on family grounds**⁴⁷⁸. This refusal violated Article 14 (prohibition of discrimination) taken together with Article 8

⁴⁶⁸ U. Neergaard, C. Jacqueson, N. Holst-Christensen, *Union Citizenship: development, impact and challenges*, XXVI FIDE Congress in Copenhagen 2014, Congress Publications vol. 2, DJØF Publishing, Denmark, 2014, p. 399.

⁴⁶⁹ Ibid.

⁴⁷⁰ Ibid: Case Ref. No. A.K.R. 68/2008, dated 23.04.08. For analysis see http://www.nodiscrimination.ombudsman.gov.cy/sites/default/files/017_fleeing_homophobia_seeking_safety_in_europe_-_asylum_on_the_basis_of_sexual_orientation_and_gender_identity.doc.

⁴⁷¹ European Parliament, 'Comparative study on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', 2009, PE 410.650, available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET\(2009\)410650_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET(2009)410650_EN.pdf), p. 189.

⁴⁷² Complaint No. 159/2008. The facts and legal issues raised in the complaint were virtually identical to the case of *Taddeucci and McCall v Italy*.

⁴⁷³ U. Neergaard, C. Jacqueson, N. Holst-Christensen, *Union Citizenship: development, impact and challenges*, XXVI FIDE Congress in Copenhagen 2014, Congress Publications vol. 2, DJØF Publishing, Denmark, 2014, p. 400.

⁴⁷⁴ Ibid.

⁴⁷⁵ Ibid.

⁴⁷⁶ Ibid.

⁴⁷⁷ Ibid.

⁴⁷⁸ Judgment in *Taddeucci and McCall v. Italy*, of 30 June 2016, application. 51362/09.

(right to respect for private and family life) of the European Convention on Human Rights. In particular, the Court found that in deciding to treat same-sex couples in the same way **as heterosexual couples without any spousal status, Italy had breached the applicants' right not to be subjected to discrimination based on sexual orientation in the enjoyment of their rights under Article 8 of the Convention.** The restrictive interpretation of the concept of family member, as applied to the case, did not take due account of the **applicants' personal situation and in particular their inability to obtain a form of legal recognition of their relationship in Italy.** In fact, the same-sex couple could not marry or, at the relevant time, obtain any other form of legal recognition of their situation in Italy.

- **Civil partnership is not recognised in the host Member State**

A number of discriminatory obstacles to free movement have been encountered by same-sex couples in registered partnerships in **Slovakia** and **Poland**, neither of which recognises same-sex partnerships in their legislation. These obstacles include **refusal of the right of permanent residence status, non-recognition of residence cards** issued by another Member State leading to refusal of entry into Poland, uninsured persons being excluded from the health insurance of their partner, **refusal to issue a birth certificate** to children of same-sex partners, and refusal of property purchases. While there is no obligation to facilitate the free movement rights of TCN partners of EU citizens if registered **partnerships are not recognised in the Member States' legislation,** in practice non-recognition results in discriminatory practices that do not seem aligned with EU free movement rights and rights to non-discrimination based on sexual orientation guaranteed by Article 21 of the Charter.

Relevant examples: Discrimination against same-sex registered partners

- In **Poland**, partners (whether different-sex or same-sex) are not considered family members as per Articles 2(2) and 3(2) of the Directive, as Poland does **not legally recognise** any form of **partnership**. As a consequence, Polish Border Guards did **not previously recognise the residence cards of partners** of an EU citizen – whether same-sex or different sex – **issued by another Member State**, due to its own lack of recognition of civil partnerships. In such cases, Border Guards required an entry visa, or other documents, from TCNs, in the absence of which they were **refused entry** into Poland. For example, in 2012 the Border Guard in Katowice-Pyrzowice in Poland refused entry to a Peruvian national in a civil partnership with an EU citizen, contracted in the UK⁴⁷⁹. Following recent judgments of the Polish Courts, the Border Guards are **now obliged to facilitate the entry of these persons**. However, a Chinese man in a civil partnership with a Polish citizen was **refused entry to Poland** in July 2015 (despite providing his Irish residency card) on the grounds that Poland does not recognise same-sex civil partnerships. As a result, the man had to apply for a visa at the airport which took a very long time to issue⁴⁸⁰.
- As a consequence of the non-recognition by **Polish** law of same-sex marriages or any form of civil partnership, an uninsured person living in such a **partnership**

⁴⁷⁹ Administrative Decision No. 93/2012/KGSG of 23 November 2012.

⁴⁸⁰ Information obtained through consultation with stakeholder (ILGA Europe, May 2016).

cannot benefit from the **health insurance of his/her partner**. A number of complaints have been received by MPs in this regard⁴⁸¹.

- A Polish person and a British person, both living in **Poland**, brought an action against Poland before the European Court of Human Rights in Strasbourg, after Polish authorities refused to issue a Polish birth certificate to their child⁴⁸².

7.4. Discrimination on grounds of racial or ethnic origin

Little information is available on EU citizens and/or their TCN family members being discriminated against on grounds of their racial or ethnic origin in exercising their free movement and residence rights. Most Member States have no reported instances of discrimination on grounds of racial or ethnic origin in relation to such rights.

However, one ethnic group is reported to be particularly vulnerable to discrimination in accessing their free movement and residence rights in some Member States: the **Roma**. Roma have, for example, faced discrimination in access to employment, education, financial services, accommodation/housing and social protection in a number of Member States (e.g. **BE**⁴⁸³ and **FR**⁴⁸⁴). They are also prevented from registering in another Member State, or from living in caravans, and are subjected to evictions, expulsions and deportations as a result. These obstacles faced by Roma are in breach of a number of provisions of EU legislation, including Article 24 of the Directive, Article 21 of the Charter of Fundamental Rights of the EU, and Article 10 of the TFEU.

7.4.1. Discriminatory barriers for Roma in exercising their rights to residence

Roma have faced numerous obstacles in **registering their residence** in **BE, ES and PL**. This not only breaches the provisions prohibiting discrimination on grounds of racial or ethnic origin set out in Article 21 of the Charter and Article 10 of the TFEU, but also Article 24 of the Directive (EU citizens residing in another Member State shall be treated equally to nationals of that Member State in exercising their free movement and residence rights). Recital 31 of the Directive also provides that it is to be implemented by the Member States without discrimination between the beneficiaries of the Directive on grounds of race, ethnic or social origin and membership of an ethnic minority’.

⁴⁸¹ Nowosielska K., ‘People living in partnerships do not benefit from the healthcare insurance of their partners’ (*Osoby żyjące w związkach partnerskich nie skorzystają z ubezpieczenia zdrowotnego swojego partnera*), Rzeczpospolita 2013, available at: <http://www.rp.pl/artykul/1071947-Osoby-zyjace-w-zwiazkach-partnerskich-nie-skorzystaja-z-ubezpieczenia-zdrowotnego-swojego-partnera.html>.

⁴⁸² Newsweek Polska, ‘Why can 4-year old Maria not obtain a birth certificate?’ (*Dlaczego 4-letnia Maria nie może otrzymać aktu urodzenia?*), available at: <http://polska.newsweek.pl/dziecko-lesbijek-nie-moze-otrzymac-w-polsce-aktu-urodzenia,artykuly,365352,1.html>.

⁴⁸³ UN Committee on the Elimination of Racial Discrimination (CERD), Concluding observations on the sixteenth to nineteenth periodic reports of Belgium, CERD/C/BEL/CO/16-19 (2014), 14 March 2014, available at: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6OkG1d%2FPPrICAqhKb7yhsr69Gyhm7OM1OqnY37itcWjEVavPqZmo0A3IoVNYN%2BfThsdRHcvMRNdzsPMIqHGbiopEXs7oxk8lw5rxC3%2FHK2g9a8DG2pngerO_CkTaCsB9gxTxygy9AuM7h9swivHNy3O%3D%3D, at para. 18; CERD, Concluding observations of the Committee on the Elimination of Racial Discrimination, CERD/C/BEL/CO/15 (2008), 11 April 2008, available at: http://www.un.org/ga/search/view_doc.asp?symbol=CERD/C/BEL/CO/15, at para. 22.

⁴⁸⁴ GISTI, End of the transitional period for Romanians and Bulgarians in France: what changes? A briefing note from Gisti and Romeurope (*Fin de la période transitoire pour les Roumains et les Bulgares en France: quels changements? Une note d'information Gisti et Romeurope*), 30 December 2013, available at : <http://www.gisti.org/spip.php?article3377>.

Relevant examples: Roma prevented from registering

- In **Poland**, Romanian citizens of Roma origin living in Poland cannot register their residence due to their lack of sufficient resources. As a result, they are discriminated against by the Polish authorities who cannot provide them with comprehensive support from the social assistance system⁴⁸⁵.
- In **Belgium**, the Equality Body, Unia, reports antiziganism by public figures and authority figures, such as municipal officials, refusing to register Roma⁴⁸⁶.
- In **Spain**, some administrative burdens to **prove residence** are particularly difficult for Romanian citizens of Roma origin to fulfill. In Spain, there is an obligation to be registered in the list of registered inhabitants of the town where the person resides. Even if, according to the national legislation⁴⁸⁷, any address is acceptable for this registration (even a fictitious one is allowed if the Social Services are aware that the individual is homeless), the process to allow the registration of homeless people (as a majority of Romanians citizens of Roma origin officially are) is not sufficiently guaranteed⁴⁸⁸. As a consequence, Roma citizens face serious difficulties in proving the continuous periods of residence necessary to obtain permanent residence, amounting to discrimination⁴⁸⁹.

Another issue is that some Member States (i.e. **BE, FR, LU**) **prevent Roma from living in caravans**, do not provide enough caravan sites to accommodate Roma, and subject them to **evictions, expulsions and deportations**. This is in breach of the Charter, the TFEU and Article 27 of Directive 2004/38/EC as restrictions to the right of entry and residence are only permissible on grounds of public policy, public security or public health, which are not present in these cases.

Relevant examples: Roma prevented from living in caravans and subjected to evictions/expulsions and deportations

- In **Luxembourg**, it is impossible for Roma to live in caravans, as campsites are not considered valid addresses and are not recognised for the registration of residence⁴⁹⁰.
- In 2012, **Belgium** was condemned by the European Committee of Social Rights for not respecting the housing rights of Roma due to the lack of sufficient caravan sites and the expulsion of Roma families from sites where they were illegally staying⁴⁹¹. At least 100 children of caravan dwellers could not attend school in 2014 as a result of the structural lack of caravan sites in Belgium. In addition, the families were forced to keep moving because the illegal sites where they live are often cleared without any legal alternative⁴⁹². In addition, Roma face increasing racial prejudice⁴⁹³. For example, in 2014, Roma were forced to leave private industrial land they were illegally occupying by a DJ engaged by the mayor to play loud music near the caravans⁴⁹⁴. In 2015, local authorities decided to dig trenches in order to prevent caravan dwellers from settling in a specific neighbourhood⁴⁹⁵.
- The 2015 Amnesty International Annual Report for **Portugal** mentions discrimination against Roma as one of the main human rights problems in Portugal, making reference to forced evictions of Roma families⁴⁹⁶.
- In **France** in 2013, GISTI (**Groupe d'information et de soutien des immigrés** – information and support group for immigrants) reported Roma being evicted from slums without a proper case-by-case assessment and illegal expulsions from the territory without individual assessments (in breach of Article 28 of Directive 2004/38/EC)⁴⁹⁷. There was a mass expulsion of Bulgarian and Roma of Romanian origin from France in 2010, along with the clearing of 'unauthorised' Roma settlements by the French Government⁴⁹⁸. Following the mass expulsion of Romanian and Bulgarian nationals of Roma origin from France, the French

⁴⁹⁰ Les Roms en Europe au 21e siècle violences, exclusions, précarité: Rapport de l'Association européenne pour la Défense des droits de l'Homme, coordonné par Philippe Goossens et Erell Chardon, sur base des recherches initiées par Sabrina Sanogo, Association Européenne pour la Défense des Droits de l'Homme, Brussels, October 2012, available at: <http://www.aedh.eu/plugins/fckeditor/userfiles/file/Discriminations%20et%20droits%20des%20minorit%C3%A9s/RAPPORT%20Roms%20AEDH.pdf>, p. 28.

⁴⁹¹ European Committee of Social Rights, *Internationale Federatie van Liga's voor Mensenrechten/Fédération Internationale des Ligues des Droits de l'Homme (FIDH) v Belgium*, complaint nr. 62/2010.

⁴⁹² De Standaard, 'Children of caravan dwellers have a full year of obligatory summer holiday' (*Kinderen woonwagbewoners hebben heel jaar verplichte zomervakantie*), 30 June 2014, available at: http://www.standaard.be/cnt/dmf20140630_01162101.

⁴⁹³ European Commission against Racism and Intolerance, ECRI Report on Belgium (fourth monitoring cycle), CRI(2009)18, 26 May 2009, available at: http://www.aedh.eu/plugins/fckeditor/userfiles/file/Discriminations%20et%20droits%20des%20minorit%C3%A9s/Report%20Belgium_26_05_09.pdf, at para. 123.

⁴⁹⁴ Het Laatste Nieuws, 'Mayor chases gypsies away with loud music' (*Burgemeester verjaagt Roma met luide muziek*), 16 July 2014, available at: http://www.hln.be/hln/nl/957/Binnenland/article/detail/1945374/2014/07/16/Burgemeester-verjaagt-zigeuners-met-luide-muziek_dhtml.

⁴⁹⁵ Unia, 'After the wall, now also ditches against caravan dwellers' (*Na de muur, nu ook geulen tegen woonwagbewoners*), 2015, available at: <http://unia.be/nl/artikels/na-de-muur-ook-geulen-tegen-woonwagbewoners>.

⁴⁹⁶ Amnesty International Portugal (*Amnistia Internacional Portugal*), '2015 Annual Report – Portugal' (*Relatório Anual 2015*), available at: http://www.amnistia-internacional.pt/index.php?option=com_content&view=article&id=2020&Itemid=29.

⁴⁹⁷ GISTI, End of the transitional period for Romanians and Bulgarians in France: what changes? A briefing note from Gisti and Romeurope (*Fin de la période transitoire pour les Roumains et les Bulgares en France: quels changements? Une note d'information Gisti et Romeurope*), 30 December 2013, available at: <http://www.gisti.org/spip.php?article3377>.

⁴⁹⁸ Ministry of Home Affairs (*Ministère de l'intérieur*), Circular No 10kk1016329J (*Circulaire No 10kk1016329J*), 24 June 2010, available at: http://www.lecanardsocial.com/upload/illustrationsLibres/Circulaire_du_24_juin_2010.pdf.

authorities adopted a new commitment to equality in 2011⁴⁹⁹. Nevertheless, entrenched discrimination against Roma creates a situation whereby Roma people leave of their own accord, due to the difficult living conditions they experience, e.g. limited social rights, access to health, education or voting rights⁵⁰⁰. Issues of sanitation and access to housing are particularly problematic⁵⁰¹.

In **2009 and 2010** a series of events raised concern in Europe, as **Roma** were targeted by the **Italian** and French authorities through evictions and expulsions.⁵⁰² The **Commission and Parliament** took a strong stance against Member State actions. As a result, as mentioned in the box above, national law was amended in **France** to include procedural guarantees and ensure compliance with the Directive⁵⁰³, while the Italian Courts struck down the government's emergency decrees.

In **Sweden**, in 2013, the Ombudsman sued a Swedish landlord for terminating a woman's rental agreement the day after she had received the keys to the apartment, stating he did **not want her to live there because she was a 'gypsy'**⁵⁰⁴. Similarly, in 2012, the Swedish Ombudsman sued a landlord for telling one of his tenants that she could no longer stay in her apartment if she or her visitors continued to wear the clothes they were wearing. In 2009, the Court of Appeal for Western Sweden found against a landlord for refusing to rent an apartment to a man because he was Roma⁵⁰⁵.

7.4.2. Roma inhibited from accessing employment in EU Member States

It has been reported in **BE, FI, IT, LT, LU, LV, PT and the UK** that Roma have been prevented from **accessing employment**⁵⁰⁶. This contravenes the Racial Equality Directive 2000/43/EC, which prohibits discrimination on the basis of race or ethnicity in the context of employment, but also in accessing education, the welfare system and social security, and goods and services⁵⁰⁷. For example, the employment rate of Roma and Sinti is around

⁴⁹⁹ GISTI, Entry, stay and expulsion. What does the law of 16 June 2011 change (*Entrée, séjour et éloignement. Ce que change la loi du 16 juin 2011*), available at: http://www.gisti.org/IMG/pdf/2011-09_cj_entree_sejour_apres_loi_besson.pdf, p. 50.

⁵⁰⁰ Commissioner for Human Rights, the Human rights of Roma and the members of the Travelling community, January 2008, available at: https://www.coe.int/t/commissioner/source/prems/prems212811_FRA_2612_Roma_and_Travellers_Extraits_A4_web.pdf.

⁵⁰¹ Defender of Rights, Description of expulsion from camps for which the circular was not, or was only partially, respected (*Description des situations d'expulsions de campements pour lesquels la circulaire n'a pas été respectée ou ne l'a été que partiellement*), available at: http://www.defenseurdesdroits.fr/sites/default/files/atoms/files/ddd_r_20130601_evacuation_campement_illicite_annexes.pdf.

⁵⁰² European Parliament Resolution of 10 July 2008 on the Census of the Roma on the basis of ethnicity in Italy, 10 July 2008, available at: [http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0312+0+DOC+XML+VO//EN](http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-0361: European Parliament Resolution of 9 September 2010 on the situation of Roma and on freedom of movement in the European Union, 9 September 2010, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0312+0+DOC+XML+VO//EN).

⁵⁰³ GISTI, Entry, stay and expulsion. What does the law of 16 June 2011 change (*Entrée, séjour et éloignement. Ce que change la loi du 16 juin 2011*), available at: http://www.gisti.org/IMG/pdf/2011-09_cj_entree_sejour_apres_loi_besson.pdf.

⁵⁰⁴ Hyresvärd i Filipstad, ANM 2011/981, Diskrimineringsombudsmannen website, available at: <http://www.do.se/lag-och-ratt/diskrimineringsarenden/hyresvard-filipstad/>.

⁵⁰⁵ Judgment by the Court of Appeal for Western Sweden, Case T-3501-08, judgment delivered 2009-01-15.

⁵⁰⁶ Your Europe Advice, Quarterly Feedback Reports (April 2012-March 2016).

⁵⁰⁷ FRA, 'Handbook on European non-discrimination law', 2011, available at: http://fra.europa.eu/sites/default/files/fra_uploads/1510-FRA-CASE-LAW-HANDBOOK_EN.pdf, p.14.

34% in Italy. Moreover, legally employed Roma and Sinti women represent only 11.5% of the entire sample, as opposed to 34.4% of Italian women⁵⁰⁸.

Relevant examples: Roma inhibited from accessing employment

- A recent survey has shown that low education level, illiteracy and negative stereotypes dramatically restrict Roma from accessing employment and perpetuating their long-term social isolation in **Latvia**⁵⁰⁹.
- In **Luxembourg**, Roma people have been victims of the extended transitional measures (abolished in January 2014), causing their incapacity to provide 'sufficient resources' for their stay⁵¹⁰.
- In **France**, the Defender of Rights received complaints from human rights associations, including Roma rights groups, concerning discrimination against Roma regarding access to employment⁵¹¹.
- In the **UK**, it has been reported that Roma have limited access to mainstream employment with decent wages:

'Roma workers are often employed as casual day labourers in the **UK** and opportunities for this type of work have decreased during the economic recession. While there have been instances of severe exploitation, sometimes amounting to forced labour, the social and economic marginalisation of the community and their limited trust in authority has made it difficult to begin to address this exploitation. Moreover, the situation of the Roma has been worsened by cuts in employment-related benefits introduced by the coalition government and they are also frequently denied welfare benefits through misapplication of the habitual residence test by staff of the Department of Work and Pensions. Furthermore, it was highlighted that there is a lack of any national strategy to promote the social inclusion of the Roma population⁵¹²'

7.4.3. Discriminatory barriers for Roma in accessing education, housing, social assistance and services

Roma have also been inhibited from **accessing education** in EU Member States, breaching the Charter, the TFEU and the Racial Equality Directive. For example, in **Belgium**, Unia reports that some head teachers are refusing to enrol Roma children in school⁵¹³. The 2015 Amnesty International Annual Report for **Portugal** also mentions segregation of Roma children in schools⁵¹⁴.

⁵⁰⁸ European Parliament, 'Evaluation of the EU Framework for National Roma Integration Strategies', at p. 31-32.

⁵⁰⁹ Market and Social Research Centre, "Latvijas Fakti" (2015). Roma in Latvia (*Romi Latvijā*). 44 p. The research was conducted within the project "Different people. Diverse experience. One Latvia II" Nr. JUST/2013/PROG/AG/4978/AD, available at: http://issuu.com/sif2015/docs/romi_pdf_publicesanai.

⁵¹⁰ Roms en Europe au 21e siècle : violences, exclusions, précarité : Rapport de l'Association européenne pour la Défense des droits de l'Homme, coordonné par Philippe Goossens et Erell Chardon, sur base des recherches initiées par Sabrina Sanogo, Association Européenne pour la Défense des Droits de l'Homme, Brussels, October 2012, available at : <http://www.aedh.eu/plugins/fckeditor/userfiles/file/Discriminations%20et%20droits%20des%20minorit%C3%A9s/RAPPORT%20Roms%20AEDH.pdf>, p.13-14.

⁵¹¹ Defender of Rights, Description of expulsion of camps for which the circular was not / partially respected (*Description des situations d'expulsions de campements pour lesquels la circulaire n'a pas été respectée ou ne l'a été que partiellement*), available at: http://www.defenseurdesdroits.fr/sites/default/files/atoms/files/ddd_r_20130601_evacuation_campement_illicite_annexes.pdf.

⁵¹² Groenendijk, K., et al., European Report on the Free Movement of Workers in Europe in 2012-2013, p.33.

⁵¹³ Unia, '2014 Annual report: A turning point for the Centre' (2015), p. 52; Unia, '2013 Annual Report on Discrimination/Diversity' (2014), p. 36 and 83.

⁵¹⁴ Amnesty International Portugal (*Amnistia Internacional Portugal*), 2015 Annual Report – Portugal (*Relatório Anual 2015*), available at: http://www.amnistia-internacional.pt/index.php?option=com_content&view=article&id=2020&Itemid=29.

It has been reported that Roma are inhibited from accessing **financial services** and **accommodation**. This breaches the Charter, the TFEU and the Racial Equality Directive. For example, in 2011, the state-funded Finnish Broadcasting Company (YLE) reported that Eastern European Roma employed in **Finland** had been facing surprising discrimination in access to financial services and municipally owned accommodation, with a number of applications rejected on the basis of ethnic origin⁵¹⁵.

Roma have also experienced barriers in **accessing social protection, e.g. in Ireland**, where counter staff and deciding officers are reluctant to grant social welfare payments to Roma, subjecting them to verbal abuse and discriminatory behaviour. For example, one Roma man reported that he was told by front-line staff to go to his own country to apply for his social welfare payments⁵¹⁶.

⁵¹⁵ 'Romanian Roma are wanted for jobs – not for begging' (*Romanian romanit halutaan töihin – ei kerjäämään*), YLE Uutiset, 2 March 2011, available at: http://yle.fi/uutiset/romanian_romanit_halutaan_toihin_ei_kerjaamaan/5090598.

⁵¹⁶ In from the margins - Roma in Ireland: Addressing the Structural Dimension of the Roma Community in Ireland', 30 May 2013, available at: <http://www.nascireland.org/wp-content/uploads/2013/05/NASC-ROMA-REPORT.pdf>, p 50.

8. COMPARATIVE OVERVIEW OF MEMBER STATES MEASURES TO COUNTER ABUSE OF RIGHTS

KEY FINDINGS

- All Member States have adopted measures to tackle **marriages of convenience**, and most of them have also adopted measures to address different kinds of **fraud** aimed at obtaining free movement rights. The most common measure adopted in the Member States tackles the issue of false information or forged documents. Abusive adoption is specifically addressed in certain Member States (e.g. **BE, IT** and **SE**). **Belgium, Spain** and **Luxembourg** have provisions sanctioning false declarations of paternity. Other relevant provisions include measures to tackle **abuses in claiming 'dependence', bogus self-employed persons** and false declarations regarding the age of a child.
- These measures provide for the refusal, termination or withdrawal of any right conferred by the Directive. In addition, abuse and fraud could lead to **finances** and **imprisonment** in a substantial number of Member States.
- **Data** on the implementation of measures to combat abuses and frauds are scarce.
- In certain Member States, these measures have a **negative or disproportionate impact** on the right to free movement. Serious concerns relate to an inversion of the **burden of proof**, when EU citizens and their spouses are required to demonstrate that their marriage is not a marriage of convenience. Under Directive 2004/38, the burden of proof lies with the national authorities. Moreover, certain Member States **systematically investigate** marriages between EU citizens and third country nationals.

8.1. Overview of the Directive's requirements on measures to counter abuse of rights

Marriages of convenience occur across the EU, though to a significantly varying degree across Member States. The involvement of organised crime in the organisation of marriages of convenience is a worrying factor⁵¹⁷.

In order to combat abuse of free movement rights, **Article 35** of Directive 2004/38 allows Member States to adopt measures to refuse, terminate or withdraw the right of entry and residence in the case of abuse of rights or fraud, such as marriages of convenience⁵¹⁸. According to the Directive, such measures must be proportionate and subject to procedural safeguards.

⁵¹⁷ European Commission, 'Communication from the Commission to the European Parliament and the Council, the European Economic and Social Committee and the Committee of the Regions - Free movement of EU citizens and their families: Five actions to make a difference', 25.11.2013, COM (2013) 837 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0837&from=EN>.

⁵¹⁸ Recital 28 refers to marriages of convenience as marriages contracted for the sole purpose of enjoying the right of free movement and residence under the Directive.

In its 2009 **Guidelines**⁵¹⁹, the European Commission specified the scope of these measures, taking into account CJEU case law. The Guidelines provide the definitions described below.

Definitions

- **Fraud:** 'deliberate deception or contrivance made to obtain the right of free movement and residence under the Directive'.
- **Abuse:** 'an artificial conduct entered into solely with the purpose of obtaining the right of free movement and residence under EU law which, albeit formally observing the conditions laid down by EU rules, does not comply with the purpose of those rules'⁵²⁰.

When it comes to **marriages of convenience**, the issue relates to the intention of the marriage, as represented by mala fide of the spouses prior to, and at the moment they enter into, the marriage. Marriages which began with genuine intentions but which later became marriages of form, or marriages in name only, are not considered marriages of convenience.

According to the 2009 Guidelines, the rules governing marriages of convenience can be extended to other analogous abusive relationships, such as **(registered) partnership of convenience, fake adoption or false declarations of parenthood**. In this latter case, an EU citizen declares him/herself the parent of a third country child in order to confer nationality and a right of residence on the child and its other parent, while knowing that he/she is not the biological parent and is not willing to assume parental responsibilities.

Abuse covers situations whereby EU citizens move to another Member State with the sole purpose of evading the national law prohibiting family reunification by invoking their rights under EU law. The so-called '**Belgium route**' could be regarded as an example of such **abuse**. Here, cases have been reported of Dutch nationals whose partners' visa/residence applications have been denied in the Netherlands relocating to Belgium in order for their partner to apply for visa/residence with the Belgian authorities⁵²¹. However, national authorities must be cautious when assessing this sort of abuse. Firstly, there cannot be a systematic presumption of abuse. Secondly, the CJEU has established that making rational immigration decisions does not amount to an abuse per se⁵²².

Another recurring abuse relates to **fraud and errors in the field of social security coordination**. Social security fraud can be any act, or omission to act, in order to obtain or receive social security benefits, or to avoid obligations to pay social security contributions, contrary to the law of a Member State⁵²³.

⁵¹⁹ European Commission, 'Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', 2.7.2009, COM(2009) 313 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52009DC0313>.

⁵²⁰ Case C-110/99 *Emsland-Stärke* [2000] ECLI:EU:C:2000:695, at para 52 et seq.; Case C-212/97 *Centros* [1999] ECLI:EU:C:1999:126, at para 25.

⁵²¹ Your Europe Advice, Quarterly Feedback Report No. 14, Quarter 4/2015 (October-December), p. 25.

⁵²² Case C-109/01 *Akrich* [2003] ECLI:EU:C:2003:491 at para 55-56.

⁵²³ Part A, Section 2(a) of the Council Resolution of 22 April 1999, OJ C 125, 6.5.1999, p. 1 as referred to in European Commission, 'Communication from the Commission to the European Parliament and the Council, the European Economic and Social Committee and the Committee of the Regions - Free movement of EU citizens and their families: Five actions to make a difference', 25.11.2013, COM (2013) 837 final, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0837&from=EN_at_p.9.

All of these abuses should be assessed in line with the **framework of EU law**, and not within national migration laws. Member States should not adopt measures to fight against marriages of convenience that could **deter** EU citizens and their family members from exercising their right to free movement or unduly encroach on their legitimate rights. Nor should they undermine the effectiveness of EU law, or discriminate on grounds of nationality. The **burden of proof** lies with the national authorities, though they may **not** take measures based on a **general presumption of abuse**, which would result in **systematic checks**. With regard to the burden of proof, TCN spouses must provide the necessary documents required by the Directive when applying for an entry visa or a residence card. The list of supporting documents in the Directive is exhaustive⁵²⁴ and does not include any requirement for EU citizens and their TCN spouses to present proof that their marriage is genuine. Consequently, TCN spouses are required only to present proof of a current, valid marriage. If the national authorities have sufficiently well-founded suspicions about the genuine nature of a particular marriage, they can request further relevant documents or evidence from the couple. In these circumstances, both spouses are obliged to cooperate with the authorities.

The risk of falsely identifying a genuine couple is reduced by the proposed '**double-lock safeguard mechanism**' according to which national authorities should first assess if there are 'hints that there is no abuse'. Only if the examination of these 'hints' does not confirm the genuine nature of the marriage should the authorities proceed to verify the existence of the hints of abuse⁵²⁵.

Hints there is no abuse

The Commission⁵²⁶ provided a set of indicative criteria, suggesting that abuse is unlikely when:

- The third country spouse would have no problem obtaining a right of residence in his/her own capacity or has already lawfully resided in the EU citizen's Member State beforehand.
- The couple has been in a relationship for a long time.
- The couple has had a common domicile/household for a long time.
- The couple have already entered a serious long-term legal/financial commitment with shared responsibilities (mortgage to buy a home, etc.).
- The marriage has lasted for a long time.

⁵²⁴ See, for example, Article 10(2) of Directive 2004/38 or Recital 14 which stipulates that "[t]he supporting documents required by the competent authorities for the issuing of [...] a residence card should be comprehensively specified in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members."

⁵²⁵ European Commission, 'Commission Staff Working Document, Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens', SWD(2014) 284 final, 26.9.2014, available at: http://ec.europa.eu/justice/citizen/files/swd_2014_284_en.pdf, p.34.

⁵²⁶ Ibid. at p. 35.

Hints of abuse

National authorities may use the following set of criteria indicating the existence of an abuse to trigger an investigation:

- The couple have never met before their marriage.
- The couple are inconsistent about their respective personal details, about the circumstances of their first meeting, or about other important personal information concerning their relationship.
- The couple do not share a common language.
- Evidence of a sum of money or gifts handed over in order for the marriage to be undertaken (with the exception of money or gifts given in the form of a dowry in cultures where this is common practice).
- The past history of one or both spouses contains evidence of previous marriages of convenience or other forms of abuse and fraud intended to acquire a right of residence.
- Development of family life only after an expulsion order was adopted.
- The couple divorces shortly after the TCN in question has acquired the right of residence.

As a **consequence** of abuse or fraud, Member States may **refuse to confer rights** of free movement under EU law (e.g. to issue an entry visa or a residence card) and to **terminate or withdraw** free movement rights (e.g. the decision to terminate validity of a residence card or to expel the person concerned who acquired his/her rights by abuse or fraud). The Directive does not specify any sanctions which may be taken by Member States to combat abuse or fraud. The Guidelines clarify that Member States may lay down **sanctions** under civil (e.g. invalidating the right of residence conferred by a proven marriage of convenience), administrative or criminal law (fine or imprisonment), provided these sanctions are effective, non-discriminatory and proportionate.

8.2. Comparative overview of national measures

8.2.1. Marriages of convenience

Each Member State has measures to tackle marriages of convenience. Most have adopted specific provisions for this abuse, while others tackle these issues through general provisions against abuse in law. For instance, the **UK** defines marriages of convenience as an **'abuse of the right to reside'**⁵²⁷ and it imposes an obligation on registrars to inform the Home Office where they suspect a marriage of convenience will take place⁵²⁸. In addition, Home Office Guidance requires caseworkers to decide, systematically, whether marriages or civil partnerships might have been contracted for convenience before issuing entry or residence documentation⁵²⁹. The Guidance makes it clear that an applicant can prove a family relationship through a valid marriage certificate and that, where a marriage of convenience is suspected, the burden of proof is subsequently with the Secretary of State.

⁵²⁷ Section 21B (1)(c) of the Immigration (European Economic Area) Regulations 2006, SI 2006/1003.

⁵²⁸ Section 24 of the Immigration and Asylum Act 1999.

⁵²⁹ Home Office Guidance, 'Direct Family Members of European Economic Area (EEA) nationals', valid from 29 September 2015, p. 14.

France imposes a **punishment of imprisonment and/or a fine for the offence of 'contracting a marriage for the sole purpose of obtaining, or causing to obtain, a residence permit or a protection against removal, or for the sole purpose of acquiring, or causing to acquire, French nationality'**⁵³⁰. More recently, a new offence was established for **'grey marriages' (*mariages gris*)**, i.e. a marriage contracted between a French national and a foreigner, where the French national has acted in good faith but the foreigner held the sole aim of obtaining a residence permit or French nationality⁵³¹. French law also provides for supplementary penalties, such as a residence ban and a ban on the exercise of any social activity, where such an offence has been committed⁵³².

Other Member States, such as Slovakia and Germany, curb this type of abuse through a number of legislative provisions not specifically addressing marriages of convenience. In **Slovakia**, the only provision that can be used by the authorities to tackle marriages of convenience states that the police must evaluate all documents submitted, including those confirming the existence of a family relationship with the EU citizen. If the documents submitted do not sufficiently demonstrate the facts, the police will not issue a residence document⁵³³.

In **Germany**, marriage of convenience falls within the broader offence of fraud related to free movement rights⁵³⁴. This offence allows the national authorities to declare the right to free movement non-existent if the conditions to be fulfilled in order to acquire a right to residence have been fabricated through false information or falsified documents⁵³⁵, and if a family member of an EU citizen does not accompany that citizen for the purposes of family reunification⁵³⁶.

Some Member States specifically tackle **abusive cohabitation or partnership**. In 2013 and 2014, **Belgium** introduced specific provisions on abusive cohabitation⁵³⁷. The measures include administrative, judicial and legal provisions to address legal cohabitation of convenience in the same manner as marriage of convenience, the establishment of a database and systematic information-sharing between the relevant services, and the intensification of controls within the first three years of the granting of a residence permit⁵³⁸.

⁵³⁰ Article L623-1 of the Code on the entry and stay of foreigners and the right to asylum ('CESEDA'); Ordinance n. 2004-1248 of 24 November 2004 (*Code de l'Entrée et du Séjour des Etrangers et du Droit d'Asile*), Official Journal n.0274 of 25 November 2004, p. 19924.

⁵³¹ Law No. 2006-911 of 24 July 2006 relating to immigration, integration and nationality (*Loi n° 2011-672 du 16 juin 2011 relative à l'immigration, à l'intégration et à la nationalité*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?categorieLien=id&cidTexte=JORFTEXT000024191380>.

⁵³² Article L 623-2 of CESEDA.

⁵³³ Škamla, M. and Varga, P, 'Report on the Free Movement of Workers in Slovakia in 2012-2013', July 2013, p.9.

⁵³⁴ Draft law amending the FreizügG/EU and other laws on residence, BT-Drs. 17/10746, p. 9.

⁵³⁵ Section 2(7) sentence 1 of the Law on the general freedom of movement of EU citizens of 30 July 2004 ('FreizügG/EU') (*Gesetz über die allgemeine Freizügigkeit von Unionsbürgern*), available at: http://www.gesetze-im-internet.de/bundesrecht/freiz_gg_eu_2004/gesamt.pdf.

⁵³⁶ Section 2(7) sentence 2 FreizügG/EU.

⁵³⁷ Article 1476bis of the Belgian Civil Code of 21 March 1804 (*Code Civil*), available at: <http://www.droitbelge.be/codes.asp#civ>; Crosspoint Migration-Integration, 'What is a legal cohabitation of convenience' (*Wat is een schijnwettelijke samenwoning?*), available at: <http://www.kruispuntmi.be/thema/gezinshereniging/je-wil-wettelijk-samenwonen-in-belgie/schijnwettelijke-samenwoning/wat-is-een-schijnwettelijke-samenwoning>.

⁵³⁸ State Secretary for Asylum and Migration Policy, 'General policy note on Asylum and Migration' (*Algemene beleidsnota Asiel en Migratie*), 2012, p. 11; EMN, 'Misuse of the Right to Family Reunification', 2012, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/family-reunification/0a_emn_misuse_family_reunification_study_final_june_2012_en.pdf, p. 12; Belgian NCP EMN, 'Focus-study: Misuse of the right to family reunification: marriages of convenience and false declarations of parenthood' (*Focus-studie: Misbruiken op het vlak van het recht op gezinshereniging: Schijnhuwelijken en valse ouderschapsverklaringen*), 2012, available at:

8.2.2. Fraud

Most Member States have adopted specific measures to address different types of fraud in obtaining free movement rights. The most widespread measure tackles the issue of **false information** or **forged documents**. In **Italy**, for instance, Legislative Decree 286/1998 specifically criminalises counterfeiting or altering documents in order to illegally obtain a visa or a residence permit⁵³⁹. If such fraud is found, the residence permit may be withdrawn.

Abusive adoption is specifically addressed in certain Member States, such as Belgium, Italy and Sweden. In **Italy**, the legislation establishes the refusal of a request for reunification when it is determined that an adoption was made for the sole purpose of enabling the person to enter and reside in the state⁵⁴⁰. Under Swedish law, if an adoption has taken place solely with a view to obtaining the right to stay, the partner or adopted person does not have a right to stay in **Sweden** as a family member of an EEA citizen⁵⁴¹.

Belgium, Spain and **Luxembourg** have provisions sanctioning **false declarations of paternity**. Under Spanish law⁵⁴², the declaration of paternity creates a contestable presumption of paternity, with the Civil Registry entitled to investigate the authenticity of the declaration⁵⁴³. These investigations include personal interviews to reveal inconsistencies, or requests for documents to detect possible fraud. If a falsification is found, registration can be refused. Finally, the Spanish authorities may ask for a DNA test in judicial procedures. A false declaration of paternity is punishable with administrative and criminal sanctions. In **Luxembourg**, a false declaration of parenthood is considered a criminal offence⁵⁴⁴. In cases where the Court finds that there is doubt about the parenthood, the applicant is asked to submit to a voluntary DNA test. If this is refused, the family reunification request may be rejected⁵⁴⁵.

Other relevant provisions include measures to tackle **abuses in claiming 'dependence'** (Spain), **bogus self-employed persons** (Belgium), and **false declarations regarding the age of a child** (Italy).

http://www.emnbelgium.be/sites/default/files/publications/0_emn_focussed_study_misuse_family_reunification_bereport_nl_17july2012.pdf, p. 5.

⁵³⁹ Article 5, para. 8bis, Legislative Decree 286/1998 'Text regulating migration and rules concerning migrants' status' as amended by Law no. 94 of 2009.

⁵⁴⁰ Article 29, para 9, of the Consolidated text of provisions governing immigration and the status of aliens, Legislative Decree 286/1998 ('*Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*'), Official Journal n.191 of 18 August 1998.

⁵⁴¹ Chapter 3a Section 4 para 3 of the Aliens Act Law 2005:716 ('*Utlänningslag*'), available at: http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/utlanningslag-2005716_sfs-2005-716.

⁵⁴² Article 113 of the Spanish Civil Code (*Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil*), Spanish Official Journal, n. 206 of July 25, 1889.

⁵⁴³ General Directorate of Registries and Notaries Instruction of 31 January 2006 (*Instrucción de 31 de enero de la Dirección General de Registros y Notarías*).

⁵⁴⁴ Bill No. 5908/00 of 28 July 2008, available at: http://chd.lu/wps/PA_1_084AIVIMRA06I4327I10000000/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/034/726/073235.pdf.

⁵⁴⁵ European Commission, Marriages of convenience and false declarations of parenthood: misuse of the right to family reunification, Luxembourg, June 2012, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/family-reunification/0a_emn_misuse_family_reunification_study_publication_bf_en.pdf, p. 38.

8.2.3. Sanctions

In addition to the refusal, termination or withdrawal of any right conferred by the Directive, abuse and fraud can lead to fines and imprisonment in a substantial number of Member States.

In **Belgium**, persons who attempt to enter into a marriage of convenience can be punished with imprisonment between one month and three years, and with a fine between EUR 50 and EUR 150⁵⁴⁶. The same punishments apply to attempts to enter into a legal cohabitation of convenience⁵⁴⁷.

Spanish law penalises marriages of convenience as administrative infringements punishable by a fine ranging from EUR 501 to 10,000. In extreme circumstances, marriages of convenience are also punished as criminal offences. Those extreme circumstances relate to situations where the marriage of convenience is linked to another criminal offence, such as aiding and abetting illegal immigration⁵⁴⁸ or document falsification⁵⁴⁹.

France imposes a punishment of five years' imprisonment and EUR 15,000 fine for marriages of convenience⁵⁵⁰. The same penalties are applicable where a person organises, or attempts to organise, a marriage or adoption of a child for the same purposes⁵⁵¹.

8.2.4. Impact of these measures on the right to free movement and residence

Cases where measures against abuse or fraud have a **negative or disproportionate impact** on the right of free movement have been reported in the **UK, Italy, Belgium and Germany**.

In the **UK**, EU citizens and their TCN partners **must demonstrate** if required that their marriage is not one of convenience, rather than being acknowledged as the automatic recipients of residence rights as the spouses and civil partners of Union citizens. As stated, this approach runs contrary to the interpretation given by the Commission, which places the burden of proof on national authorities and states that checks should not be systematic. The UK requires caseworkers to decide, systematically, whether marriages or civil partnerships might be undertaken for convenience before issuing entry or residence documentation⁵⁵². In the case of *Papajorgji*, an entry clearance officer initially refused to issue residence documents to the Albanian wife of a Greek national on the basis that further evidence had not been submitted, beyond the 115 written questions that they had answered and the numerous documents that they had already supplied. The Upper Tribunal made clear that the burden of proof was on the Home Office to demonstrate that their marriage of 14 years, which had produced two children, was not genuine⁵⁵³.

⁵⁴⁶ Article 79bis para 1 and 2 of the Act of 15 December 1980 on access to the territory, residence, settlement and removal of foreigners (*Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*).

⁵⁴⁷ Article 79ter of the Act of 15 December 1980 on access to the territory, residence, settlement and removal of foreigners.

⁵⁴⁸ Article 318bis of the Spanish Criminal Code.

⁵⁴⁹ Article 392 of the Spanish Criminal Code.

⁵⁵⁰ Article L623-1 of the CESEDA.

⁵⁵¹ Article L623-1 of the CESEDA.

⁵⁵² Home Office Guidance, 'Direct family members', p. 14.

⁵⁵³ *Papajorgji* [2012] UKUT 00038 (IAC); See also *ZH (Afghanistan) v Secretary of State for the Home Department* [2009] EWCA Civ 1060.

In **Italy**, too, a case was reported of an EU citizen required to prove that his/her marriage was genuine⁵⁵⁴, despite the fact that the burden of proof should normally fall on the national authorities. A similar issue is reported in **Belgium**, where, in 2013, the authorities were reported to regularly perform checks on evidence provided by applicants that they are not engaged in a marriage of convenience⁵⁵⁵. TCNs with illegal/precarious residence status are considered *a priori* suspects of marriages of convenience⁵⁵⁶.

In **Germany**, the possibility of issuing **re-entry bans** has been introduced for cases where false information or falsified documents have been used, or where no family reunification was intended⁵⁵⁷. Controversy has arisen over the compliance of this measure with Article 15(3) of Directive 2004/38/EC⁵⁵⁸, which provides that the host Member State may not impose a ban on entry in the context of an expulsion decision on grounds other than public policy, public security or public health⁵⁵⁹. Other concerns relate to an alleged lack of procedural safeguards in the context of the measures listed under Article 35 of the Directive⁵⁶⁰. The European Commission intends to examine this amendment to German law⁵⁶¹.

In **Poland**, the law makes no distinction between marriages of convenience and marriages contracted in good faith but which broke down after some years, leading the spouses to live *de facto* separately. Non-nationals in these situations are often **forced to hide the fact of their separation**, as their stay in Poland legally depends on their remaining married.

Another example of disproportionate effect relates to measures aimed at preventing fraud. In the **UK**, all claims by EU citizens for social welfare trigger a **compliance check**. This policy is arguably in breach of Article 14(2) of Directive 2004/38, which stipulates that **verification checks relating to an EU citizen's continued right to reside in the host State** will not be carried out systematically⁵⁶².

8.2.5. Implementation of these measures in practice

In general, little **data** on the scope of abuse and fraud and on the implementation of measures to combat them are available, which makes it almost impossible to evaluate whether these are related to free movement – as some Member States alleged – and

⁵⁵⁴ Your Europe Advice, Quarterly Feedback Report No. 2, Quarter 3/2012 (July-September), p.16.

⁵⁵⁵ Your Europe Advice, Quarterly Feedback Report No. 6, Quarter 4/2013 (October-December), p. 33.

⁵⁵⁶ EMN, 'Ad-hoc query on requirements of marriage and suspected numbers of marriages of convenience' (2013), available at: http://www.emnbelgium.be/sites/default/files/publications/uk_emn_ahq_requirements_for_marriage_and_suspected_marriages_of_convenience_wider_3_0.pdf, p. 5; Immigration Office, 'Activity report 2012' (*Activiteitenrapport 2012*), 2013, available at: https://dofi.ibz.be/sites/dvzoe/NL/Documents/2012_NL.pdf, pp. 206-214.

⁵⁵⁷ Section 7(2) sentence 2 ff. FreizügG/EU.

⁵⁵⁸ Agreeing: Thym, D., Statement on draft law amending FreizügG/EU and other provisions of 22 September 2014, BT-Ausschussdrucksache 18(4)164 F, p. 9; disagreeing and also referring to Article 20 of the TFEU: Welte, H.-P., 'Rechtsverlust- oder Nichtbestehensfeststellung nach erfolgloser Arbeitssuche' ZAR 2014, 190, 193; further opinions from Dienelt, K., in Bergmann, J., Dienelt, K. (eds) *Ausländerrecht* (11th edition 2016) § 7 FreizügG/EU para. 41 ff.

⁵⁵⁹ Thym, D., Statement on draft law amending FreizügG/EU and other provisions of 22 September 2014, BT-Ausschussdrucksache 18(4)164 F, p. 9.

⁵⁶⁰ Dienelt, K., in Bergmann, J., Dienelt, K. (eds) *Ausländerrecht* (11th edition 2016) § 7 FreizügG/EU para. 41 ff.

⁵⁶¹ Fóti, K., in Eurofund (ed) *Social dimension of intra-EU mobility: Impact on public services* (2015) 34, 5 March 2016, available at: http://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1546en_3.pdf.

⁵⁶² O'Brien, C., 'The Pillory, the Precipice and the Slippery Slope: the profound effects of the UK's legal reform programme targeting EU migrants' (2015) 37(1) JSWFL, p. 111-136, 117.

whether the measures taken by Member States are effective. **Belgium** stands out as an exception in this regard, as the Belgian Immigration Office provides regular data on these issues, which do not distinguish between host EU citizens and their TCN family members and others. The Immigration Office reports that, in 2013, 131 residence permits were revoked after annulment of marriage by the courts on the grounds that the persons had entered into a marriage of convenience, compared to 118 in 2012⁵⁶³. In the same year, overall 7,278 marriages were annulled, considerably less than the year before (9,064 annulments) and the steepest decline in 10 years⁵⁶⁴. According to the State Secretary for Asylum and Migration Policy, this indicates that the measures introduced in 2013 are effective⁵⁶⁵.

To aid effective implementation, an ambitious project, HESTIA⁵⁶⁶, is being funded by the **European Commission under the 'Prevention of and Fight against Crime Programme'** to reduce the number of marriages of convenience. Starting in 2015, the project has a duration of two years and is being implemented in six Member States (**EE, FI, IE, LT, LV, SK**). In addition, in 2015 the **Irish** Garda National Immigration Bureau set up '**Operation Vantage**', to investigate illegal immigration, with a particular focus on marriages of convenience as defined under the Civil Registration Act 2014⁵⁶⁷. Sixteen people were arrested as a result of marriages of convenience, nine of whom were subsequently deported. The Office of the Registrar General now has the power to investigate a couple prior to agreeing to a marriage.

⁵⁶³ Immigration Office, '2013 Activity report' (*Activiteitenrapport 2013*), 2014, available at: https://dofi.ibz.be/sites/dvzoe/NL/Documents/2013_NL.pdf_p.108-109.

⁵⁶⁴ De Standaard, 'Number of marriages of convenience declines' (*Aantal schijnhuwelijken valt terug*), 5 August 2014, available at: http://www.standaard.be/cnt/dmf20140805_01204880; Knack, 'Fewer marriages of convenience annulled' (*Minder schijnhuwelijken ontbonden*), 5 August 2014, available at: <http://www.knack.be/nieuws/minder-schijnhuwelijken-ontbonden/article-normal-269297.html>.

⁵⁶⁵ Ibid.

⁵⁶⁶ Project 'Preventing human trafficking and sham marriages: a multidisciplinary solution' (HESTIA).

⁵⁶⁷ Civil Registration (Amendment) Act 2014, S.I. No. 34 of 2014, available at: <http://www.irishstatutebook.ie/eli/2014/act/34/enacted/en/pdf>.

9. OVERVIEW OF THE EXTENT OF THE REFUSAL OF ENTRY AND RESIDENCE EXPULSIONS IN MEMBER STATES

KEY FINDINGS

- **Data** concerning refusal of entry, refusal of residence rights and expulsions are rarely publicly available, if collected at all in the Member States. Moreover, national authorities are often unwilling to provide this sort of information. The same applies to data on the main reasons invoked by Member States to justify these decisions.
- Refusals of residence and expulsions on the basis of a **lack of sufficient economic resources** are a recurrent issue in certain Member States. In some cases, the concerned Member State seems not to take into account all the relevant considerations to establish whether a person has become an unreasonable burden on the social assistance system. This might entail a violation of Directive 2004/38.
- A considerable number of Member States misapply the possible restriction on free movement based on **public policy and public security**. In particular, certain Member States expel EU citizens and their family members on the basis of criminal convictions without taking into due account all the relevant circumstances of the case.
- Not all Member States respect the **increased protection** established by the Directive for EU citizens and family members who have resided in the host member State for more than five or ten years.
- In many Member States the grounds for refusals of entry, residence and expulsion are not sufficiently determined by legal provisions and administrative guidelines. This leaves the national authorities with excessive discretion and leads to **legal uncertainty** for EU citizens and their family members.
- Certain issues exist regarding the **safeguards** in place against refusals of entry, residence and expulsions.

9.1. The Directive

Member States are restricted in **refusing** EU citizens and their family members **entry** to their territory. Entry can be refused only to EU citizens without an identity card or passport and to third country family members without an entry visa. Member States must, before refusing entry, give such persons every reasonable opportunity to obtain the necessary documents, to present them within a reasonable period of time, or to corroborate or prove by other means that they are covered by the right of free movement and residence⁵⁶⁸.

Similarly, the **right of residence** for **up to three months** can be refused only when the EU citizen is not in possession of a **valid identity card or passport** and where the third country family member is not in possession of a passport⁵⁶⁹. However, this right of residence can be withdrawn where the EU citizen and/or the third country family member

⁵⁶⁸ Article 5 of Directive 2004/38/EC.

⁵⁶⁹ Article 6 of Directive 2004/38/EC.

become an unreasonable burden on the social assistance system of the host Member State⁵⁷⁰.

Member States can refuse the right of residence for **more than three months** to students and economically inactive EU citizens who do not have **sufficient resources** to prevent themselves and their family members from becoming a burden on the social assistance system of the host Member State during their period of residence, and who do not have **comprehensive sickness insurance cover**⁵⁷¹. As long as the beneficiaries of the right of residence do not become an **unreasonable burden on the social assistance system** of the host Member State, they may not be expelled⁵⁷².

In the case of EU citizens and their family members who have resided legally for a **continuous period of five years** in the host Member State, national authorities cannot refuse or withdraw residence rights on the basis of the conditions described above⁵⁷³.

Article 27 of Directive 2004/38, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of **public policy, public security or public health**. These grounds must **not** be invoked to serve **economic ends**. **Re-entry bans** in the context of an expulsion decision cannot be based on grounds other than public policy, public security or public health⁵⁷⁴.

The requirements of public policy and public security remain at the discretion of each individual Member State in accordance with its needs. However, since freedom of movement is one of the foundations of the EU, derogations from this principle must be **interpreted strictly**⁵⁷⁵.

EU citizens may be **expelled** only for conduct punishable by the law of the host Member State, or where other genuine and effective measures intended to combat such conduct have been taken⁵⁷⁶. Failure to comply with the registration requirement does not, in itself, constitute a threat to public policy or public security and cannot be the sole justification for the expulsion of a person⁵⁷⁷.

Measures taken on the grounds of public policy, public security or public health must be based exclusively on the **personal conduct** of the individual concerned. **Previous criminal convictions** cannot in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a **genuine, present and sufficiently serious threat** affecting one of the fundamental interests of society. Restrictive measures cannot be based solely on considerations pertaining to the protection of public policy or public security advanced by another Member State⁵⁷⁸.

⁵⁷⁰ Article 14 of Directive 2004/38/EC.

⁵⁷¹ Article 7 of Directive 2004/38/EC.

⁵⁷² Recital 16 of Directive 2004/38/EC.

⁵⁷³ Article 16 of Directive 2004/38/EC.

⁵⁷⁴ Article 15(3) of Directive 2004/38/EC.

⁵⁷⁵ European Commission, 'Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Brussels 2009, COM(2009) 313 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009DC0313&from=EN>.

⁵⁷⁶ Cases C-115/81 *Adoui and Cornuaille* [1982] ECLI:EU:C:1982:183, at paras 5-9 and Case C-268/99 *Jany* [2001] ECLI:EU:C:2001:616, at para 61.

⁵⁷⁷ Case C-48/75 *Royer* [1976] ECLI:EU:C:1976:57, at para 51.

⁵⁷⁸ Cases C-33/07 *Jipa* [2008] ECLI:EU:C:2008:396, at para 25 and C-503/03 *Commission v Spain* [2006] ECLI:EU:C:2006:74, at para 62.

Justifications that are isolated from the particulars of the case, or that rely on considerations of **general prevention**, are not acceptable⁵⁷⁹. Restrictive measures following a criminal conviction cannot be automatic and must take into account the personal conduct of the offender and the threat that it represents for the requirements of public policy⁵⁸⁰. Grounds extraneous to the personal conduct of an individual cannot be invoked. Automatic expulsions are not allowed under the Directive⁵⁸¹.

Current membership of a criminal **organisation** may be taken into account where the individual participates in the activities of the organisation and identifies with its aims or designs⁵⁸². In certain circumstances, persistent **petty crime** may represent a threat to public policy⁵⁸³. When assessing the existence of the threat to public policy in these cases, the authorities may take into account the nature and frequency of the offences and the damage or harm caused⁵⁸⁴.

With regard to the public health ground, the only **diseases** justifying measures restricting freedom of movement are diseases with epidemic potential and other infectious diseases⁵⁸⁵. Diseases occurring after a three-month period from the date of arrival cannot constitute grounds for expulsion from the territory.

The Directive establishes a system by which longer periods of residence in the host Member State increase the protection against expulsion: EU citizens or their family members who have the right of **permanent residence** on its territory may not be expelled **except on serious grounds of public policy or public security**. An expulsion decision against EU citizens who have resided in the host Member State for the **previous 10 years** may only be taken if the decision is based on **imperative grounds of public security**. As a rule, Member States are not obliged to take **time actually spent behind bars** into account when calculating the duration of residence during which no links with the host Member State are built⁵⁸⁶.

Once the authorities have established that the personal conduct of the individual represents a sufficiently serious threat to warrant a restrictive measure, they must carry out a **proportionality** assessment to decide whether the person concerned can be denied entry or removed on grounds of public policy or public security⁵⁸⁷.

The following factors can be taken into account:

- degree of social danger;

⁵⁷⁹ Article 28 of Directive 2004/38/EC; Case 67/74 *Bonsignore* [1975] ECR 297.

⁵⁸⁰ Cases C-348/96 *Calfa* [1999] ECLI:EU:C:1999:6, at paras 17-27 and 67/74 *Bonsignore* [1975] ECR 297, at paras 5-7.

⁵⁸¹ Case C-408/03 *Commission v Belgium* [2006] ECLI:EU:C:2006:192, at paras 68-72.

⁵⁸² Case 41/74 *van Duyn* [1974] ECLI:EU:C:1974:133, at para 17 et seq.

⁵⁸³ Case C-349/06 *Polat* [2007] ECLI:EU:C:2007:581, at para 35.

⁵⁸⁴ European Commission, 'Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', Brussels 2009, COM(2009) 313 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009DC0313&from=EN>, at p. 12.

⁵⁸⁵ Article 29 of Directive 2004/38/EC.

⁵⁸⁶ European Commission, 'Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', Brussels 2009, COM(2009) 313 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009DC0313&from=EN>, at p. 14.

⁵⁸⁷ *Ibid.*, p. 13.

- nature of the offending activities, their frequency, cumulative danger and damage caused;
- time elapsed since acts committed and behaviour of the person concerned;
- personal and family situation of the individual.

The persons concerned must have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek a review of any decision taken against them on the grounds of public policy, public security or public health⁵⁸⁸. An expulsion order must be notified in written form, including the reason for the expulsion and the authority with which an appeal can be lodged⁵⁸⁹. In general, **automatic expulsions** are not allowed under the Directive⁵⁹⁰.

9.2. Overview of existing data

Data concerning refusal of entry, refusal of residence rights and expulsions are rarely publicly available. While requests for the purposes of this study were sent to all Member States, only a small number responded with comprehensive information.

Where data were provided, they often did not distinguish between TCN family members of EU citizens and other TCNs. Where not otherwise specified, figures in the tables refer to EU citizens, TCN family members of EU citizens and other TCNs. The data, therefore, were of minimal comparative value for the purposes of this study. In addition, it was not possible – other than in exceptional cases - to obtain information on the main reasons justifying the refusals and the expulsions.

Only in the **UK** is it possible to state that the number of refusals of entry or residence, as well as expulsions of EU citizens, is steadily on the rise. National authorities indicate that this is the result of concerted efforts to refuse entry or to expel EU citizens convicted of a criminal offence, as well as EU citizens who do not meet the conditions attached to extended residence rights under Article 7 of the Directive. This indicates the UK's willingness to publicly demonstrate that it is addressing popular concerns such as criminality and immigration, including the immigration of EU citizens. Also in **Belgium**, the number of residence permits of EU citizens and their family members (including TCNs) that have been revoked has increased steadily in recent years: from 502 in 2010 to 1,542 in 2011, 2,470 in 2013, 2,712 in 2013 and 2,042 in 2014⁵⁹¹.

9.2.1. Refusal of entry

Data on refusal of entry are rarely publicly available and national authorities are often unwilling to provide this type of information. Most Member States do not collect data specifically relating to the refusal of entry of EU citizens and their TCN family members. However, there is some data but it is patchy, covering different categories of persons

⁵⁸⁸ Article 31 of Directive 2004/38/EC.

⁵⁸⁹ Article 30 of Directive 2004/38/EC.

⁵⁹⁰ Case C-408/03 *Commission v Belgium* [2006] ECLI:EU:C:2006:192, para 68-72.

⁵⁹¹ Immigration Office, '2014 Annual Statistical Report' (*Statistisch jaarverslag/rapport annuel statistiques 2014*), 2015, p. 25.

(including other TCNs and asylum seekers) and only some Member States⁵⁹². The only Member States where there is relevant data are Belgium and Finland. For the purposes of family reunification with a Belgian citizen, 3997⁵⁹³ EU citizens were refused entry into **Belgium** in 2012. Similarly, in 2013, 2615 EU citizens were refused entry while in 2014 the number of EU citizens who were refused entry into Belgium dropped to 342⁵⁹⁴. In 2013, 736 EU citizens were refused entry into **Finland**. The number of EU citizens who were refused entry into Finland dropped to 644 in 2014. Unfortunately, the data obtained do not permit any conclusions to be drawn on refusals of entry across Europe.

Data on the main reasons invoked by Member States for refusing entry are also very scarce. In **Belgium**, most visa refusals for the TCN family member of an EU citizen are based on a strict interpretation of the notion of '**genuine chance of being engaged**' and the requirement to have **sufficient resources**, albeit without all revenues taken into consideration⁵⁹⁵. **Romania** also often invokes the **lack of sufficient financial resources** to refuse entry, together with the lack of valid travel documents. In **Poland**, national authorities refuse the right of entry to TCN family members of EU citizens mainly on the grounds that they are **travelling without the EU citizen** in question. In several cases, the Polish Border Guards have refused entry to third country family members of EU citizens who are in possession of a residence card issued by a Member State outside of the Schengen Area⁵⁹⁶.

9.2.2. Refusal of residence rights

As with refusal of entry, data on refusal of residence rights are rarely publicly available and national authorities are often unwilling to provide them. Moreover, many Member States do not collect data specifically relating to the refusal of residence of EU citizens and their TCN family members but only have data on the refusals of residence of all categories of persons (including other TCNs and asylum seekers)⁵⁹⁷. The data gathered do not permit any conclusions to be drawn on refusals of the right of residence across Europe.

⁵⁹² Refusals of entry to AT: 954 (2011), 1854 (2012), 2046 (2013). Refusals of entry to BG: 135 (2012), 70 (2013), 80 (2014), 57 (2015). Refusals of entry to EE: 52 (2012), 69 (2013), 80 (2014), 46 (2015). Refusals of entry to RO: 4171 (2014), 4956 (2015). Refusals of entry to SI: 1 (2012), 1 (2013), 8 (2014), 1 (2015). Refusals of entry to UK: 1409 (2014), 1779 (2015). This data does not specifically state which categories of persons it refers to.

⁵⁹³ Myria, '[Migration Annual Report 2013](#)' (2013), p. 47.

⁵⁹⁴ Myria, '[2015 Migration in numbers and in rights](#)' (2016), p. 48.

⁵⁹⁵ CIRE, '[Annual Report 2014 \(Rapport annuel 2014\)](#)', July 2015, p.16.

⁵⁹⁶ Information obtained through consultation with stakeholder (Border Guards units, April 2016).

⁵⁹⁷ Refusal of residence from EE: 0(2012), 0(2013), 2(2014),0(2015). Refusals of residence from LU: 34 (Two refusals of residence plus 32 withdrawals of residence rights) (2012), 36(2013), 156 (126 refusals of residence plus 30 withdrawals of residence rights) (2014). Refusals of residence from SI: 105 (89 refusals of registration of residence, 1 refusal of temporary residence permit for EU citizen's family members, 15 terminations/annulments of registration) (2012), 76 (46 refusals of registration of residence, 2 refusals of temporary residence permit for EU citizen's family members, 28 terminations/annulments of registration) (2013), 56 (31 refusals of registration of residence, 4 refusals of temporary residence permit for EU citizen's family members, 21 terminations/annulments of registration) (2014), 62 (44 refusals of registration of residence, 6 refusals of temporary residence permit for EU citizen's family members, 12 termination/annulment of registration) (2015). Refusals of residence from the UK: 23,916(9,478 applications for residence rejected, 14,438 applications for residence considered invalid) (2012), 25,022 (20,922 applications for residence rejected, 4,100 applications for residence considered invalid) (2013), 28,106 (21,719 applications for residence rejected, 6,387 applications for residence considered invalid) (2014).

Table 4: Refusal of residence rights

Member State	Refusals of residence in 2011	Refusals of residence in 2012	Refusals of residence in 2013	Refusals of residence in 2014	Refusals of residence in 2015
AT	EU citizens: 1,624	EU citizens: 1,893	EU citizens: 1,730		
BE		EU citizens and TCN family members: 2.407	EU citizens and TCN family members: 2.712	EU citizens and TCN family members: 2,042	
CZ				EU citizens: 952 ⁵⁹⁸ TCN family members: 630 ⁵⁹⁹	
DE		EU citizens: 1,659 ⁶⁰⁰			EU citizens: 1,932 ⁶⁰¹
FI		EU citizens: 0 TCN family members: 1	EU citizens: 0 TCN family members: 2	EU citizens: 7 TCN family members: 14	

The main reasons invoked by Member States for refusing residence rights are:

- Failure to fulfil the residence criteria (**DE**⁶⁰², **PL**⁶⁰³ and **SI**⁶⁰⁴), in particular representing an **unreasonable burden** on the social security system (**BE**⁶⁰⁵).
- Grounds of public policy, security or health (**DE**⁶⁰⁶ and **PL**⁶⁰⁷).
- Lack of valid travel documents, or other valid documents confirming identity and citizenship, or visa (**PL**⁶⁰⁸).
- **Family member does not match the definition of a 'family member'** (**EE**⁶⁰⁹).
- The personal data of the person concerned has been entered onto the register of foreign nationals whose stay is not welcome (**PL**⁶¹⁰).

⁵⁹⁸ Data refers to refusals of temporary residence permits.

⁵⁹⁹ Ibid.

⁶⁰⁰ Data refers to withdrawal of residence.

⁶⁰¹ Ibid.

⁶⁰² § 5(4) FreizügG/EU.

⁶⁰³ Roicka, P., Study on Obstacles to the right of free movement and residence for EU citizens and their families. Country report for Poland, 2016.

⁶⁰⁴ Data provided by the Ministry of the Republic of Slovenia upon request.

⁶⁰⁵ Article 42bis of the Act of 15 December 1980 on access to the territory, residence, settlement and removal of foreigners; Touquet, H. and Wets, J., 'Context, motive and opportunities of Central and Eastern European immigration: exploratory research with a focus on Roma' (2013), p. 24.

⁶⁰⁶ § 6(1) sentence 2 FreizügG/EU and Welte, H.-P., 'The travel ban-an instrument for restricting freedom of movement' (*'Das Einreiseverbot – ein Instrument zur Beschränkung der Freizügigkeit'*) ZAR 2013, 330.

⁶⁰⁷ Roicka, P., Study on Obstacles to the right of free movement and residence for EU citizens and their families. Country report for Poland, 2016.

⁶⁰⁸ Ibid.

⁶⁰⁹ Police and Border Guard Board Estonia (*Politsei- ja Piirivalveamet*), Email correspondence, 14 March 2016.

⁶¹⁰ Roicka, P., Study on Obstacles to the right of free movement and residence for EU citizens and their families. Country report for Poland, 2016.

9.2.3. Expulsions

The same problems concerning the availability of data for refusals of entry and residence apply to expulsions. Moreover, many Member States do not collect data specifically relating to the expulsion of EU citizens and their TCN family members but only have data on the expulsion of all categories of persons (including other TCNs and asylum seekers)⁶¹¹. Similarly, therefore, no definitive conclusions can be drawn about the expulsions of EU citizens and their family members. There is limited information available from **Cyprus, France and Germany**. 208 and 288 EU citizens were expelled from **Cyprus** in 2011 and 2012 respectively. 773 EU citizens were expelled from **Germany** in 2015. In addition, 7,727⁶¹², 5,300⁶¹³, 4,135⁶¹⁴ and 4,068⁶¹⁵ were expelled from **France** in 2012, 2013, 2014 and 2015 respectively.

The main grounds justifying expulsions of EU citizens and their third country family members seem to be:

- Public order and security reasons (**FI**⁶¹⁶, **CZ**⁶¹⁷).
- The committing of crimes (**SE**⁶¹⁸, **FI**⁶¹⁹ and **IE**⁶²⁰).
- Failure to fulfill residence conditions (**UK**⁶²¹).
- Unreasonable burden on the social assistance system (**CY**⁶²² and **NL**⁶²³).

A particular issue for EU citizens and their family members who, lacking sufficient economic resources, are not expelled from the host Member State, is the loss of their residence

⁶¹¹ Expulsions from AT: 1267(2012), 1323(2013). Expulsions from BE: 277 Romanians and 188 Bulgarians (2012), 303 Romanians and 188 Bulgarians (2013). Expulsions from CZ: 2346(2012), 2193(2013), 2583 (2014). Expulsions from EE: 55(2012), 77(2013), 50(2014), 24 (2015). Expulsions from FI: 222(2012), 273 (2013), 258 (2014), 279 (2015). Expulsions from HU: 2039 (1,386 ordered by the Hungarian Office of Immigration and Nationality, 653 ordered by courts) (2012), 1352 (966 ordered by the Hungarian Office of Immigration and Nationality, 386 ordered by courts) (2013), 1962 (1,454 ordered by the Hungarian Office of Immigration and Nationality, 508 ordered by courts) (2014), 2603 (1,550 ordered by the Hungarian Office of Immigration and Nationality, 1,053 as ordered by courts) (2015). Refusals from SI: 15(2012), 8(2013), 17(2014), 11(2015). Expulsions from the UK: 3591 (3,128 forced expulsion and 463 voluntary departures) (2014), 4479 (3,765 forced expulsions and 714 voluntary departures) (2015).

⁶¹² 2,934 forced removals of EU citizens; 1,810 spontaneous returns of EU citizens; 2,983 assisted returns of EU nationals.

⁶¹³ 3,382 forced removals of EU citizens; 1,400 spontaneous returns of EU citizens; 518 assisted returns of EU nationals.

⁶¹⁴ 3,332 forced removals of EU citizens; 721 spontaneous returns of EU citizens; 82 assisted returns of EU nationals.

⁶¹⁵ 3,432 forced removals of EU citizens; 597 spontaneous returns of EU citizens; 39 assisted returns of EU nationals.

⁶¹⁶ European Commission, Report on on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2008) 840 final, 2008, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0840:FIN:en:PDF>, p 8; Section 168 of the Finnish Foreigners Act (Aliens Act) 301/2004 amended by Act 360/2007 and further amended by Act 358/2007 *Ulkomaalaislaki 301/2004*.

⁶¹⁷ Section 119(2) of Act No 161/2006 Coll. which amends the Residence Act. No. 326/1999 Coll. about Residence of Foreigners on the Territory of the Czech Republic (Foreigners Residence Act); CEPS, 'Implementation of Directive 2004/38 in the context of EU Enlargement: A proliferation of different forms of citizenship', April 2009, p 11; Union citizenship: developments, impact and challenges, The XXVI FIDE Congress in Copenhagen 2014, Congress Publications Vol. 2, DJØF Publishing, Copenhagen, 2014, p 443.

⁶¹⁸ Eriksson, I. and Pettersson, H., Study on Obstacles to the right of free movement and residence for EU citizens and their families. Country report for Sweden, 2016.

⁶¹⁹ European Commission, Report on on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2008) 840 final, 2008, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0840:FIN:en:PDF>, p 8.

⁶²⁰ Information obtained through consultation with stakeholder (KOD Lyons Solicitors, March 2016).

⁶²¹ Amended by the Immigration (European Economic Area) (Amendment) (No.2) Regulations 2013, SI 2013/3032, Sch.1 para.13(b), entering into force 1 January 2014.

⁶²²Your Europe Advice, Quarterly Feedback Report No. 4, Quarter 2/2013 (April-June), p. 23.

⁶²³ Union citizenship: developments, impact and challenges, The XXVI FIDE Congress in Copenhagen 2014, Congress Publications Vol. 2, DJØF Publishing, Copenhagen, 2014, p. 89-90.

rights, and, therefore, the loss of their entitlement to social benefits. As described in **Section 6.6.1**, this leads to a **'de facto expulsion'**.

In general, the scarcity of data on expulsions makes it difficult to draw conclusions in respect of this issue.

9.3. Main problems identified

9.3.1. Economic grounds

Under Directive 2004/38, EU citizens and their family members cannot be expelled on economic grounds as long as they do not become an **unreasonable burden on the social assistance system** of the host Member State. An expulsion measure should not, therefore, be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and consider the duration of residence, the personal circumstances and the amount of aid granted, in deciding whether or not the beneficiary has become an unreasonable burden on the social assistance system and should be expelled⁶²⁴.

Refusal of residence and expulsion on the basis of a **lack of sufficient economic resources** are a persistent issue in **BE, CY, FR** and **the UK**. In some cases, the Member State does not seem to take into account all relevant considerations in establishing whether or not a person has become an unreasonable burden on the social assistance system. These practices may, therefore, run counter to the Directive.

In **Cyprus**, for example, a Greek citizen was ordered to leave the country after residing there for 17 years, because of his application for an invalidity pension⁶²⁵.

In **Belgium**, following a 2006 ruling of the CJEU⁶²⁶, the legislation was amended to ensure that the personal situation of applicants – including the nature and regularity of their income, as well as the number of dependant family members – be taken into account when evaluating their sufficient resources⁶²⁷. However, **critics have noted that many 'de facto' expulsions (as a result of an 'order to leave the territory')** because a person has been deemed an **'unreasonable burden to the social security system'** appear to be an almost systematic result of receiving social assistance and unemployment benefits, without any such consideration of personal circumstances, e.g. health or family situation⁶²⁸. The Immigration Office is given a significant amount of **discretion in assessing** whether or not a person is an unreasonable burden, including the means to check whether or not the person benefits from social assistance⁶²⁹. Since 2011, the Ministry for Social Integration sends the Immigration Office a monthly list with information from the Crossroads Bank for Social

⁶²⁴ Recital 16 of Directive 2004/38/EC.

⁶²⁵ Your Europe Advice, Quarterly Feedback Report No. 4, Quarter 2/2013 (April-June), p. 23.

⁶²⁶ Case C-408/03 *Commission v Belgium*, [2006] ECLI:EU:C:2006:192, para 18, 40 and 67-72.

⁶²⁷ Royal Decree of 28 November 2007 amending Royal Decree of 8 October 1981 concerning access to the territory, residence, settlement and removal of foreigners, Official Journal, 14 December 2008; European Parliament, Comparative study on the application of Directive 2004/38/EC of 29 April 2004 on the Right of Citizens of the Union and their family members to move and reside freely within the territory of the Member States, Brussels, 2009, PE 410.650, available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET\(2009\)410650_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET(2009)410650_EN.pdf), p. 57 and p.184.

⁶²⁸ INCA CGIL, *'Sorry, this access route is closed. Your rights and responsibilities when you work in another Member State'*, p.18.

⁶²⁹ CIRE, *The right to residence of European citizens in Belgium (Le droit de séjour des citoyens européens en Belgique)*, p. 8; Judicial Foreigners' Council [decision of 30 September 2013 No 111.076](#).

Security⁶³⁰ containing personal data on all EU/EEA citizens and their family members who have received social allowances for three consecutive months over the past year⁶³¹. According to a number of academics and organisations, these **systematic data transfers** violate Directive 2004/38/EC because they result in automatic withdrawals of the right of residence by the Immigration Office without due consideration of the specific circumstances of each individual case⁶³². As a consequence of a more strict follow-up of cases and increased information-sharing between the different services over the past few years through the Bank for Social Security, there has been a considerable increase in the number of EU citizens and their family members who have had their right to residence revoked on the grounds of becoming an unreasonable burden on the social assistance system⁶³³. In 2010, this happened to 502 persons, increasing to 1,542 in 2011, 2,470 in 2013, 2,712 in 2013 and 2,042 in 2014⁶³⁴.

As discussed in the country report, the **UK** has taken regulatory steps to enforce the removal of EU citizens who no longer meet the residence conditions of Directive 2004/38, particularly on economic grounds. For instance, in April 2010, the then-UK Border Agency introduced a scheme whereby **homeless EU citizens** were required to attend an interview at a local police station to determine whether they were exercising residence rights under Directive 2004/38. It was reported that, one month into the project, 200 people had been targeted by the project, 100 of whom were served removal notices and 13 of whom had already been deported⁶³⁵. A 2013 report by *Inside Housing* indicates that this removal scheme was revived, on at least one occasion. Accordingly, 63 Romanians were questioned in London, around 20 of whom were subsequently deported to Romania⁶³⁶. The lawfulness of such deportations has been criticised⁶³⁷, as homeless EU citizens not relying on social welfare arguably reside in the UK as self-sufficient citizens.

In the **Netherlands**, a few cases of expulsion based on economic reasons have also been registered, with one case reported in **Sweden**⁶³⁸. There is no clear indication that the personal situation of the applicants is taken into consideration when determining if they represent an unreasonable burden on the social assistance system of the host Member State. There is no evidence of expulsions on economic grounds in the other Member States. The absence of data, however, means that this can only be stated with caution.

Certain Member States, such as **Ireland**, do not clarify in their legislation that expulsion cannot automatically result from recourse to the social assistance system⁶³⁹. In practice,

⁶³⁰ Bank for Social Security (*Kruispuntbank van de Sociale Zekerheid / Banque Carrefour de la Sécurité Sociale*).

⁶³¹ State Secretary for Asylum and Migration, ['Withdrawal of residence rights of EU citizens in Belgium: evolution from 2008 to 2013'](#) (*Intrekkingen verblijfsrecht van EU-onderdanen in België: de evolutie van 2008 tot en met 2013*) (2014); Immigration Office, ['Activity Report 2012'](#) (*Activiteitenrapport 2012*) (2013), p. 13.

⁶³² Myria, ['2015 Migration in numbers and in rights'](#) (2016), pp. 127-129; Bailleux, A., Carlier, J.-Y., Dumont, D., Martens, P. and Nevens, J.E. (La Libre Belgique), ['Free movement of EU citizens: misuse by Belgium of its social databanks'](#) (*Libre circulation des citoyens européens: du mauvais usage par la Belgique de ses banques de données sociales*) (2015); Letter from Inco, ABVV-FGTB, [EU Rights Clinic en BXL Laïque on the expulsions of EU citizens from Belgium](#) (*Lettre concernant les expulsions de citoyens européens de Belgique*).

⁶³³ Myria, *ibid.*, pp. 126-128 and 207; Immigration Office, ['Activity Report 2012'](#), 2013, p. 14 and p. 106.

⁶³⁴ Myria, *ibid.*, p. 127.

⁶³⁵ Neilen, C., 'Plans to Deport Eastern European Rough Sleepers Comes Under Fire', *The Guardian*, 20 July 2010, available at: <http://www.theguardian.com/society/2010/jul/20/eastern-european-rough-sleepers-deported>; See also Shaw, J. et al, 'Getting to grips with EU citizenship: Understanding the friction between UK immigration law and EU free movement law', *Edinburgh Law School Citizenship Studies*, 2013, p.31.

⁶³⁶ http://www.insidehousing.co.uk/6527844_article.

⁶³⁷ Shaw, J. et al, 'Getting to grips with EU citizenship: Understanding the friction between UK immigration law and EU free movement law', (2013) *Edinburgh Law School Citizenship Studies*, p 32.

⁶³⁸ Your Europe Advice, Quarterly Feedback Report No.2, Quarter 3/2012 (July-September).

⁶³⁹ Article 14(3) of Directive 2004/38/EC; European Commission, Report on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2008) 840 final p. 7; U. Neergaard, C. Jacqueson, N. Holst-Christensen,

however, stakeholders confirm that no expulsions took place on the grounds that the person is deemed to be an unreasonable burden on the social assistance system, nor have there been any complaints in respect of this issue⁶⁴⁰. It also appears that Ireland does not expel EU citizens and/or their family members on purely economic grounds⁶⁴¹.

A particular issue concerns those EU citizens and their family members who, lacking sufficient economic resources, lose their residence rights but cannot be expelled from the host Member State because they do not represent an unreasonable burden on its social assistance system. The loss of their residence rights leads to the loss of any entitlement to social benefits, which is based on the person being legally resident in the host Member State⁶⁴². **This leads to a 'de facto expulsion' since these EU citizens and their family members are left with no resources with which to conduct a decent life in the host Member State.** The same applies to those EU citizens and their family members who are considered an unreasonable burden on social assistance but who are not expelled, even though this would be allowed under Directive 2004/38.

For instance, in **Belgium**, the majority of the decisions to terminate residence rights were based on the person being deemed to be **unreasonable burden on social security**⁶⁴³. When the right of residence is terminated, the EU citizen and family members receive an **'order to leave the territory'**⁶⁴⁴. The order does not automatically lead to expulsion but, rather, the EU citizen and his/her family members are **no longer registered** in Belgium and are no longer entitled to receive social benefits⁶⁴⁵.

In the **UK**, cases regarding residence rights of EU citizens often arise in the context of applications for social welfare. While courts frequently conclude that EU citizens and/or their family members do not enjoy residence rights because of a **lack of sufficient resources**, this determination usually leads national courts to categorise such individuals as **'lawfully present' in the UK but without a 'right to reside'** under Directive 2004/38. Individuals are then subject to ordinary UK immigration control and are potentially liable for deportation by the Secretary of State⁶⁴⁶.

9.3.2. Public policy and public security

Issues concerning the **misapplication** of Article 27 Directive 2004/38 on the restrictions on the right of entry and the right of residence on grounds **of public policy, public security or public health** have been reported in **DK, EL, FR, IE, IT** and **the UK**.

France is experiencing issues with the question of when expulsions can be carried out based on a threat to public policy. Under French law⁶⁴⁷, the prefect is allowed to expel all foreign nationals, including EU citizens, who are considered a threat to public order,

Union Citizenship: development, impact and challenges, XXVI FIDE Congress in Copenhagen 20014, Congress Publications vol. 2, DJØF Publishing, Denmark, 2014, p. 650.

⁶⁴⁰ Information obtained through consultation with stakeholder (Immigrant Council of Ireland, Your Europe Advice Service and KOD Lyons Solicitors, March 2016).

⁶⁴¹ Information obtained through consultation with stakeholder (KOD Lyons Solicitors, March 2016); Information obtained through consultation with stakeholder (Your Europe Advice Service, March 2016).

⁶⁴² Case C-333/13 *Dano* [2014] ECLI:EU:C:2014:2358.

⁶⁴³ Immigration Office, *'Activity Report 2013'*, 2014, p. 108.

⁶⁴⁴ State Secretary for Asylum and Migration, *'Withdrawal of residence rights of EU citizens in Belgium: evolution from 2008 to 2013'* (*Intrekkingen verblijfsrecht van EU-onderdanen in België: de evolutie van 2008 tot en met 2013*) (2014).

⁶⁴⁵ Ibid.

⁶⁴⁶ *Kaczmarek v Secretary of State for Work and Pensions* [2008] EWCA Civ 1310, particularly para.5.

⁶⁴⁷ Article 65 of Law 2011-672 on immigration, integration and nationality (*Loi 2011-672 relative à l'immigration, à l'intégration et à la nationalité*), 17 June 2011, available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000024191380&dateTexte=20160502>.

especially if the person(s) is 'subject to criminal proceedings' for certain offences, such as drug trafficking, trafficking in human beings, pimping, exploitation of begging and illegal occupation of land.

French law⁶⁴⁸ allows for the expulsion of foreign nationals, including EU citizens, who have resided legally in France for less than three months based on the **mere suspicion** that the person has committed one of the offences listed above. No conviction is required. This directly contradicts Directive 2004/38/EC, which states that the threats justifying an **expulsion must be 'genuine, present and sufficiently serious' to the fundamental interests of society**⁶⁴⁹. Previous convictions have also been used in France to justify expulsions. According to the figures obtained by the European Roma Rights Centre (ERRC) in 2012, a **number of persons 'asked' to leave French territory had all just been released from prison**. In **Ireland**, a proposal to issue a removal order is triggered as soon as a person is served with a custodial sentence⁶⁵⁰. Many of the causes for such expulsions are, therefore, due **to a person's conduct (i.e. criminal conduct)**⁶⁵¹. As outlined in the Irish country report, a number of cases concern removal and exclusion orders which have been made against persons on the grounds that, following their **criminal conviction**, their remaining in the State is contrary to public policy. In the recent 2016 case *Balc v Minister for Justice*⁶⁵², the Minister for Justice and Equality issued a removal order imposing an exclusion period of five years against the applicant for being a serious risk to public policy, as the applicant had served a prison sentence for sexual assault⁶⁵³. This decision was deemed lawful by the court⁶⁵⁴.

The CJEU has established that serious crimes such as the sexual exploitation of children, may justify the expulsion of an EU citizen who has lived for more than 10 years in the host Member State only if the individual concerned represents a genuine and present threat affecting one of the fundamental interests of society. This implies a general assumption of a propensity to act the same way in the future⁶⁵⁵. A generalised practice of expulsion following a criminal conviction violates Directive 2004/38.

The same problem is present in **Italy**, where the Local Government Offices seem to violate Directive 2004/38⁶⁵⁶, insofar as they issue expulsion decisions on the grounds of **any guilty verdict by a court**.

In the **UK**, a person's previous criminal convictions do not themselves justify an expulsion decision⁶⁵⁷. However, recent changes to Home Office Guidelines mean that all EU offenders given **one or more custodial sentences** are referred for consideration for deportation. There is no longer a requirement that the sentence be of particular length before a referral is made⁶⁵⁸. In numerous cases, national courts have emphasised the need for a **present** threat to a fundamental interest of society, warning against using previous convictions or offender assessment reports made at the time the offence was committed to inform a

⁶⁴⁸ Ibid.

⁶⁴⁹ Article 27 of Directive 2004/38/EC.

⁶⁵⁰ Information obtained through consultation with stakeholder (KOD Lyons Solicitors, March 2016).

⁶⁵¹ Ibid.

⁶⁵² *Balc v Minister for Justice* [2016] IEHC 47.

⁶⁵³ Ibid., at para 44-45.

⁶⁵⁴ Ibid., at para 130-131.

⁶⁵⁵ Case C-348/09 *P.I.* [2012] ECLI:EU:C:2012:300.

⁶⁵⁶ Citizens without Borders, Free Movement and Residence in the European Union: a Challenge for European Citizenship, 31 May 2013, available at: http://www.meltingpot.org/IMG/pdf/citizens_inglese.pdf, p. 42.

⁶⁵⁷ Reg 21(5)(e) of the EEA Regulations.

⁶⁵⁸ Home Office Guidance, 'Criminal Casework – European Economic Area (EEA), Foreign national offender (FNO) cases', 6 October 2015, p. 5.

deportation decision⁶⁵⁹. However, in several cases, previous convictions have been taken in conjunction with **evidence of an individual's continued unwillingness to reform or to abide by the law** in order to determine a present threat.

In **Denmark**, where Union citizens or their family members have not yet acquired permanent residence, offences punished by a prison sentence are sufficient to justify expulsion. This system skirts close to a **presumption of expulsion**, a practice consistently censured by the CJEU in its case law⁶⁶⁰.

Finally, it has been reported that, in **Greece**, a Polish citizen was denied a registration certificate solely because she had recently received a minor sentence following her conviction for insulting a police officer⁶⁶¹. In 2008, a Romanian citizen was denied a registration certificate because he had been convicted of committing a series of burglaries over a long period of time and for illegally entering Greece⁶⁶².

9.3.3. Increasing level of protection

Issues have been reported with the **increased protection** established by the Directive for EU citizens who have resided in the host Member State for more than five years - who can only be expelled based on serious grounds of public policy or public security - and the even higher level of protection for those resident for more than 10 years - for whom only imperative grounds of public security justify expulsion⁶⁶³. This is the case in **Denmark** and **the UK**.

The **UK** requires **continuous, legal residence in the 10 years** prior to the deportation decision in order to trigger enhanced protection, although this is not an explicit requirement under Directive 2004/38⁶⁶⁴. Meaningful access to enhanced protection is arguably severely hindered by these requirements, since periods of imprisonment do not constitute legal residence and can thus break the continuity of residence, effectively resetting it to zero. Most deportation decisions follow a period of imprisonment, thereby precluding access to this enhanced protection even for EU citizens who have lived in the UK for decades prior to their imprisonment. The CJEU has confirmed that the UK approach of counting *backwards* for the deportation order is in line with the wording of Article 28, **although a holistic consideration of the EU citizen's integration into the UK is also required**⁶⁶⁵. This approach has been incorporated into Home Office Guidance⁶⁶⁶. At the administrative level, there is a lack of consistency in determining whether or not a person has resided in the UK for the past 10 years, despite a period of imprisonment prior to the deportation order, which has led to **inconsistent application** of the enhanced protection⁶⁶⁷. In addition, the UK does not consider primary carers of a child with EU citizenship, who benefit from derived residence rights under the *Chen*⁶⁶⁸ and *Zambrano*⁶⁶⁹ case law, as beneficiaries of the higher level of protection from deportation afforded by

⁶⁵⁹ *A, B, C v Secretary of State for the Home Department* [2013] EWHC 1272 (Admin); *BF (Portugal) v Secretary of State for the Home Department* [2009] EWCA Civ 923.

⁶⁶⁰ Neergaard et al. 'Union Citizenship: Development, Impact and Challenges.' The XXVI FIDE Congress in Copenhagen, 2014. Congress Publications Vol. 2, p.131.

⁶⁶¹ Ibid, p 592.

⁶⁶² Ibid.

⁶⁶³ Article 28 of Directive 2004/38/EC.

⁶⁶⁴ Case C-400/12 *MG* [2014] ECLI:EU:C:2014:9; At national level, see *HR (Portugal) v Secretary of State for the Home Department* [2009] EWCA Civ 371.

⁶⁶⁵ Case C-400/12 *MG* [2014] ECLI:EU:C:2014:9..

⁶⁶⁶ Home Office Guidance, 'Criminal Casework', p. 5.

⁶⁶⁷ Compare *Bulale* [2008] EWCA Civ 806 and *VP (Italy) v Secretary of State for the Home Department* [2010] EWCA Civ 806.

⁶⁶⁸ Case C-200/02 *Zhu and Chen* [2004] ECLI:EU:C:2004:639.

⁶⁶⁹ Case C-34/09 *Ruiz Zambrano* [2011] ECLI:EU:C:2011:124.

Directive 2004/38. Instead, expulsion decisions are made under ordinary UK immigration law, on the basis of whether or not deportation would be 'conducive to the public good'⁶⁷⁰.

In **Denmark**, the relevant national rules link the expulsion of a foreigner who has lived for more than nine years in Denmark to offences punishable by more than three years in prison. Since most of these cases will involve residence for more than 10 years, there seems to be an **incorrect application of the 'imperative grounds of public security'** criterion established by Article 28(3). When a foreigner has lived there for between five and nine years, offences that are punishable by just one year in prison are sufficient to justify an expulsion. This does not seem to be in line with the serious grounds of public policy or public security criteria of Article 28(2)⁶⁷¹.

9.3.4. Vagueness of grounds justifying refusals of entry, residence and expulsions

In many Member States (such as **CZ, DE, FI, IT, LT and PL**) the grounds for refusal of entry, residence and expulsion are **not sufficiently determined** by legal provisions and administrative guidelines. This leaves the national authorities with **excessive discretion** and leads to legal uncertainty for EU citizens and their family members.

In **Italy**, the reference made in the transposing legislation to a number of other provisions (contained in Laws, Decrees, Codes, Articles, etc.) makes it difficult to identify the crimes for which an EU national may be expelled. In particular, the conditions for removal for **other reasons of public policy or public security** have been criticised by academics⁶⁷² for being too general, therefore not complying with EU requirements (in particular, the clear definition of the protected interests of society⁶⁷³).

Similarly, in **Poland**, the grounds for the restriction of the right of entry, residence and expulsion are quite vague, and no clear guidelines have been issued. Each case is decided on its individual merits, allowing for considerable administrative discretion.

The **Czech Republic** does not provide any conceptual framework for its interpretation of public policy, public security and public health⁶⁷⁴.

In **Germany**, there is no explicit transposition of Article 14(3) excluding expulsion as an automatic consequence of recourse to the social assistance system. Even though this provision is respected under the current legal regime and is correctly applied in practice, a clarification in the legislation would provide more legal certainty.

It is also reported that, in **Lithuania**, authorities have considerable discretion in assessing specific cases, as no clear guidelines are in place. Similarly, **Slovenia, Bulgaria, Portugal and Cyprus** have no publicly available guidelines.

⁶⁷⁰ Reg 21A(3)(a) of the EEA Regulations.

⁶⁷¹ Neergaard et al. "Union Citizenship: Development, Impact and Challenges." The XXVI FIDE Congress in Copenhagen, 2014. Congress Publications Vol. 2, p. 131.

⁶⁷² B. Nascimbene, A. Di Pascale, 'Italy' p. 674; *Associazione per gli Studi Giuridici sull'Immigrazione* (ASGI), G. Perin e P. Bonetti, 'Allontanamento dei cittadini dell'Unione Europea e dei loro familiari e tutele giurisdizionali', Scheda pratica, 23 March 2012, p. 11.

⁶⁷³ European Commission, Communication on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Brussels 2009, COM(2009) 313 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009DC0313&from=EN>, p. 10.

⁶⁷⁴ Carrera, S. and Faurer Atger, A., Implementation of Directive 2004/38 in the context of EU enlargement, April 2009, Centre for European Policy Studies, Brussels, 2009, available at: <http://aei.pitt.edu/10758/1/1827.pdf>, p 10.

9.3.5. Safeguards

Some issues have been reported with respect to the **safeguards** in place against refusals of entry, residence and expulsions in certain Member States (e.g. **BE, IE, LT** and **the UK**).

In **Lithuania**, recently adopted amendments have abolished the one-month period for EU nationals to leave the territory of the host Member State when served with an expulsion decision. Instead, these amendments have introduced a general time limit of 7-30 days, which, in practice, may mean that EU nationals will have **less than one month to leave** the country, in contrast to Article 30(3) of the Directive. No cases of application of this provision have been reported⁶⁷⁵.

Transposition problems have been reported for **Ireland** and the **UK**. In fact, Article 31 of the Directive concerning procedural safeguards has not been sufficiently transposed in the Irish 2015 Regulations. In the **UK**, transposition of Articles 30 and 31 of Directive 2004/38 remains problematic. Recent amendments to the EEA Regulations appear to widen the gap between the protection offered by the Directive and the national legislation. For instance, as described in the UK country report, **new restrictions** have been imposed on the appeal rights of partners in durable relationships with Union citizens, requiring them to provide proof of the relationship before appeal rights will be granted. More broadly, the UK imposes a requirement that family members produce evidence that they are, *inter alia*, the family member of an EEA national **before** they are granted appeal rights⁶⁷⁶. This is problematic because the requirement to provide **proof of the applicant's status as a family member** is the substance of the appeal where an individual is refused entry or residence on the basis that they are not family members under Directive 2004/38, making it a Catch-22 situation. In addition, UK law continues to stipulate that certain appeals cannot be made from within the UK⁶⁷⁷.

Finally, in **Belgium**, violations of the right to be heard and children's rights at the administrative level have been reported. However, the judicial review offered by the Alien Litigation Council seems to effectively redress these violations. In fact, the Alien Litigation Council suspended two expulsion orders for TCNs who had formed a dependent family with an EU citizen, on the basis of a violation of the right to be heard⁶⁷⁸. In both cases, the TCN was unable to explain their family situation, which the Immigration Office should consider when taking a decision regarding expulsion, together with the rights of the child and the health situation of the individual⁶⁷⁹. The Council of State held that the Immigration Office must hear the concerned party in order to allow him/her to provide arguments against the termination of his/her right to residence before deciding whether or not to terminate such a right⁶⁸⁰. The Immigration Office thus has a duty to actively investigate the case by collecting all relevant information, including explicitly inviting the foreigner to be heard⁶⁸¹. It has been

⁶⁷⁵Groenendijk, K., et al., European Report on the Free Movement of Workers in Europe in 2012-2013, 2014, p.14.

⁶⁷⁶ Reg 26(3) of the EEA Regulations.

⁶⁷⁷ Reg 27(1) of the EEA Regulations.

⁶⁷⁸ See, for example: *X v Belgium* [2015], Alien Litigation Council No. 128.856; *X v Belgium* [2015], Alien Litigation Council No. 130.247; Crosspoint Migration-Integration, 'Alien Litigation Council [suspends expulsion order due to violation of the right to be heard](#)' (*RvV schorst uitwijzingsbevel wegens schending hoorrecht*) (2014).

⁶⁷⁹ Crosspoint Migration-Integration, '[Alien Litigation Council suspends expulsion order due to violation of the right to be heard](#)' (2014).

⁶⁸⁰ See, for example: *XXX v Belgium* [2015], Council of State judgment No. 230.257; Crosspoint Migration-Integration, '[Foreign Affairs Office needs to hear concerned persons before ending right to residence](#)' (*DVZ moet betrokkene horen alvorens verblijfsrecht te beëindigen*), (2015).

⁶⁸¹ *Ibid.*

reported that, in several of its cases, the Alien Litigation Council has ruled that the Immigration Office failed to take the importance of the child sufficiently into account when making decisions on the right of residence of EU citizens, thereby violating Article 8 ECHR on the right to respect for private and family life⁶⁸². For example, in 2015 the permanent residency rights of a Romanian woman and her family members who had been in Belgium for five years were withdrawn because they had been granted such rights on the basis of a fraudulent situation. The Alien Litigation Council found that the Immigration Office failed to consider the interests of the children, who went to school in Belgium, or to account for their adaptability in the case of a return to Romania⁶⁸³.

⁶⁸² See, for example: *X v Belgium* [2014], Alien Litigation Council No. 117.967, point 4.3.2; Myria, '[2015 Migration in numbers and in rights](#)', 2016, p. 113-114; Children's Rights Commissioner (*Kinderrechtencommissariaat / Commissariat aux Droits de l'Enfant*), '[Policy note on Asylum and Migration: from a childrens' rights perspective](#)' (*Beleidsnota Asiel en migratie: vanuit kinderrechten bekeken*), 2015, p. 3-4.

⁶⁸³ *X v Belgium* [2014], Alien Litigation Council No. 126.119, point 2.3.

10. CONCLUSIONS

The right to free movement of EU citizens and their TCN family members is one of the main pillars of the European Union. It is enshrined in the EU Treaties, in the Charter of Fundamental Rights and is implemented notably through Directive 2004/38/EC. Notwithstanding its importance, the transposition process has been long and difficult, leading the Commission to initiate infringement procedures against a number of Member States and leading citizens to go to court in order to have their right to free movement reaffirmed.

The right to free movement has been put under particular pressure in recent years. In April 2013, four EU governments (**AT, DE, NL** and **the UK**) wrote a letter to the then President of the Justice and Home Affairs Council calling on the EU to change its rules on free movement. They claimed that EU citizens were abusing free movement rules for the purposes of benefit or welfare tourism and that there had been an excessive strain on the social security systems in the receiving states as a result. The letter recommended making it harder for EU citizens/TCN family members to claim benefits when moving to another Member State and asked for measures to fight fraud and abuse of free movement⁶⁸⁴.

The debate on free movement and the introduction of modifications to the Directive has continued since. As the **UK** was preparing to hold a referendum on whether to leave or stay in the EU, the European Summit of 18 and 19 February 2016 adopted an agreement paving the way for restrictive modifications to the free movement regime. The agreement, which would have entered into force only if the UK had voted to remain in the EU, fell in the wake of the referendum result. The current free movement regime remains unchanged, though the whole episode - on the back of the 2013 letter - puts considerable pressure on what is a fundamental right.

Against this backdrop, this study shows that **there is still work to be done in order to ensure that the right of citizens to move freely in the EU is properly guaranteed and that the transposition of the Directive is completed**. Ten years after the deadline for transposition of the Directive, **transposition** is for the most part in line with the Directive in the nine selected Member States. However, some challenges remain. **Article 14 on the retention of the right of residence** and **Article 27 on restrictions to entry and residence on grounds of public policy, security and health** appear to be the **most problematic** provisions as the majority of the nine selected Member States have not effectively and completely transposed them.

A number of **transposition issues** are the result of the **terminology** used in the Directive itself. For example, Member States have had trouble defining the concepts of '**sufficient resources**', '**unreasonable burden**', '**dependent family members**', '**durable relationship duly attested**', '**genuine chance of being engaged**' and '**public security and public policy**' in their national legislation, often leaving it up to the discretion of the competent authorities to interpret such concepts. This has led to the unreasonable restriction of free movement and residence rights.

⁶⁸⁴ The letter to the Presidency is available at: http://docs.dpaq.de/3604-130415_letter_to_presidency_final_1_2.pdf.

While the **right of entry** is broadly unproblematic for EU citizens, it is far more challenging for TCNs who face numerous bureaucratic obstacles, especially with regard to obtaining visas.

The picture is less positive with regard to the **right of residence** where EU citizens (particularly frontier workers) and TCN family members face numerous **obstacles**, including **onerous documentation requirements**, excessive **delays**, excessive **fees**, **scarce and confusing information** and the justification of **denials** of the right of residence **on invalid grounds**.

Although the right of access to **social security** is not directly linked to, or specifically set out in, Directive 2004/38/EC, it does concern free movement as EU citizens and their family members should be able to access such social security services in another Member State. From the research conducted, EU citizens and their family members have encountered issues while trying to access **old age pensions, healthcare, family benefits and unemployment benefits** in another Member State. Such obstacles are mainly due to **bureaucratic issues**, a **lack of knowledge** of the applicable legal framework and a **lack of coordination and communication** between national authorities of different Member States.

EU citizens and their family members have also experienced **other recurring obstacles**, which, although not directly linked to Directive 2004/38/EC, relate to other Directives and EU legislation concerning free movement rights. Such obstacles include **accessing employment, using vehicles** in another Member State, **double taxation** of salaries and pensions, **poor administrative services**, additional requirements for EU citizens seeking **to register to vote/stand as a candidate** in European and municipal elections in another Member State and issues with the **recognition of academic diplomas** from another Member State.

While there is a lot of information on **discrimination** on grounds of nationality, racial/ethnic origin and sexual orientation/civil status in general, only a limited number of complaints and petitions have been found. Therefore, while it is not possible to conclude that discrimination on such grounds in accessing free movement and residence rights is an extensive problem, EU citizens (particularly Roma) and TCN family members have nonetheless experienced some discrimination on grounds of **nationality and racial/ethnic origin** in **accessing employment, education, banks and financial services, housing, social protection and public transport**.

Moreover, a number of discriminatory obstacles to free movement have been encountered by **same-sex couples** in registered partnerships in **Slovakia** and **Poland**, on grounds of their civil status/sexual orientation, when accessing their entry, residence and social security rights. Such obstacles include **refusal of the right of permanent residence** status, **non-recognition of residence cards** issued by another Member State leading to refusal of entry, **refusal to grant a residence card or a work permit** and uninsured persons being **excluded from the health insurance of their partner**.

While there are **measures** in all of the Member States to combat **marriages of convenience** and most of the Member States have adopted measures to address **different kinds of fraud** aimed at obtaining free movement rights, there is a **lack of data** available to enable assessment of whether these measures are effective or whether they inhibit free movement rights in practice. However, there is some evidence from certain Member States indicating that these measures have a negative or disproportionate

impact on the right to free movement. For example, serious concerns relate to an **inversion of the burden of proof**, where EU citizens and their spouses are required to demonstrate that their **marriage is not one of convenience**. Moreover, certain Member States **systematically investigate marriages** between EU citizens and TCNs.

Data concerning the number and main reasons for **refusals of entry, refusals of residence rights and expulsions** of EU citizens and their family members are rarely publicly available, if collected at all. National authorities are often unwilling to provide this sort of information. Furthermore, while some data is available in a few Member States, it more often than not does not specify whether the data relates to EU citizens/TCN family members. Therefore, from the information available, it is impossible to firmly assess, compare and conclude how many EU citizens/TCN family members have been refused entry and residence rights or have been expelled from the Member States and the main reasons for such refusals and expulsions.

From the limited data available, it appears that refusals of entry, residence and expulsions on the basis of a **lack of sufficient economic resources** are a recurrent issue in certain Member States. A considerable number of Member States also misapply the possible restriction on free movement based on **public policy and public security**.

When **Austria, Germany, the Netherlands** and the **UK** wrote to the then Council Presidency to express concern at the abuse of free movement rights, they provided no hard evidence to support their argument that benefit tourism was either a major or growing problem. This study has also found no compelling evidence to back up this claim. These four Member States, in addition to the other EU Member States, have measures in place to combat abuse of free movement rights. No resounding evidence has been found to indicate that these measures have been frequently implemented in Austria, Germany, the Netherlands and the UK to combat instances of abuse of rights, suggesting that such abuse is rare. Only the UK seems to make more widespread use of such measures. Nor is there clear evidence of an excessive strain being placed on the social security systems of these receiving Member States as a result of the influx of EU citizens and their TCN family members. **This once again highlights that the "problem" of free movement is chiefly a political problem.**

While the study has found almost no evidence of abuse of rights or large-scale social security challenges linked to free movement, it has nonetheless highlighted that, 14 years after Directive 2004/38 was adopted, its transposition and implementation remain problematic. While transposition is largely compliant with the Directive, issues exist in all of the Member States analysed. One of the key issues arises from broad and general terms and requirements which, if not clearly defined at national level, give a wide margin of discretion to national authorities to interpret such terms in ways which are potentially at odds with the spirit of the Directive. The practical implementation shows a **tendency to make the most of the permitted restrictions** to the rights of entry and residence and to **interpret the Directive in a restrictive manner**.

The question of free movement and the presence of EU citizens in the UK was a key issue **in the referendum on the UK's future membership of the EU. Indeed, it was one of the chief drivers of the vote to leave** (and now throws up a number of free movement-related questions - not least on the future of EU citizens in the UK and UK nationals in the EU).

Yet, paradoxically, **free movement is the EU right most cherished by Europeans**⁶⁸⁵ and is seen as the major achievement of European integration by European citizens⁶⁸⁶. Respondents to the European Commission's public consultation on EU citizenship also expressed positive views about free movement. A large majority were of the opinion that free movement within the EU promotes cultural diversity (81%) and fosters mutual understanding (77%). Only 16% expressed the view that free movement creates problems, with those expressing this view tending to refer especially to practical reasons⁶⁸⁷. Over 14 million EU citizens are now resident in another Member State on a stable basis.

This study highlights again the persisting gaps and obstacles and calls for fresh efforts to reinvigorate the principle of free movement and ensure that it delivers on a day-to-day basis for citizens. This calls for careful monitoring of the transposition and implementation of the Directive to guarantee the fundamental right to free movement, enshrined in the Treaties and in the Charter of Fundamental Rights and a pillar of the EU, and central to the functioning of the European single market.

⁶⁸⁵ European Commission, 'Free movement of people: five actions to benefit citizens, growth and employment in the EU', Press Release, 25 November 2013, available at: http://europa.eu/rapid/press-release_IP-13-1151_en.htm.

⁶⁸⁶ European Commission, 'Standard Eurobarometer 80: Autumn 2013: Public Opinion in the European Union', December 2013, available at http://ec.europa.eu/public_opinion/archives/eb/eb80/eb80_first_en.pdf, p.38; Fondation Robert Schuman, 'The Free Movement of People in the European Union: principle, stakes and challenges', Europe Issue No 312, 12 May 2014, available at: <http://www.robert-schuman.eu/en/european-issues/0312-the-free-movement-of-people-in-the-european-union-principle-stakes-and-challenges>.

⁶⁸⁷ European Commission, 'EU citizenship 2015: Common values, rights and democratic participation', 2016, available at: http://ec.europa.eu/justice/citizen/document/files/2015_public_consultation_booklet_en.pdf, p.8.

11. RECOMMENDATIONS

The recommendations aim at addressing the key issues in relation to the transposition and implementation of Directive 2004/38/EC identified during the research for this Study. Recommendations are addressed in turn to the European institutions and to the Member States.

11.1. Recommendations for the European Parliament and the European Commission

11.1.1. Recommendation 1: Collect more systematic and comparable information and data at Member State level

Issue: The availability of information at EU level on the implementation of the Directive is scarce. This study is based on information collected by national experts. However, information is not systematically gathered and published by public authorities. In some Member States, access to the information was very difficult. The study, therefore, refers to cases that may be representative of a more general problem but, in the absence of full information, it has not been possible to draw wholly robust conclusions. There is also a need for a systematic approach at EU level, for example by requiring Member States to collect the same information and to submit it to the Commission. Free movement rights are central for the EU and to the functioning of the European single market and deserve close scrutiny by the European Parliament and European Commission.

Similarly, the data on refusal of residence and expulsion of EU citizens and family members was, if collected at all, rarely available or publicly accessible in most of the Member States. While requests for the purposes of this study were sent to all Member States, only a small number responded with comprehensive information. Where the data were provided, they were not comparable across Member States. For example, the data often do not distinguish between TCN family members of EU citizens and other third country nationals. Therefore, there is a need for collection of data in a rigorous and comparable manner in order to understand how the Directive is applied and what issues may exist.

Recommendation: The European Commission should require Member States to collect and provide data on the number of refusals of entry and residence and the number of expulsion of EU citizens and family members as well as the reasons for the refusals and expulsion. The European Commission should also request Member States to regularly report information on the implementation of the Directive. To this end, the European Commission should at least request precise and clear information on the key rights established in the Directive, in particular regarding the points where the most issues and barriers have been identified, but also to assess the recent trends and monitor the possible impact of other events (such as the debates in the EU before and after the Brexit vote, the immigration crisis, terrorists attacks, new measures, etc) on the implementation of the Directive.

11.1.2. Recommendation 2: Enforce full transposition

Issue: While Member States have largely aligned their national legislation with the Directive, issues of transposition have been identified in all the Member States selected for the in-depth analysis. The transposition issues vary from minor gaps or ambiguities to lack transposition of some key Directive requirements. For example, national legislation

does not always explicitly guarantee that conditions of residence should not be automatically verified or that expulsion must not be an automatic consequence of recourse to social security. In some cases, the **Directive's requirements are reflected in administrative guidelines rather than in legally binding texts**. The former cannot be considered as effective transposition of the Directive as required by extensive case law⁶⁸⁸. These transposition issues must be addressed in an effective and prompt manner.

Recommendation: The European Commission should monitor closely and enforce the full transposition of the Directive in all the Member States. The European Commission should **act more systematically on Member States' breaches** of the Directive. While the European Commission has initiated 29 infringement proceedings since 2008 related to various transposition issues, none of which went as far as the CJEU, the fact that the transposition is still problematic in several Member States shows that rigorous monitoring and action from the Commission are still needed.

11.1.3. Recommendation 3: Clarify terms

Issue: The Directive provides a number of requirements allowing for a margin of interpretation on the part of the Member States. For example, the Directive leaves it up to Member States to determine if public policy and public security grounds can justify the expulsion of EU citizens and their family members. However, some Member States do not sufficiently determine what is covered by the grounds of public policy and public security, leaving a wide margin of appreciation to national administrative authorities in their decisions, which is insufficiently controlled either by the legislative framework or by judicial oversight.

In addition, a number of terms can result in various interpretations by Member States, some of which could be against the spirit of the Directive. The CJEU has stepped in to further clarify some terms. However, national legislation needs to be amended to reflect recent CJEU case-law and uncertainties still remain in relation to a number of terms. The following terms require (further) clarifications:

1. **'Dependants' (Article 3(2)):** Some Member States do not define who is considered a dependant. The CJEU has further defined who can fall within the scope of dependants. Accordingly, the status of dependant **family member is the result of 'a factual situation characterised by the fact that material support for the family member is provided by the holder of the right of residence'**⁶⁸⁹.
2. **'Durable relationship duly attested' (Article 3(2)):** what is meant by durable relationship must be defined by Member States. However, it is not always clearly

⁶⁸⁸ Case C-131/88 Commission v Germany, [1991] E.C.R. I-825: it requires a legally binding legislative or **regulatory provision of 'unquestionable binding force, or with the specificity, precision and clarity required by the case-law of the Court in order to satisfy the requirement of legal certainty' (...)** 'so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, **where appropriate, rely on them before the national courts'**

Case C339/87 Commission v Netherlands [1990] E.C.R. I-851 referring to Case C-429/85 Commission v Italy [1988] ECR 843 states that **'mere administrative practices, which by their nature may be changed at will by the authorities, do not constitute proper transposition'**

Case C339/87 Commission v Netherlands [1990] E.C.R. I-851 referring to Case 236/85 Commission v Netherlands [1987] ECR 3989 states that administrative practice does not constitute sufficient transposition **'irrespective of the fact that an administrative practice may be in conformity with the requirements of protection laid down in the directive'**

⁶⁸⁹ CJEU C-200/02 Zhu and Chen, ECLI:EU:C:2004:639, para 43.

defined, leaving a wide margin of appreciation to national authorities to interpret what durable relationship means.

3. **'As soon as possible' (Article 3):** The Directive requires Member States to ensure that visas for TCN family members of EU citizens are issued as soon as possible. This term leaves a margin of interpretation on the number of days considered 'as soon as possible'.
4. **'Sufficient resources' (Article 8):** The notion of sufficient resources is not always defined in national legislation, which may cause difficulties with respect to entitlement to a registration certificate or residence card.
5. **'Unreasonable burden' (Article 14):** The requirement of not being an unreasonable burden in order to retain the right of residence has proved challenging in most Member States. While some Member States mirror the Directive's provision, they do not define the concept, leaving it up to the discretion of the competent authorities. Others transpose the concept incorrectly or interpret it narrowly. The consequence of these inconsistencies has led to expulsions on the grounds that an individual is deemed an unreasonable burden on the social assistance system of the host Member State.
6. **'Genuine chance of being engaged' (Article 14):** The Directive guarantees that jobseekers cannot be expelled from the host Member State as long as they are seeking employment and have a genuine chance of being engaged. The interpretation of this term may vary from one Member State to another and, if not sufficiently defined, could lead to wide discretion for national authorities.
7. **'Reasonable and non-discriminatory period of time' (Article 15):** The Directive enables Member States to require citizens to register within a reasonable and non-discriminatory period of time. These terms also leave a margin of interpretation for Member States, which leads to abuses and breaches of the Directive.
8. **'Grounds of public security and public policy' (Article 27):** As the Commission Communication highlights, the grounds of public security and policy must be defined by the Member States. However, some Member States have not defined or not sufficiently defined what falls within public security and public policy at national level. This leaves too wide a margin of discretion to national authorities to decide on expulsions on those grounds.

Recommendation: The European Commission should update and expand its guidance for better transposition and application of Directive 2004/38/EC in order to include the recent developments from the CJEU as well as additional clarifications on aspects of the Directive which were not covered. The European Commission should use the approach of the Transposition Implementation plans (TIPS) to ensure the complete and proper application of the Directive, in particular with the support of interpretative transposition guidelines and a transposition checklist. TIPS consist of an inventory and planning of proactive measures with a focus on provisions likely to pose difficulties in order to ensure timely and complete transposition as well as proper application of a directive.

11.1.4. Recommendation 4: Address citizens' complaints as a priority and supplement SOLVIT with a hotline

Issue: Incorrect application of the Directive has been reported in many Member States. The application of the Directive may be incorrect as a result of an excessively strict or invalid interpretation of the Directive or lack of knowledge of the rights and obligations established by it. Instances of incorrect application include refusals of visa or permanent residence status on invalid grounds or without a justified reason. It can also occur in relation to expulsion decisions where, for example, there is no clear indication that the personal situation of the applicants is taken into consideration when determining if they represent an unreasonable burden on the social assistance system of the host Member State. The vagueness of the justifications provided as grounds for withdrawing residence rights or for expelling a person is particularly problematic. Incorrect application can result from legal provisions that are not sufficiently clearly determined or because too much discretion is granted to national authorities. This leads to legal uncertainty for EU citizens and family members.

Recommendation: The European Parliament Petitions Committee should continue to monitor closely petitions in relation to free movement rights and work in close collaboration with the European Commission to address the petitions.

The SOLVIT service is an online service that connects citizens with the national administration in each EU Member State to support them when their rights as EU citizens are breached by public authorities. The SOLVIT service aims to help citizens with issues related to free movement rights, including the right to entry and residence and discrimination, before any judicial or administrative appeal is sought. It is crucial that complaints received within the SOLVIT system are dealt with effectively and rapidly. As the SOLVIT service is based online, it is not able to address free movement issues which require immediate attention, as would be the case of citizens and their family members being refused entry to a Member State at the border, facing expulsion or in need of urgent healthcare. In such situations, immediate action or information may be critical and there is a risk that the citizens are put in a situation where heavy costs are incurred or where they suffer consequences which cannot be undone. Therefore, the SOLVIT service should be supplemented with a hotline that would allow EU citizens and their family members to receive timely information and support when facing barriers to the exercise of their free movement rights. The hotline staff would then be able to assess whether a complaint may require speedy handling.

11.1.5. Recommendation 5: Raising awareness about rights

Issue: The lack of information on rights and obligations is a consistent issue raised across the Member States and constitutes an important barrier to the exercise of free movement rights. What is particularly problematic is the absence of information or the provision of incorrect or confusing information on visa requirements for family members or on residence rights. Correct information is essential for correct application of the Directive.

Recommendation: The European Parliament and the European Commission should increase their efforts to raise awareness among EU citizens and their family members of their free movement rights.

11.2. Recommendations for Member States

11.2.1. Recommendation 6: Complete the transposition of Directive 2004/38/EC

Issue: Instances of incorrect or incomplete transposition have been identified in all the Member States analysed in depth for this study (see recommendation 2).

Recommendation: Member States must take, without delay, the necessary action to ensure that their national legislation reflects all the requirements of the Directive.

11.2.2. Recommendation 7: Remove unnecessary barriers

Issue: Facilitation of the right of entry and residence to TCN family members is problematic in a number of Member States. As mentioned under section 3, TCN family members in at least nine Member States have been denied access to the accelerated procedure for visas. Similarly, in a number of Member States, TCN family members have been required to pay for their visas.

Delays and excessive documentation requirements are recurrent barriers reported in relation to the right to entry and residence. For example, EU citizens and their family members report excessive delays in obtaining a residence card/registration certificates in twelve Member States. The delays in obtaining a residence card have an impact on access to employment or essential services such as healthcare.

Discrimination against same-sex couples who are exercising their free movement rights has been reported in a number of Member States. For example, despite recognising civil partnerships, some Member States have rejected applications on the part of EU citizens' civil partners or do not recognise civil partnerships contracted in other Member States.

Recommendation: Member States should ensure the removal of unnecessary barriers to the right of entry/residence in particular as regards the requirement to report presence, excessive administrative requirements at the borders for EU and non-EU Member States, granting TCN family members access to the accelerated entry procedure, the establishment of appeal systems against refusals and any discriminatory practices.

11.2.3. Recommendation 8: Providing information on rights

Issue: As mentioned above, the lack of information as well as incorrect or confusing information about visa requirements for family members and residence rights are recurrent barriers to the exercise of free movement rights by EU citizens and their family members.

Recommendation: Member States should ensure that national authorities provide clear and sufficient information regarding requirements for visas for TCN family members and residence rights.

11.2.4. Recommendation 9: Guidelines and training on the Directive's rights and obligations

Issue: National authorities are not always fully aware of the rights and obligations established under Directive 2004/38/EC. As a result, they do not always recognise some rights or they misapply the Directive. For example, issues have been reported in a number of Member States of a lack of recognition of the EHIC or denial of the accelerated visa application procedure for family members.

When the requirements of, for example, entry for TCN family members are not fully defined in the national legislation, responsibility for ensuring the right to entry is left to individual staff working for the authorities who might not be aware of the legislation. This leaves potentially a lot of discretion to the national authorities. A harmonised approach and training should be provided.

Incorrect and inconsistent decisions not only impact significantly on those directly concerned, but the compounding effect of repetitive incorrect decisions is also costly for the organisation itself and wider public services, such as ombudsmen and appeal bodies, which need to absorb the increased number of appeals and complaints. It is therefore key for public services to apply the Directive correctly right from the start.

Recommendation: Member States should ensure the proper training of national authority staff. Member States should also ensure that the Directive's requirements are sufficiently defined in legislation and, if needed, supplemented by adequate administrative guidelines in order for national authorities to have clear instructions on the application of the Directive.

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