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Table of Contents

EXECUTIVE SUMMARY	4
LIST OF ABBREVIATIONS.....	5
1. INTRODUCTION TO EU LAW RELEVANT TO ACCESS TO SOCIAL RIGHTS	6
1.1 Regulation 883/2004 (the Coordination Regulation)	6
1.2 Regulation 492/2011 (the Regulation on Free Movement of Workers).....	8
1.3 Articles 20-21 TFEU (The Treaty provisions on EU Citizenship).....	9
1.4 Directive 2004/38 (the Citizenship Directive).....	10
1.5 Implementation of Directive 2004/38.....	11
2. SUBSISTENCE BENEFITS.....	16
2.1 EU Law and Subsistence Benefits	16
2.2 The Citizenship Directive and the Right to Social Assistance in the Countries of Our Study.....	22
2.3 The Practice Followed if an EU Citizen Applies for Subsistence Benefit.....	30
2.4 Is Support Available if Subsistence Benefits are Refused?	33
2.5 Can persons be expelled if they claim subsistence benefit?	35
2.6 Is there National Case Law on these Issues?	38
2.7 Analysis and Recommendations.....	40
3. HEALTH CARE	47
3.1 Persons Residing in the Country where they Claim Health Care.....	47
3.2 Family Members.....	50
3.3 Access to Health Care by Third Country Nationals.....	51
3.4 Persons Asking Health Care while Staying in Another Country.....	53
3.5 Conclusions.....	58
4. STUDY GRANTS.....	60
4.1 Introduction.....	60
4.2 The Access of EU Citizens to Study Grants	63
4.3 Export of Study Grants	65
4.4 The Position of Third Country Nationals.....	66
4.5 Conclusions.....	67
5 HOUSING SUBSIDIES	69
5.1 The National Law on Housing Allowances.....	69
5.2 Conclusions.....	71
6 CONCLUSION	72
6.1 The Relevance of Access to Social Rights to the Concept of EU Citizenship.....	72
6.2 The Developing Concept of EU citizenship	72
6.3 Problematic criteria for defining the degree of integration	73
6.5 Scenarios to respond to the Barriers Found in this Study	76
6.6 Final Remarks	78
REFERENCES.....	80

EXECUTIVE SUMMARY

This report is an analysis of national reports on Denmark, Estonia, Germany, Poland, Netherlands, Sweden and Spain on the access of EU citizens to social rights. The social rights studied here are subsistence benefits, housing benefits, education grants and housing benefits. Especially these rights are vulnerable in case of economically non-active EU nationals; on the other hand exclusion from these rights may lead to serious poverty. Hence a very important area.

We found that in case law of the Court of Justice and in the Citizenship Directive criteria are developed to give non-economically active persons only after they have established a degree of integration into a Member State access to social rights. This is a very interesting development of EU citizenship, that both protects social systems and does not exclude EU citizens on ground of their nationality. It is also a difference approach then in case of, for instance, political rights for EU nationals, where equal treatment is not reached to the extent that after five years one can vote for the national parliament of the host country.

We then investigated the ways in which countries have traditionally developed conditions on the degree of integration and how these still influence the reaction of the system to mobile EU citizens. We found that elements as the criteria for residency, the conditions on registering and the financing of the systems vary considerably between the countries. Some systems have more problems with EU law and react differently to this than others. Where for some countries influx of patients means an increased market, for others it is a serious threat. By then further protecting the system legal certainty and transparency are diminishing for both workers and EU citizens where no permanent solution is in sight.

This study therefore makes the analysis that there are several ways to design a social rights system and that some seem to create fewer problems than others while still having more legal certainty for the EU citizen.

In scenarios the possibilities for Member States, both the host States and the States of origin, and also that of the European Commission are sketched to reconcile EU citizenship with national systems and thus to create more legal certainty.

LIST OF ABBREVIATIONS

A2 countries	Bulgaria and Romania
A8 countries	Eight of the ten countries that joined the EU in 2004, namely: Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia
AufenthG	Aufenthaltgesetz
cf.	confer (see)
CPR	Civil registration number
DLA	Disability Living Allowance
EC	European Commission
ECHR	European Convention on Human Rights
EEA	European Economic Area
EFA	Education Funding Agency (UK)
EFTA	European Free Trade Association
e.g.	exempli gratia (for example)
EHIC	European Health Insurance Card
EU	European Union
FBL	Folkbokföringslagen (Swedish population register)
FreizügG/EU	Gesetz über die allgemeine Freizügigkeit von Unionsbürgern (Act on general free movement of EU citizens)
GP	General Practitioner
HIV	Human Immunodeficiency Virus
HRT	habitual residence test
i.e.	id est (namely)
ILR	Indefinite leave to remain
IND	Immigratie and Naturalisatiedienst (Dutch Immigration and Naturalisation Service)
JSA	Jobseeker's Allowance (UK)
NGO	Non-governmental organisation
NHS	National health system
NUS	National Union of Students
SA	Social assistance
SFA	Skills Funding Agency (UK)
SNCB	Special non-contributory benefits
SU	Swedish maintenance grant
TB	Tuberculosis
TFEU	Treaty on the Functioning of the European Union
UC	Universal credit
UCAS	Universities and Colleges Admissions Service
UK	United Kingdom
UKIP	United Kingdom Independence Party
WRS	Worker Registration Scheme
WWB	Wet werk en bijstand (Dutch Social assistance act)
ZIN	Zorginstituut Nederland

1. INTRODUCTION TO EU LAW RELEVANT TO ACCESS TO SOCIAL RIGHTS

In the first report of this project,¹ it was investigated which barriers exist for EU citizens to access social rights in another Member State. Now, in this report, these barriers are addressed again in the framework of a study of how these barriers relate to EU law. For this purpose the systems of the countries studied for the first report are taken as object of the investigation: Denmark, Estonia, Germany, the Netherlands, Poland, Spain, Sweden and United Kingdom. Also the same social rights studied for the first report are taken into account: subsistence benefits, health care, study grants and housing benefits.

The experts in these countries, participating in this project, were asked to write a national report on the basis of a questionnaire. These national reports were the basis for this comparative study. In this report the legislation and practice concerning these rights are confronted with EU law that can be invoked by mobile persons. By doing a major element of the discussion on EU citizens' rights is identified: can, and if so, under which conditions can an EU citizen be barred from access to social rights in another EU Member State? The national experts have been sent the draft of this report and were asked to comment on this and thus additional information and corrections were included.

The relevance of this issue to EU Citizenship appears already from the fact that it was a core element in the negotiations between the European Council and UK Prime minister Cameron on a new relationship between the UK and the EU in February 2016.²

Related to the law concerning access to social rights is the law on the right to reside, since under some circumstances claiming social rights may lead to expulsion from the host country. For this reason this part of EU law is addressed as well in this report.

The major elements of relevant EU law are: Regulation 883/2004 on the coordination of social security schemes; Regulation 492/2011 on the free movement of workers and Article 18 TFEU in connection with Article 21 TFEU on non-discrimination on ground of nationality and on EU citizenship. In order to elaborate the latter articles in 2004 a directive was adopted: Directive 2004/38. These instruments will be discussed in the succeeding sections in so far as relevant to the topic of this report, which outline may make reading and assessing the national situations in the following chapters easier.

In this report we will not only discuss the position of EU citizens, i.e. persons with EU nationality, but also that of third country nationals. The reason for this is that we want to give a broad overview of the conditions for access to social rights for persons 'coming from outside'.

1.1 REGULATION 883/2004 (THE COORDINATION REGULATION)

Article 48 TFEU provides that the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers. These measures do not – and are not allowed to – harmonise social security systems of the Member States, but they are coordination rules, including rules on the aggregation of periods taken into account under the laws of the several countries for the purpose of acquiring and retaining the right to benefit and on calculating the amount of benefit; rules on payment of benefits to persons resident in the territories of Member States; and rules prohibiting discrimination on ground of nationality.

¹ Cecilia Bruzelius, Elaine Chase and Martin Seeleib-Kaiser, *Social Rights of EU migrant Citizens: A Comparative Perspective* Oxford 2015, Deliverable WP 6.1 of the beUcitizen project (see beUcitizen website).

² See for the outcome EUCO 1/16; this will be further discussed in Chapter 2.

The measures required by Article 48 TFEU are elaborated in Regulation 883/2004, whose full title is: Regulation EC No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems,³ also known as the Coordination Regulation.

The personal scope of Regulation 883/2004 is not limited to the economically active population. Article 2 reads that this Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.

The Coordination Regulation can be applied only in respect of benefits which are within its material scope. This is defined in Article 3, that provides that the Regulation applies to all legislation concerning the following branches of social security: sickness benefits; maternity and equivalent paternity benefits; invalidity benefits; old-age benefits; survivor's benefits; benefits in respect of accidents at work and occupational diseases; death grants; unemployment benefits; pre-retirement benefits; and family benefits.

This is a limitative list of the benefits; benefits not mentioned here, such as study grants and housing benefits, are not covered. Furthermore, the material scope is limited to *statutory* benefits.

If a subsistence benefit is qualified as 'public assistance' it is outside the material scope of the Coordination Regulation. However, the Court of Justice adopted a restrictive interpretation of the term 'public assistance', public assistance benefits are only benefits which are not linked to one of the risks mentioned in Article 3 of the Regulation. Thus, benefits, even paid from taxes and means-tested are within the scope of the Regulation, if they are specifically meant for one of the risks, e.g. a minimum benefit for disabled persons. In order to respond to this case law, the EU legislator introduced rules on the so-called special non-contributory benefits into the Coordination Regulation. These rules provide that this type of benefits have to be paid regardless of the nationality of the EU national, but that they are not exportable. Since these benefits do not require a work or insurance record they are accessible for EU nationals arriving in a country who satisfy the conditions (e.g. being disabled for the disability special non-contributory benefit. As such they are very relevant to our report; see further Chapter 2.

Article 4 of Regulation 883/2004 provides that unless provided for by the Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof. It prohibits direct discrimination on grounds of nationality. Direct discrimination means that the rule concerned makes a direct reference to nationality. Direct discrimination is always forbidden, unless an admitted (statutory) ground applies. The Regulation does not mention such grounds, but they can be found in the Treaty (Article 45 TFEU), i.e. limitations justified on grounds of public policy, public security or public health. Other limitations, such as administrative problems or costs of the application of the rule, cannot justify discrimination.

Article 4 also forbids indirect discrimination. Indirect discrimination exists where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of the group other than the nationals of the country concerned unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to nationality. Suspicion that indirect discrimination is at stake will arise particularly when benefit conditions can be fulfilled much more easily by nationals of the Member State in question than by subjects with another nationality, or when benefit entitlement ends sooner for foreign beneficiaries than for the nationals of that Member State. If such effects occur, there is still only a *suspicion* of discrimination; this can be refuted if objective grounds for justification can be presented.

³ Regulation 883/2004 was published in OJ L 166/1 of 2004.

The most obvious example of indirect discrimination on grounds of nationality is the rule that claimants to a benefit have to be resident of the country concerned: this condition will in general be more easily fulfilled by nationals of that State than by others. For instance, this rule excludes frontier workers (person working in that country, but residing in another one). Although frontier workers do not always have the nationality of another Member State, in most cases this will be the case.

1.2 REGULATION 492/2011 (THE REGULATION ON FREE MOVEMENT OF WORKERS)

As we have seen, not all benefits or advantages fall under Regulation 883/2004. The material scope of that Regulation does, for instance, not include public assistance benefits and study grants. Therefore, the equal treatment provision of the Regulation discussed in this section, Regulation 492/2011,⁴ may be useful in supplementing the non-discrimination rule of Regulation 883/2004. This non-discrimination rule, Article 7, is Regulation 492/2011's only coordination provision on social rights; the Regulation does not give provisions on, for instance, aggregation of periods and export of benefits.

Article 7 of Regulation 492/2011 (non-discrimination clause) provides:

1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should s/he become unemployed, reinstatement or re-employment.
2. He shall enjoy the same social and tax advantages as national workers (...).

Persons who have entered the employment market may, on the basis of Article 7(2) of Regulation 492/2011, claim the same social and tax advantages as national workers. This is possible from the first day of work.

Regulation 492/2011 is relevant only to workers and jobseekers; self-employed and non-active persons can therefore not rely on it. The Court of Justice ruled that the term 'worker' in Article 45 TFEU and Regulation 492/2011 has a Community meaning and, since it defines the scope of a fundamental freedom, this term must not be interpreted narrowly. The essential feature of an employment relationship is, according to the *Blum* judgment,⁵ that a person performs work for a certain period of time for and under the direction of another person for which s/he receives remuneration. Any person who pursues activities which are effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. From this judgment it follows that also part-timers are workers for the purpose of the Regulation, provided that they perform activities which are effective and genuine. In the case law of the Court of Justice a student-trainee, - not a former worker - could not invoke Article 7(2) as his training (during which he performed work) was regarded as an obligatory part of his technical studies and thus ancillary to his status as a student.⁶

Thus the relevant criterion is whether activities are effective and genuine, and not marginal only. The Court does not give itself the decision whether activities satisfy this criterion or not.

Even though in the case law of the Court only exceptional cases were excluded from being a worker – e.g. the student who performed work within the framework of his study – in practice some Member States have defined a threshold in terms of a number of working hours that have to be worked a month in order to be a worker. We will see examples of this below when discussing the national reports.

⁴ OJ 2011, L 141.

⁵ Case 66/85, [1986] ECR 2121.

⁶ Case 197/85, Brown [1988] ECR 3205.

The personal scope of Article 7(2) Regulation 492/2011 is limited, in principle, to persons actually performing work. Therefore Regulation 492/2011 does not cover persons seeking work, *i.e.* persons who never worked before.

In principle, once the employment relationship has ended, the person concerned as a rule loses his status of worker. This status may produce, however, certain effects after the relationship has ended if these effects are intrinsically linked with the recipient's objective status as worker.⁷

This case law draws a distinction between Member State nationals who have not yet entered into an employment relationship in the host Member State where they are looking for work and those who are already working in that State or who, having worked there but no longer being in an employment relationship, are nevertheless considered to be workers.⁸

Initial jobseekers, such as nationals from another Member State, benefit from the principle of equal treatment only as regards access to employment.

If Article 7(2) of Regulation 492/2011 were to be interpreted literally, it would be applicable solely to workers and not to the members of his family. The Court, however, followed a broader interpretation of this provision. In the *Cristini* decision⁹ it considered that if a Member State could refuse advantages to family members and/or relatives of the worker on the ground of their nationality, the employed person might leave the Member State in which s/he had his or her residence and in which s/he was employed. This would run against the objectives and the spirit of freedom of movement. There is, however, only the obligation to grant a social benefit to members of the family if this can be regarded as a social advantage *pertaining to the worker*. In determining this, it is important whether the employed person actually supports the family members in question. If a family member is no longer financially dependent on the worker, s/he cannot rely on Article 7(2).

For some time, it was not clear whether the term 'social advantages' in Article 7(2) was restricted to advantages directly connected with the status of employee or whether the term had a broader meaning. In the *Cristini* judgment (see previous note) the Court clarified this term. Social advantages, in the sense of Article 7(2) of Regulation 492/2011, are all those which, 'whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the Community'. In later judgments the Court has consistently held this interpretation. This means that with respect to all advantages, with the exception of compensation of war damage, equal treatment is required, so also equal treatment in respect to the social rights dealt with in this study is to be ensured to all workers.

1.3 ARTICLES 20-21 TFEU (THE TREATY PROVISIONS ON EU CITIZENSHIP)

Article 20 TFEU provides that citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship. Article 20(2) further provides that citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. Article 21 provides that every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.

⁷ Case 85/96, *Martínez Sala*, [1998] ECR I-2691. In most judgments it is decided that the national court has to investigate whether the conditions for being classified as a worker are fulfilled.

⁸ See Case 39/86 *Lair* [1988] ECR 3161.

⁹ Case 32/75, [1975] ECR 1085.

Article 20 TFEU has, in relation to social advantages, been given a meaning by connecting it to Article 18 TFEU. Article 18 TFEU provides that within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The first judgment on citizenship and social rights was the *Martínez Sala* judgment.¹⁰ In this judgment the Court argued that Article 21 TFEU attaches to the status of citizen of the Union the rights and duties laid down by the Treaty, including the right, laid down in Article 18 TFEU, not to suffer discrimination on grounds of nationality within the material scope of the Treaty. In order to be able to invoke this Article, the Court added, the facts of the case have to fall within the scope of the Treaty. Since Ms Martínez Sala was a Spanish national lawfully residing in Germany for around twenty years, she could invoke Article 18 TFEU in order to combat the refusal of the benefit. Before this decision by the Court of Justice on Article 18 TFEU she would have had no EU instrument for doing so, as the only other instruments were the mentioned Regulations, of which it was very uncertain that they applied to her.

The material scope of Article 18 TFEU is the same as that of Regulation 492/2011, meaning that social rights, including subsistence benefits, are included.¹¹ Thus EU nationals could now claim equal treatment also in respect of social assistance in other Member States. This appeared in the *Grzelczyk* judgment,¹² where a French student successfully claimed that he was entitled to Belgian social assistance, since the exclusion on basis of nationality was against (the predecessor of) Article 18 TFEU. The question arose also in this judgment whether a person who invokes the non-discrimination rule in relation to public assistance can be expelled from the country. The directive on the right to residence applicable at the time allowed Member States to require from students who are nationals of a different Member State and who wish to exercise the right of residence on their territory, that they satisfy the relevant national authority that they have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence. If this condition is no longer satisfied, a Member State can terminate the residence permit.

Nevertheless, the Court decided that in no case may such measures become the automatic consequence, but it must be made clear that the student has become 'an unreasonable' burden on the public finances of the host Member State.

In later case law the Court accepted exceptions to the prohibition of discrimination. In the *Bidar* judgment¹³ the Court decided that, as regards assistance covering the maintenance costs of students, that Member States are permitted to ensure that the grant of social assistance does not become an unreasonable burden upon them and that the grant of such assistance may be limited to students who have demonstrated 'a certain degree of integration'. The conditions to ascertain such degree must be appropriate and proportional.

So far this has been the topic of many cases, in which the Court decided on a case by case basis whether this condition is satisfied.

1.4 DIRECTIVE 2004/38 (THE CITIZENSHIP DIRECTIVE)

After the first case law on EU citizenship, a directive was adopted in order to regulate and ensure residence rights. This directive replaced the then existing residence directives (there were several, each for a specific group, such as students) and incorporated the case law on citizenship. The directive was called Directive

¹⁰ Case 85/96, [1998] ECR I-2691.

¹¹ Case 456/02, *Trojani* [2004] ECR I-7573; Case 184/99, *Grzelczyk* [2001] ECR I-6193.

¹² Case 184/99, [2001] ECR I-6193.

¹³ Case C-209/03 [2005] ECR I-2119

2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.¹⁴

According to Article 6 of the Directive, Union citizens have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport. This is also true for third country family members accompanying or joining them.

According to Article 7, Union citizens have the right of residence on the territory of another Member State for a period of longer than three months if they: (a) are workers or self-employed persons in the host Member State; or (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State (..).

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

Article 24 of the Directive provides that the host Member State is not obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), i.e. the period the person concerned (who has not worked yet in that country) is seeking work. Nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families. We will discuss the directive further in relation to social assistance in Section 2.1.

1.5 IMPLEMENTATION OF DIRECTIVE 2004/38

This section shows how the Member States of this study have implemented Directive 2004/38.

In *Denmark* the EU Residence Order was amended in order to ensure the right to residence of economically inactive Union citizens and their family members as well as the formalities attached thereto. Article 24 of the Citizenship Directive was not transposed into the EU Residence Order, but the exceptions to the principle of equal treatment provided for in Art. 24(2) of the Directive can explicitly or implicitly be found in existing Acts.¹⁵ The exception in respect of *students* was implemented through an amendment of the Students' Grants and

¹⁴ OJ 2004 L 158/877.

¹⁵ See also C. Jacqueson, *Union citizenship – Development, Impact and Challenges, Report on Denmark*, DJØF 2014, p. 460-462; and C. Jacqueson, 'From negligence to resistance – Danish residence schemes in the light of EU free movement law', *EJSS* 2016 (forthcoming).

Loans Scheme Act which excludes nationals from other Member States who are not workers or family members from the entitlement to student grants and loans within the first five years of residence.¹⁶

The implementation of the Citizenship Directive did not bring any substantial changes into *Estonian* legislation.

In *Germany* the implementation of Directive 2004/38 involved drastic changes to German legislation. The current Residence Act (*AufenthG*) only applies in expressly specified expulsion cases (Section 11(1) sentences 1 and 2 *FreizügG/EU*) and in cases in which it provides a more favourable legal position than the *FreizügG/EU*. It is also applicable when the immigration authorities conclude that there is no right or there is a loss of the right pursuant to Section 2(1) (right of entry and residence) or of the right to reside permanently (Section 2(5)).

The directive resulted in an improvement of the rights of family members of EU citizens in particular. Before the implementation of the directive, national residency law only applied to the core family. After implementation, the residence permit upon application was abolished for EU citizens. EU citizens and their family members who are citizens of an EU Member State are now issued a certificate of the right of residence in a simplified *ex officio* procedure. Another significant point is that foreign nationals who have immigrated to Germany on the basis of the Residence Act have the right to attend integration courses, while from a purely legal viewpoint, EU citizens immigrating to Germany do not.

In order to implement the Directive, in the *Netherlands* four laws were adopted,¹⁷ including the Act amending the Work and Social Assistance Act (*Wet werk en bijstand*) - the predecessor of the currently in force Participation Act (*Participatiewet* 2015). The amendment of the Work and Social Assistance Act concerned Article 11 of the Act, and meant an exclusion from benefit for EU citizens for three months. This was done by a direct reference to the directive (see further Chapter 2).

In order to implement the provisions of the Directive in *Poland*, an Act on the entry, residence and exit in and from Poland by EU citizens was enacted. Also the act on social assistance was amended. After the amendment, these social benefits can be received by citizens of EU and EEA Member States and citizens who under agreements concluded by their States with the EU can make use of the freedom of movement of persons, and persons who are residents or permanent residents in Poland.

In *Spain* the Directive was implemented mainly by Royal Decree 240/2007 on the Entry, Free Movement and Residence in Spain of Citizens of EU and EEA Member States. The Decree initially followed a restrictive interpretation, limiting the right to work of ascendants and descendants over the age of 21 of European citizens, while Article 23 of the Directive recognises the right of these relatives to 'take up employment or self-employment' in the host country. The Decree permitted them to reside, but not to work in Spain. That was a restriction of rights that was inconsistent with EU Law.

On 1 June 2010 the Supreme Court declared several provisions of the Decree invalid, because it contained less favourable provisions than the rules of the General Immigration law. Furthermore, the Decree treated Spanish nationals less favourably than families of nationals of other EU Member States. Finally, experience with the application of the Decree revealed the need for the amendment of certain articles in order to realize

¹⁶ See *inter alia* Sect. 2a in the Act on the Students' Grants and Loans Scheme No 661 of 29/6/2009 (*LBK om statens uddannelsesstøtte (SU-loven)*) amending Act No 448 of 1995 with further amendments (*Lov om Statens uddannelsesstøtte med senere ændringer*).

¹⁷ These are the Work and Social Assistance Act (*Wet werk en bijstand*), the Student Finance Act 2000 (*Wet studiefinanciering 2000*), the Contribution for Education Act (*Wet tegemoetkoming onderwijsbijdrage en schoolkosten*) and the Foreigners Act 2000 (*Vreemdelingenwet 2000*). The bill and parliamentary discussions can be found in *Kamerstukken II* (Parliamentary Papers) 2005-2006, 30 493, No. 3, p.1 (Explanatory memorandum).

implementation of Directive 2004/38. Consequently, various articles of the Royal Decree of 2007 were modified by Royal Decree 1710/2011.¹⁸

In Sweden Directive 2004/38 was implemented primarily through changes in Chapter 3a of the Aliens Act (*Utlänningslagen*) and the Aliens Ordinance (*Utlänningsförrordningen*).¹⁹ The changes introduced the term 'right to residence' as a crucial condition for being allowed to stay in Sweden. If one has the right to residence, one has, under some conditions, the right to stay in Sweden for more than three months. The right to residence occurs automatically when the applicable conditions are fulfilled. The possibility of obtaining the right of residence differs for so-called economically active and economically inactive persons. Economically active persons include employees, self-employed persons, jobseekers and their family members, regardless of the number of working hours. If non-economically active persons claim benefit, they must prove that they have sufficient resources as well as sickness insurance for the duration of their intended stay. Insufficient resources do however not lead to expulsion of EU citizens.

According to Article 8(1) of the directive the receiving Member State can demand that an EU citizen registers his or her stay at the competent authority if s/he is planning to stay in the country for more than three months. Sweden initially made use of this possibility and implemented a registration requirement in the Aliens Act and established a Register. A EU citizen who wanted to stay in Sweden for more than three months had to register the stay at the National Migration Board.

In 2007 the Swedish Migration Board proposed to abolish the registration system and remarked that the registration was not a condition for the right to stay in the country. They also stated that the statistics obtained on the basis of the registrations do not give an accurate picture of the number of EU citizens with a right of residence staying in the country and that overall the registration has limited practical significance. Consequently the registration system was abolished on the 1 May 2014.

However, for residence based benefits it is still highly beneficial to be registered in the Population Register in order to prove that you are a resident in a municipality or county, but the evaluation of whether one is resident is made on the facts of the case.

A person is considered to be resident in Sweden if s/he is likely to regularly spend his or her night rest or equivalent rest (day rest) in this country for at least one year. This one-year rule is a prognosis for future residence and a person shall be registered when s/he has shown an intention to stay for more than a year. If a person regularly spends time and 'sleeps at night' both in Sweden and in other countries one has to establish the habitual residence of the person.

Therefore, there must be an intention of staying for more than one year in order to be registered. Persons and even workers having their legal residence in Sweden under Directive 2004/38 will not be registered in the civil registry if their intended stay is shorter than one year. This may cause practical problems for them, as will be discussed in the following chapters.

¹⁸ A new amendment has been adopted in Decree 987/2015 in order to adapt the Spanish legislation to an ECJ judgment (Case C-40-11, *Yoshikazu Iida* [2012]) saying that outside the situations governed by Directive 2004/38 a third country national cannot claim a right of residence deriving from an Union citizen.

¹⁹ The changes came into force on 30 April 2006 and meant that the previous system of residence permits for EU/EEA nationals and their families was abolished.

In 2014 the Law was changed and the condition that the residence had to be lawful was introduced for registration in the civil registry (Aliens Act §4).²⁰ This means that if one has the intention to stay for a year, it must also be clear that this stay will be a legal stay, otherwise the condition is not fulfilled.

In May 2004, when most other old Member States (EU15) limited access to their labour market from the ten new Member States, the *United Kingdom*, along with Ireland and Sweden, allowed A8 workers²¹ entry to their labour markets. Transitional arrangements implemented in the UK consisted primarily of the creation of the Worker Registration Scheme (WRS) on which all A8 workers were required to register for their first 12 months of continuous paid employment. Until those 12 months had been completed, A8 workers only held a qualifying right to reside as workers for the purpose of EU regulations whilst actively in work; during periods of unemployment they were therefore unable to retain worker status, reverting instead to the status of jobseeker with no right to reside. The Accession (Immigration and Worker Registration) Regulations (2004/1219) fleshed out the UK's 'national measures' regarding the restrictions on A8 workers in relation to right of residence and the requirement for registration on the WRS, as permitted by 2003 Accession Treaty. A draft of secondary legislation was additionally introduced in April 2004 to ensure that those transitional restrictions were reflected in the regulatory frameworks covering access to social rights, in particular in relation to social welfare provisions.

In 2007, more stringent restrictions were put in place to limit access to the labour market and the attached social rights of A2 citizens,²² which ran in parallel with the A8 scheme. Bulgarian and Romanian citizens who were highly skilled were allowed to enter the UK to look for work in any sector; their skilled compatriots could only work in specified sectors of the labour market in which a skills shortage had been identified, and they were required to obtain an Accession Worker Card prior to commencing work, while Bulgarians and Romanians seeking low-skilled work were only allowed to enter the UK to take up work on dedicated programmes such as the Seasonal Agricultural Work Scheme and the Sector-Based Scheme. While highly-skilled and skilled A2 citizens could acquire full worker status after 12 months' consecutive employment, this was difficult for the low-skilled since both Seasonal Agricultural Work and Sector-Based Scheme generally allowed short-term contracts, and for the Seasonal Agricultural Work scheme the maximum six month contract had to be followed by a break of three months before a new contract could be taken up. As was the case for A8 citizens, A2 citizens taking paid employment only qualified as 'workers' during periods of employment in the first 12 months on the Seasonal Agricultural Work scheme or on completion of 12 months of authorised employment, and were thus only eligible for certain welfare support and for housing provision in those periods.

It should be noted that the restrictions applied via the A8 and A2 registration schemes were always intended to be time-limited, since a maximum seven-year transitional period was allowed by the EU (and the UK kept both schemes in place for the full seven years, although the lawfulness of this has been questioned, since the EU's transitional arrangements allowed for the maintenance of restrictions during the final two years only in the case of 'serious disturbances (or a threat thereof) of the labour Markets'.²³ A recent UK case has found the extension of the scheme from May 2009 to April 2011 to be unlawful²⁴. The restrictions applied only to

²⁰ Prop. 2012/13:120 (p. 148).

²¹ The A8 countries were eight of the ten countries that joined the European Union in 2004, namely: Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia.

²² The A2 countries are Bulgaria and Romania.

²³ European Commission. *The Transitional Arrangements For The Free Movement Of Workers From The New Member States Following Enlargement Of The European Union On 1 May 2004*. Employment, Social Affairs and Equal Opportunities DG, Brussels.

²⁴ In *TG v Secretary of State for Work and Pensions*, the Administrative Appeals Chamber of the Upper Tribunal ruled that the government acted unlawfully when it extended the Worker Registration Scheme (WRS) for its final two years of operation: CPC/1026/2014; [2015] UKUT 50 (AAC).

employed citizens of the A8 and A2 accession states; workers from the pre-2004 Member States (EU-14) - together with citizens of Cyprus and Malta, which joined the EU in May 2004 but were not made subject to the transitional restrictions - were not affected by the transitional schemes. In addition, the restrictions applied only to those wishing to engage in paid employment; both A8 and A2 citizens had full rights to enter the UK as self-employed persons, as students or in a self-sufficient capacity, and those who did so received equal treatment to the self-employed /students/the self-sufficient pre-2004 EU citizens. All restrictions for A8 workers were lifted at the end of April 2011, while those pertaining to A2 workers ended in December 2013. All A8 and A2 workers now enjoy the same rights to take up paid employment in any sector without need for permission or registration, and qualify as workers for the purpose of access to European social rights immediately. The only EU citizens currently subjected to transitional restrictions on labour market access and linked social rights are Croatian citizens, for whom the requirement to comply with a registration scheme will remain in place until 2018 or possibly 2020.

Since winning the 2015 election and forming the new government, the Conservative Party has declared its intentions to implement its manifesto commitments in full. The proposals relating to EU migrant citizens include: renegotiating the principle of free movement itself, so that the UK can impose limits on the numbers of EU citizens who can come to the UK for work, self-employment, or as jobseekers; and restricting the length of time certain people may exercise a right to reside and the conditions under which they may access their EU-mandated social rights to welfare benefits and housing. There appears to be cross-party support for many of the proposed reforms, with Labour and the Liberal Democrats differing from the Conservative position by degrees rather than in substance. The Scottish National Party and the Green Party appear to be less keen on further reform, and emphasise the need for fairness and inclusion for all in society, while UKIP advocates for a complete halt to EU migration although has proposed that those EU citizens from other Member States already in the UK should be allowed to stay, work and 'enjoy the benefits of the UK as before'.

The negotiations led to an agreement in February 2016 between the Council and the UK, which will be discussed in Chapter 2.

As one can see, these measures and discussions concern the free movement of workers, rather than that of non-economically persons, for whom the EU citizens law was meant. However, in the UK indeed it is the (marginal) workers the discussion centres on when discussion EU citizenship.

2. SUBSISTENCE BENEFITS

2.1 EU LAW AND SUBSISTENCE BENEFITS

When EU nationals make use of their right to free movement and move to another Member State, but happen to come in need, they may want to claim subsistence benefit in the host country. The conditions of that country's legislation – e.g. that one has to have resided for x years in that country – may, however, oppose eligibility for benefit. This condition on past residence can thus be seen as a barrier to free movement, as the person concerned may as a result of benefit being refused be obliged to return to the country of origin.

However, if anyone entering a country would be entitled to social assistance from the moment of entering the country, the availability of benefit may become a reason in itself to go to that country ('benefit tourism') and that would clearly overstretch the solidarity of the host community. For this reason subsistence benefits constitute a politically highly sensitive area.

By subsistence benefits we mean here all benefits that have the objective to realize a minimum income level as defined by the country that pays these benefits. These benefits may be the only income for the persons concerned, but they may also supplement other income, whether or not from work. Subsistence benefits are by definition means-tested.

There are also non-means-tested types of benefits that guarantee a subsistence minimum, e.g. flat-rate pensions for pensioners. However, these are not discussed here, since they are not means-tested.

2.1.2 SUMMARY OF THE RELEVANT EU LAW

As we have seen in Chapter 1, if a subsistence benefit is qualified as 'public assistance' it is outside the material scope of Regulation 883/2004. Applicability of the Coordination Regulation to public assistance would *inter alia* mean that persons could not be excluded from this benefit on the basis of nationality and that was found to be undesirable.

The Court of Justice adopted, however, a restrictive interpretation of the term *public assistance*: these are only benefits which are not specifically meant to cover one of the risks mentioned in Article 3 of the Regulation.²⁵ Thus, benefits, even if they are at the subsistence level and means-tested, are within the scope of the Regulation if they are linked to one of the risks covered by the Regulation, e.g. invalidity or old age. These types of subsistence benefits can, under some conditions (of which a major one is that the benefit is listed in Annex X to the Regulation), be qualified as *special non-contributory benefits*. If this is the case, the non-discrimination provision of the Regulation is applicable to them. In Section 2.1.3 below we will discuss the effects of claiming these benefits for residence rights (the Citizenship directive).

For *workers* claiming subsistence benefits Article 7 of Regulation 492/2011 on freedom of movement for workers is relevant. Any person who pursues activities under supervision of another person or company for wages which are effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker', according to consistent case law of the Court of Justice.

For non-economically active persons, EU citizens, Article 18 TFEU may be relevant, which article is elaborated and further regulated by Directive 2004/38 (the Citizenship Directive). According to this directive, persons have during three months the right to stay in an EU Member State, but during this period they can be excluded from public assistance. According to Article 7 of the directive, they have the right of residence on the territory of another Member State for a period of longer than three months if they: (a) are workers or self-employed

²⁵Case 1/72, [1972] ECR 471.

persons in the host Member State; or (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State.

Article 14(4)(b) provides that an expulsion measure may in no case be adopted against Union citizens or their family members if: (a) the Union citizens are workers or self-employed persons, or (b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

Article 24 of the Directive provides that the host Member State is not obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), i.e. the work seeking period.

An expulsion measure shall, however, not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security.

Union citizens who have resided legally for a continuous period of five years in the host Member State have the right of permanent residence there. Once acquired, the right of permanent residence is lost only through absence from the host Member State for a period exceeding two consecutive years.

2.1.3 CASE LAW ON THE RELATIONSHIP BETWEEN CLAIMING SUBSISTENCE BENEFITS AND THE RIGHT TO RESIDENCE

In the previous section we summarized EU law on the relationship the right to residence and the prohibition of discrimination on ground of nationality. There are also several judgments of the Court of Justice on this relationship.

Case law before Citizenship Directive 2004/38 was adopted

Some judgments were given on basis of (the predecessor of) Article 18 TFEU. The *Grzelczyk* judgment²⁶ concerned a student of French nationality, Mr Grzelczyk, who lived in Belgium and applied for social assistance after four years of studying since, because of more demanding study obligations, he did not have the time anymore to earn an income from work. A Belgian student in these circumstances would, according to national law, be entitled to public assistance. This benefit was refused to Mr Grzelczyk, since he did not have Belgian nationality. The Court ruled that this rule was not consistent with the non-discrimination provision of the Treaty (what is now Article 18 TFEU). It added that it remains open to the host Member State to take the view that a national of another Member State who has recourse to social assistance no longer fulfils the conditions of his right of residence. In such a case the host Member State may, within the limits imposed by Community law, take a measure to remove him. However, recourse to the social assistance system by a citizen of the Union may not automatically entail such a measure. The criterion for allowing so is whether there will be an unreasonable financial burden for the host Member State.

This judgment was already given before the Citizenship directive was adopted and its approach was laid down in the directive, as can be seen from the provisions that were mentioned in Section 2.1.2.

²⁶ Case 184/99, [2001] ECR I-6193.

Also the facts of the *Collins* judgment²⁷ took place under a previous residence directive.²⁸ Mr Collins, of Irish and American nationality, applied in the UK for a jobseekers allowance, which was refused to him. The Court ruled that nationals of a Member State seeking employment in another Member State fall within the scope of Article 45 TFEU and, therefore, enjoy the right laid down in Article 45(2) to equal treatment. However, as was laid down in earlier case law,²⁹ *nationals who move in search of employment* qualify for equal treatment only as regards *access to employment*, but not with regard to social and tax advantages within the meaning of Article 7(2) of Regulation 492/2011. Article 5 of the regulation, however, relates to the assistance afforded by employment offices. The Court now decided that a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State also falls under Article 45(2) TFEU. It argued that the jobseekers allowance can be subject to a residence requirement only if it is based on objective considerations that are proportionate to the legitimate aim of the national provisions. The Court then considered that it may be regarded as legitimate for a Member State to grant such an allowance only after it has been possible to establish that a genuine link exists between the person seeking work and the employment market of that State, in particular that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question. However, if the requirement is to be proportionate it cannot go beyond what is necessary in order to attain that objective. More specifically, its application by the national authorities must rest on clear criteria known in advance and provision must be made for the possibility of a means of redress of a judicial nature.

Case law after the Adoption of the Citizenship Directive

The Citizenship Directive had an impact on the ECJ case law. First it is relevant that the Directive excludes some categories from public assistance, in particular persons during the first three months of their stay and persons who are jobseekers. Since Article 18 TFEU provides that ‘within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited’, exceptions to the non-discrimination principle by secondary EU law, such as the Citizenship directive, are allowed. The case law can be categorised on pertaining to the following categories.

I. Special-non-contributory benefits

Special non-contributory benefits are of a special nature, since they are, though subsistence benefits, not excluded from Regulation 883/2004 as social assistance. Does this also mean that these are not ‘public assistance’ for the Citizenship directive and that also EU nationals are eligible for these upon entry into the country? If that is the case, do they then have sufficient resources and consequently have, on that basis, a right to stay?

The first judgment relevant to this question is the *Brey* judgment,³⁰ concerning Austrian compensatory supplement to invalidity pensions and care allowance, which supplement is a special non-contributory benefit.

The Court considered that the question was whether Directive 2004/38 should be interpreted as precluding a compensatory supplement to a national of another Member State who is not economically active, on the grounds that, despite having been issued with a certificate of residence, he does not meet the necessary requirements for obtaining the legal right to reside on the territory of the first Member State for a period of longer than three months, since such a right of residence is conditional upon that national having sufficient resources not to apply for the benefit. Although compensatory supplement does indeed fall within the scope of

²⁷ Case C-138/02, [2004] ECR I-02703.

²⁸ Council Directive 68/360/EEC of 15 October 1968.

²⁹ See the *Collins* judgment, note 27 *supra*.

³⁰ Case C-140/12, EU:C:2013:565. See also H. Verschuere, ‘Special Non-contributory Benefits in Regulation 1408/71, Regulation 883/2004 and the Case Law of the ECJ’, *European Journal of Social Security* 2009, p. 211 ff.

Regulation 883/2004, but that fact cannot, in and of itself, be decisive for the purposes of interpreting Directive 2004/38, since the objectives pursued by Regulation 883/2004 are different to the objectives pursued by that directive. Regulation 883/2004 seeks to achieve the objective set out in Article 48 TFEU (the legal basis for the coordination Regulation) which concerns preventing the possible negative effects of the exercise of the freedom of movement. Although the aim of Directive 2004/38 is to facilitate and strengthen the exercise of the right to move, it is also intended to set out the conditions governing the exercise of that right. These conditions include that Union citizens who do not or no longer have worker status must have sufficient resources, which condition is meant for the protection of the public finances, the Court argued.

In those circumstances, the concept of 'social assistance system' as used in Article 7(1)(b) of Directive 2004/38 cannot be confined to those social assistance benefits which do not fall within the scope of the coordination regulation. The special non-contributory benefits can thus also be considered as public assistance. 'Social assistance system' must – according to the Court - be interpreted as covering all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State.

The Court added to this that claiming public assistance does not automatically mean that the person does not have sufficient resources to avoid becoming an unreasonable burden on the social assistance system of the host Member State. The national authorities cannot draw such conclusions without first carrying out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole, by reference to the personal circumstances characterising the individual situation of the person concerned.

Furthermore, in order to determine whether a person receiving social assistance has become an unreasonable burden on its social assistance system, the host Member State should, before adopting an expulsion measure, examine whether the person concerned is experiencing temporary difficulties and take into account the duration of residence of the person concerned, his personal circumstances, and the amount of aid which has been granted to him. This must not automatically lead to an expulsion measure.

Furthermore, the Court decided in the *Alimanovic* judgment³¹ that jobseekers benefits must be regarded as 'social assistance' within the meaning of Article 24(2) of Directive 2004/38. The Court ruled that it is sufficient to note that the referring court has itself characterised the benefits at issue as 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation 883/2004. It stated in that regard that those benefits are intended to cover subsistence costs for persons who cannot cover those costs themselves and that they are not financed through contributions, but through tax revenue. Since those benefits are moreover mentioned in Annex X to Regulation 883/2004, they meet the conditions in Article 70(2) thereof, even if they form part of a scheme which also provides for benefits to facilitate the search for employment. The predominant function of these benefits is in fact to cover the minimum subsistence costs necessary to lead a life in keeping with human dignity. It follows from those considerations that those benefits cannot be characterised as benefits of a financial nature which are intended to facilitate access to the labour market of a Member State. So here it deviated from the approach in *Collins*, discussed *supra*.

³¹ Case C-67/14, EU:C:2015:597.

II. *Persons who have not worked yet*

Also the *Dano* case³² concerned a special non-contributory benefit, and it attracted a lot of attention from lawyers concerned with EU law, but also from the general press. The case concerned a Romanian national, who had not worked in Germany or Romania and there was nothing to indicate that she had been looking for a job. The question was whether EU law allows Member State to exclude nationals of other Member States who are not economically active from entitlement to certain special non-contributory cash benefits although those benefits are granted to nationals of the Member State concerned who are in the same situation.

The Court of Justice answered this in the affirmative. A Union citizen can claim equal treatment with nationals of the host Member State in relation to benefit only if his/her residence in the territory of the host Member State complies with the conditions of Directive 2004/38. In the case of periods of residence of up to three months, Article 6 of Directive 2004/38 limits the conditions and formalities for the right of residence to the requirement to hold a valid identity card or passport and, under Article 14(2) of the directive, that right is retained as long as the Union citizen and his family members do not become an unreasonable burden on the social assistance system of the host Member State. A Member State must therefore have the possibility of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence. Therefore, the financial situation of each person concerned should be examined specifically, without taking account of the social benefits claimed, in order to determine whether s/he meets the condition of having sufficient resources to qualify for a right of residence under Article 7(1)(b) of Directive 2004/38.

The referring court in this procedure had already given the information that the applicants (Ms Dano and her son) did not have sufficient resources and thus could not claim a right of residence in the host Member State under Directive 2004/38. Note that they had a right to permanent residence according to national law, but relevant here is they did not have a right to residence according to the Citizenship directive. Therefore, they could not invoke the principle of non-discrimination in Article 24(1) of the directive.

In the *García-Nieto* judgment³³ the Court continued this argument. The applicant was less than 3 months in Germany, and thus had a right to stay according to the Directive. The Court decided that he may base a right of residence on Article 6(1) of Directive 2004/38, but, in such a case, the host Member State may rely on the derogation in Article 24(2) of Directive 2004/38 in order to refuse to grant that citizen the social assistance sought.

III. *Persons who have worked (even if only a very short period)*

Persons who have worked fall under Article 7 of Regulation 492/2011. This is the case even if persons have a very small job or work for a very short time, as was confirmed in the *Vatsouras* and *Koupatantze* judgments.³⁴ One of the applicants in this case worked for some months and had a low income, the other worked hardly more than one month. The Court ruled that neither the origin of the funds from which the remuneration is paid nor the limited amount of that remuneration can have any consequence in regard to whether or not the person is a 'worker' for the purposes of Community law.³⁵ Nor does the fact that the income from employment is lower than the minimum required for subsistence prevent the person in such employment from being regarded as a 'worker' within the meaning of Article 45 TFEU,³⁶ even if the person in question seeks to

³² Case C-333/13, EU:C:2014:2358.

³³ Case C-299/14. EU:C:2016:114.

³⁴ Cases C-22/08 and C-23/08, EU:C:2009:344.

³⁵ As was already decided in Case 344/87 *Bettray* [1989] ECR 1621 and Case C-10/05 *Mattern and Cikotic* [2006] ECR I-3145.

³⁶ As was already decided in Case 53/81 *Levin* [1982] ECR 1035 and Case C-317/93 *Nolte* [1995] ECR I-4625.

supplement that remuneration by other means of subsistence such as financial assistance drawn from the public funds of the State in which s/he resides.³⁷ Furthermore, the fact that employment is of short duration cannot, in itself, exclude that employment from the scope of Article 45 TFEU.³⁸ It follows, the Court continued, that, independently of the limited amount of the remuneration and the short duration of the professional activity, it cannot be ruled out that that professional activity, following an overall assessment of the employment relationship, may be considered by the national authorities as real and genuine, thereby allowing its holder to be granted the status of 'worker' within the meaning of Article 45 TFEU. Whether this is the case had to be decided by the referring court. If the national court reaches the conclusion that the applicants in this case were workers, they had retained the status of workers for at least six months, subject to compliance with the conditions laid down in Article 7(3)(c) of Directive 2004/38. In that case, they would have had the right to benefits such as the German jobseekers allowance during that period of at least six months. After that period the Member State has no longer the obligation to pay social assistance (following Article 24(2) of the Citizenship Directive).

So this *Vatsouras* and *Koupatantze* judgment means that the applicants in this case are entitled to social assistance for a limited period – six months - on the basis of their (short) period of being a worker. Such claim could also mean that after their status as worker has expired, they can be expelled.

In this judgment the Court still left open whether the jobseekers allowance was social assistance or a benefit to facilitate access to the labour market. Member States can require a link with the labour market before granting this benefit. In the *Alimanovic* judgement,³⁹ as we have seen, the Court decided that a jobseekers allowance is social assistance. The persons in this case had worked, but lost their job. Since the Citizenship Directive makes clear how long one remains worker for the purpose of the directive, namely a period of six months after the cessation of employment during which the right to social assistance is retained, after this period they could not invoke Regulation 492/2011 anymore. The Court also considered that this system guarantees a significant level of legal certainty and transparency in the award of social assistance, while complying with the principle of proportionality, and therefore the Member State does not have to make an individual assessment of the situation anymore.

IV. *Persons who are working, even in quite marginal work*

Persons who are worker can claim social assistance even if the amount of work they perform is rather small, since they can invoke the non-discrimination provision of Article 7(2) of Regulation 492/2011.

V. *Conclusions*

The Court has narrowed down, in the course of time, the possibilities of EU citizens to claim social assistance in another Member State in an early stage of their stay. Partly, these changes in case law can be explained by the Citizenship Directive (such as the exclusion from social assistance during the first three months and during the jobseeker period), but there are also changes that seem to be a response to the changing political context of free movement of persons, such as by considering special non-contributory benefits as social assistance, and by no longer leaving the possibility open that jobseekers allowances are not social assistance.

For the rest, the rules are basically as follows. EU citizens who have entered the territory of the host Member State in order to seek employment must not be expelled for as long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged. In such a case, the host

³⁷ As was already decided in Case 139/85 *Kempf* [1986] ECR 1741.

³⁸ As was already decided in Case C-3/90 *Bernini* [1992] ECR I-1071, and Case C-413/01 *Ninni-Orasche*. [2003] ECR I-13187.

³⁹ Case C-67/14, EU:C:2015:597.

Member State may rely on the derogation in Article 24(2) of that directive in order not to grant that citizen the social assistance sought.

Persons who are involuntary unemployed after completing a fixed-term employment contract of less than one year or after having become involuntarily unemployed during the first 12 months and have registered as a jobseeker with the relevant employment office, retain the status of worker for no less than six months. During that period, the Union citizen concerned retains his right of residence in the host Member State under Article 7 of Directive 2004/38 and may, consequently, rely on the principle of equal treatment, laid down in Article 24(1) of that directive. This includes that s/he remains eligible for social assistance (i.e. for six months).

Persons who are working are to be treated in the same way as nationals, already from the first day of work, and from the case law of the Court it appears that also very minimal work can still qualify a person as worker.

2.2 THE CITIZENSHIP DIRECTIVE AND THE RIGHT TO SOCIAL ASSISTANCE IN THE COUNTRIES OF OUR STUDY

2.2.1 EU NATIONALS

In *Denmark* subsistence benefit (*køstanthjælp*) is provided on the basis of the Act on Active Social Policy to all persons in need who are lawfully residing in Denmark. The Act was amended in 2004 and since then it excludes short-term residents (persons staying less than three months) and jobseekers from entitlement to benefit except from financial help to get back home.⁴⁰

The national expert remarks in her report that this exclusion of first-time jobseekers has been criticised for some time for being inconsistent with the Court's rulings in *Collins* and *Vatsouras* (discussed in section 2.1.3), since this benefit was seen as a jobseeker's allowance. After the *Alimanovic* judgment, however, it is clear that jobseeker's allowance can be seen as public assistance. Thus, while the approach adopted by the Danish authorities could initially be seen as inconsistent with the Court's case-law, this does now no longer seem to be the case.

According to the present rules, access to social rights depends on a cpr (civil registration number) number. A cpr number can only be obtained upon proof of residence in Denmark in addition to showing a registration certificate or residence card. One has to document 'permanent' residence, by, for example, showing a letter from the landlord, a rent contract or utility bills.

Entitlement to social assistance for all Union citizens residing for more than three months who are not workers or self-employed is assessed case by case.⁴¹ Essential is that one is lawfully residing in Denmark. Since there is only very limited case-law and information on practice, it is difficult to assess whether rights are actually effectively protected.⁴² According to a report on migrant workers the proportion of recipients of social assistance between the age of 16 and 66 coming from other EU countries is lower than the general proportion of benefit recipients in Denmark.⁴³

⁴⁰ In addition, between 2002 and 2011 this benefit was conditional upon a residence period in Denmark of seven years out of the last eight years. This requirement was especially targeted at non-Danish nationals, but was neutrally formulated. Citizens who had settled in Denmark for less than seven years could only claim a reduced minimum means of subsistence known as *starthjælp*. The law was amended by the Social Democrat government in 2011, where both the residence requirement and *starthjælp* were abolished (Act No 282 of 26/4/2004 inserting Sect.12a in the Act No 455 on Active Social Policy of 1997 (*Lov om aktiv socialpolitik*)).

⁴⁰ Sect. 3 of the Aliens Act of 2013.

⁴¹ *Idem*.

⁴² See decisions of the Appeal Tribunal for Social and Employment Affairs (*Ankestyrelsen*) A-191-11 of 8/9/1 and A-27-07 of 27 November 2007.

⁴³ *Beskæftigelsesministeriets notat om Vandrende arbejdstageres rettigheder under Beskæftigelsesministeriets ressort*, December 2013.

As we saw in Chapter 1, in *Estonia* the implementation of the Citizenship Directive did not cause substantial changes of Estonian legislation. This is also true for social assistance law. Basically, the right to social benefits depends on the right to stay, which may be for a fixed term or a permanent period. The full amount of social assistance in cash and in kind is granted to EU citizens if they have been registered in the Population Register. Registration is obligatory if an EU citizen has stayed in Estonia for more than three months.

Ordinary social assistance is provided to persons legally staying in Estonia, e.g. permanent residents of Estonia; aliens residing in Estonia on the basis of a residence permit or right of residence; and persons enjoying international protection staying in Estonia. Claiming social assistance does not constitute a legal basis for termination of the right to stay.

According to the Aliens Act, if a person does not give the correct information s/he can lose the right to stay in Estonia and may be expelled due to the fact that s/he claimed social assistance. In practice this opportunity is never used. It hardly ever happens that EU citizens claim social assistance and therefore they are not viewed as a burden to the social assistance system, according to the national expert.

In *Germany* unemployed EU citizens who are not looking for work in Germany or whose reason for being in Germany is not solely to look for work may be excluded from SGB II benefits (the non-contributory unemployment benefits – jobseekers allowance) during the first three months of their stay. EU citizens whose reason for being in Germany is solely to look for work may be permanently excluded from these benefits.

EU citizens staying in Germany in order to look for work are only entitled to reside in Germany for a maximum of six months and only as long as they are able to prove that they are continuing to look for work and have legitimate prospects of being hired (Section 2(2) no. 1a FreizügG/EU).⁴⁴

As we have seen in section 2.1, the Court of Justice has handed down a number of judgments upon questions by German courts,⁴⁵ such as the *Dano*, *Garcia-Nieto* and *Alimanovic* judgments. Interesting is that the German Federal Social Court ultimately ruled, following decisions of the German Federal Constitutional Court on the constitutional right to a subsistence minimum (Arts. 1(1) j^o 20 of the Basic Law), that EU citizens who are excluded from jobseekers allowances (SGB II – Social Code book II) have a right to social assistance (SGB XII). The social welfare offices must therefore review whether social welfare benefits should be granted as discretionary benefits. In its decision of December 2015, the Federal Court held that in the case of a ‘stable residency’ of over six months, the discretionary powers of the public authority are practically reduced to zero, which means that public assistance benefits under SGB XII will generally have to be paid to foreign nationals in these situations.⁴⁶

In *the Netherlands*, EU citizens are regarded as workers or self-employed by the *IND* (the immigration authorities) if they perform genuine and effective work, i.e. if they earn more than 50 percent of the applicable public assistance rate (i.e. 1,524 euro a month for a couple, or 1060 euro for a single person in 2016), or if they work at least 16 hours per week.⁴⁷

For non-economically active persons (i.e. persons not reaching this threshold) it is relevant that in order to implement the Citizenship Directive, Article 11 of the Work and Social Assistance Act (*Wet werk en bijstand*),

⁴⁴ This was introduced with the Act to amend the FreizügG/EU and other regulations of 2 December 2014, BGBl. I 2014, No. 56, p. 1922 ff.

⁴⁵ See also Absenger/Blank in WSI-Mitteilungen 5/2015, p. 355 ff.

⁴⁶ See also: <http://www.welt.de/politik/deutschland/article149593118/EU-Auslaender-koennen-deutsche-Sozialhilfe-bekommen.html>. On the Federal Government’s reaction to the Federal Social Court’s decision in December 2015, see for example <http://www.welt.de/14.02.2016>, pursuant to which the Government is planning to draft legislation to significantly restrict the rights of EU nationals to social welfare benefits.

⁴⁷ B10, 2.2 *Vreemdelingencirculaire* 2000.

the predecessor of the current Act (*Participatiewet*), was amended. Since then the amended article provides that only a person with Dutch nationality who is a resident of the Netherlands is entitled to social assistance. In the second paragraph of this Article, however, is regulated which categories of foreigners residing in the Netherlands are assimilated with Dutch nationals. These categories are persons with one of the types of residence permit or status mentioned in the *Vreemdelingenwet* (Aliens Act), i.e. Article 8(a-e) and (l). Persons with these permits are, according to Article 11(2) of the *Participatiewet*, assimilated with Dutch nationals, *with the exception of the cases meant in Article 24(2) of Directive 2004/38* (my italics). As we have seen, Article 24 of the Directive provides that the host Member State is not obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b) (the job seeking period). This reference to Article 24(2) establishes an automatic and dynamic link with EU law, including the developing case law of the Court of Justice on the Citizenship Directive.

Persons belonging to the categories referred to in Article 11(2) *Participatiewet* who can claim social assistance can in some circumstances lose their right to residence if they apply for this benefit.

After five years of residence or residing on the basis of the permit mentioned above, there is a right to permanent residence, as is also provided by the directive. A claim for assistance benefit will in this stage not affect the right of residence anymore.

In order to be eligible for social assistance in *Poland* claimants (both Polish nationals and other EU-citizens) must belong to one of the statutorily defined categories entitled to benefits, one must further be in a difficult situation, unable to overcome it, and stay in the territory of Poland.

A major social assistance scheme in *Spain* is the *Back to work allowance scheme*, established by Royal Decree 1369/2006. This is a permanent unemployment regulation, that assists citizens in a marginal position who are experiencing extreme poverty and difficulties in realising basic rights, including the right to health, education, culture, work and a decent standard of living. A range of programmes have been developed with this purpose in mind, at State and regional level. However there is no state-wide system of minimum income assistance in place yet, and therefore no national safety net with uniform guarantees.

The right to Back to work allowance exists for long-term job seekers (those who have been seeking work for twelve months or more) aged over 45 and for persons not in receipt of any other source of income. Eligible categories include disabled people, returning migrants and victims of gender or domestic violence. Benefits will generally be paid for up to eleven months.

Article 14(1) of Organic Law 4/2000 on the rights and freedoms of foreigners in Spain and their social inclusion provides that foreign residents are entitled to social security services and benefits under the same conditions as Spanish nationals. This article probably includes, according to the Spanish report, non-contributory and public assistance benefits and most likely also the State back to work allowance.

Also the Autonomous Regions have introduced benefits for social integration. The rules on these benefits vary from Region to Region. These are rather complicated as they constitute a heterogeneous and non-coordinated system; financial and budgetary difficulties have caused great delays in payment of these benefits, both to Spanish and foreigner citizens.

Some of the Regions allow entitlement to these benefits regardless of nationality.⁴⁸ Normally a condition for the receipt of financial benefit is legal residence in the Autonomous Community where the application is

⁴⁸ Neither the Decrees of the Balearic Islands, Canary Islands, Aragon, Catalonia or Catalonia request legal residency, but they require a minimum period of continuous residence prior to application.

made⁴⁹ or in Spain,⁵⁰ where applicants can sometimes be expected to have held their legal status for a certain period of time prior to application.⁵¹ However, the Andalusian regulation expressly states that those who are not EU citizens are not entitled to these minimum benefits. This provision seems inconsistent with the provisions of Spanish Organic Law on Immigration (on the analysis in view of EU law, see Section 2.7 *infra*). Most likely the rule is explained by the extent of migration in that particular Community.⁵²

Since the Law on Immigration has established social integration of foreigners as one of its objectives, the Spanish rapporteurs claim that it cannot be left to the discretion of each community to determine which rights are basic and which are not, as this would create situations of inequality.⁵³ However, although not all Autonomous regulations on minimum income allowance require legal residence, most of them do, as stated above, in addition to registration in one of the municipalities of the Autonomous Community.

The time that applicants are required to be resident ranges from six months to three years immediately preceding the application. However, these conditions allow for exceptions in case a person is working or in case of force majeure, as well as in case of emergence of sudden and unexpected situations of extreme need that may occur after the registration in the Autonomous Community. The minimum condition on residence is often waived for migrants returning to Spain, refugees with pending asylum applications and those whose stay in Spain has been authorised for humanitarian or social interest reasons, as well as for victims of human trafficking, victims of gender violence who change their address for safety reasons, or people from other Autonomous Communities who are effectively receiving an identical benefit when they move to their current permanent residence in Spain.

Additionally, assistance can be paid to applicants in an emergency or urgent situation without resources. A growing trend is that some communities ask prior registration in the municipal register (*Padrón municipal*) or actual residency also for this emergency benefit.⁵⁴ This condition is intended to prevent people moving from one municipality to another with the sole purpose of claiming emergency benefits.

In *Sweden* two conditions are relevant to being eligible for social assistance. The first one is that one has the right to residence in Sweden; the second is that one resides habitually in a municipality.

(a). *The right to residence.* In 2014, the law regulating the Swedish Population Register (*Folkbokföringslagen (FBL)*) was amended. The Act now requires lawful residence as a prerequisite for registration (Article 4 FBL).⁵⁵ In practice, this means that a person moving to Sweden will have to prove not only his or her intended stay in Sweden for at least one year, but also that s/he will be lawfully residing during that period. Otherwise s/he will not be registered in the Population Register and thus face difficulties in being considered as resident as regards to access to social rights, such as social assistance, health care etc.

⁴⁹ For example, Madrid, De La Rioja, Galicia, Castilla and Leon and Extremadura.

⁵⁰ Navarra and Galicia.

⁵¹ Murcia requires legal residency in Spain for a period of no less than five years. Cantabria and Extremadura require twelve months immediately prior to the application.

⁵² As highlighted by J.A. Fernández Avilés 'Andalucía' in V.A. Monereo Pérez (ed), *El derecho de las migraciones en España. Estudio por Comunidades Autónomas*, Comares, Granada, 2013, p. 405-406.

⁵³ See also M^a.I. Granados Romera, 'Trabajadores extranjeros, servicios y asistencias sociales ¿Un *minimum* protector?' in J.L. Monero Pérez (ed.), *Protección jurídico-social de los trabajadores extranjeros*, Comares Publishers, Granada, 2010, p. 314-315.

⁵⁴ For instance six months in advance in Basque Country.

⁵⁵ There are exceptions for specific categories of persons, foreign public servants, diplomats, foreign students and their family members. These persons will not be regarded as fulfilling the residence concept in Register even if they are actually residing in Sweden. Family members are defined as husband/wife and children under the age of 18.

When assessing whether a person is resident of a municipality the following criteria are essential: (a) Has the person accommodation for himself or herself and the family in the municipality? (b) Has the person employment in the municipality? (c) In which place is the person registered according to the Population Register?

As mentioned in Chapter 1, the criterion ‘where you sleep at night’ and the presumed intention of stay for more than one year are among the conditions for becoming registered the Civil Registry. This means that persons with a contract of employment for less than one year are not be regarded as resident.

(b) *The municipality of habitual residence.* Social assistance law makes municipalities responsible for social assistance. For this purpose it is important whether a person is in a municipality of his/her habitual residence or temporary residence. Only if a person is in the municipality of habitual residence s/he is entitled to ordinary social assistance. It is up to the municipality to decide on the claim to social assistance and the benefit level; this is done on a case-by-case basis. So it is important to have a municipality of habitual residence, otherwise one is not entitled to social assistance (or other benefit) even if one has the right to residence in Sweden.

EU citizens without a municipality of habitual residence are - according to case law - only entitled to help in an emergency situation, which in practice amounts to a ticket to go back to their country of origin. This interpretation of the law has been debated over the past years in Swedish media. It is based on the application of the principle of equal treatment (article 18 TFEU) on Swedish law, resulting in the argument that EU-citizens who do not have the right to residence are allowed to apply for social assistance as anyone else residing in a Swedish municipality, but since they do not have right of residence they cannot be considered to be residents and therefore they are not entitled to subsistence benefits other than emergency help.

The practice of limiting social assistance to persons with a habitual residence has proven especially complicated for job seeking EU-citizens who are not considered to have a right of residence. Since a couple of years, the public debate in Sweden on EU citizens is almost entirely focused on the group often referred to as EU migrants. These are individuals, mainly Roma people from Romania and Bulgaria, travelling to Sweden, often in order to escape the harsh living conditions in their home countries.

Some critics say, according to the Swedish rapport, that the municipalities lack a legal ground for excluding EU migrants from social assistance purely on the basis of not being resident. The criteria of residency that they use often date from a court case almost twenty years old involving a third-country national. For this reason it is argued that municipalities do not have a sound basis for their decisions and that the decisions to some extent disregard EU law and the principles of equal treatment and non-discrimination.

In the *United Kingdom* there is a large number of benefits that supplement low incomes. Examples are the Job Seekers Allowance, Housing Benefit, Child Benefit and Child Tax Credit. Also workers with a low income and/or working part-time are eligible for these benefits. Harris gives the following overview:⁵⁶

Name of benefit		Brief description	EU classification
I Contributory benefits			
Contribution-based and Support Allowance (ESA)	Employment	Working age incapacity/sickness benefit available for up to 365 days of limited work capability.	Social security benefit (SSB)
Contribution-based Allowance (JSA)	Jobseeker's	Unemployment benefit. Maximum entitlement period of 6 months.	SSB
Bereavement allowance	payment and	Lump sum and weekly payments for survivors.	SSB
State Retirement Pension		Old age pension.	SSB
Maternity, paternity or adoption pay		Short-term earnings-replacement paid via employer. There is also maternity allowance.	SSB
Statutory Sick Pay		28 weeks of employer-paid sickness benefit	SSB

⁵⁶ N. Harris, ‘Demagnetization of social security and healthcare for migrants to the UK’, EJSS 2016(2), to appear.

II Non-contributory and (mostly) non-means-tested benefits		
Child Benefit	For those with young dependants.	SSB
Disability Living Allowance (DLA) and Personal Independence Payment (PIP)	Weekly disability allowance. Can be claimed by under-65s. DLA is being replaced by PIP. DLA and PIP have care/daily living (CC) and mobility components (MC).	SSB (for CC) or special non-contributory benefit (SNCB) (for MC)
Attendance allowance	For disabled people claiming when aged 65 or over.	SSB
Winter fuel payment	Annual fuel payment for older people.	SSB
III Income-related benefits and tax credits		
Universal credit (UC)	Monthly benefit for jobseekers, non-working sick/ disabled people and low paid.	Social assistance (SA)
*Income support	Weekly basic benefit for people unable to work due to sickness, disability or caring.	SA
*Income-based JSA	Weekly benefit for the unemployed people with capacity for work and no entitlement to contribution-based JSA.	SA
*Housing Benefit	Assistance towards rent.	SA
*Income-related ESA	For working age persons with limited work capability due to ill health/disability and no entitlement to contributory ESA.	SA
*Working Tax Credit	Credited to persons in low paid work of sufficient hours per week.	SA
*Child Tax Credit	Basic credit for children's parent/carer on means-tested benefit or in low paid work.	SSB
State Pension Credit	Like income support, but for those of (female) pensionable age.	SNCB
The Social Fund	Funeral or maternity grants and cold weather payments.	SA
* = benefits being replaced by UC		
*Income-based JSA	Weekly benefit for the unemployed people with capacity for work and no entitlement to contribution-based JSA.	SA
*Housing Benefit	Assistance towards rent.	SA
*Income-related ESA	For working age persons with limited work capability due to ill health/disability and no entitlement to contributory ESA.	SA

Because of these types of benefits and the circumstance that quite many workers have a low hourly income and/or work part-time, the position of these workers plays a large role in discussions in the UK on subsistence benefits for mobile EU citizens.

Since the Government do not want to grant persons with a very low income who have recently come to the UK such benefits they introduced thresholds for eligibility. One threshold is that persons are considered as workers only if they earn more than the so-called Minimum Earnings Threshold. This Minimum Earnings Threshold was introduced in March 2014, initially as a means of assessing the eligibility of EU citizens for Job Seekers Allowance, Housing benefit, Child Benefit and Child Tax Credit, but from October 2014 it was extended to apply to claims for Income Support and Employment and Support Allowance, and from November 2014 also to State pension credit.⁵⁷

The Minimum Earnings Threshold requires an average weekly income at, or above, the prevailing primary earnings threshold (the point at which someone becomes liable to pay national insurance in the UK) over the previous three months of £155 per week (2015/16 tax year). If this threshold has been met, the applicant is viewed as worker (or self-employed person) and eligible for the benefit(s) in question. If the test is not met, the decision maker must look more closely at the case to determine whether other aspects of the applicant's work

⁵⁷ <http://www.cpag.org.uk/content/residence-rights-and-wrongs>

or self-employment (such as hours worked, pattern of work, nature of employment contract⁵⁸) indicate that s/he still meets the criterion of 'genuine and effective', rather than 'marginal and ancillary',⁵⁹ economic activity (second stage of the test).^{60/61}

So in this approach there is a direct link between qualification as worker for Article 45 TFEU and eligibility for benefit. This means that if a person is not considered worker s/he cannot invoke Regulation 492/2011, that prohibits, as we have seen in Chapter 1, discrimination on ground of nationality, including indirect discrimination.⁶²

Another element of the UK approach to restrict claims for subsistence benefit was to redefine the duration that one remains worker after losing work. Initially EU workers who had been employed for at least one year prior to becoming involuntarily unemployed were able to retain their worker status and linked social rights for six months, but this could be prolonged if they were able to provide evidence that they were seeking employment in the UK and have a genuine chance of being engaged.^{63/64} This provision was amended as from 1 January 2014⁶⁵ (by SI 2013/3032) and now provides that after six months of having worked they retain worker status for an extended period only if they can produce 'compelling evidence' of efforts to find work and a genuine chance of being offered employment. Those who had been employed for less than a year retain worker status only for an absolute maximum of six months; this is not open to extension, regardless of any compelling evidence of a genuine chance of being engaged.⁶⁶

The new British rules also provide that a worker who gives up work *voluntarily* may now be regarded as a jobseeker (if registered as such), which was previously not the case. Such a person may only retain jobseeker status for more than six months if s/he is able to provide compelling evidence of seeking work and having a genuine chance of being engaged. Loss of worker status means no eligibility of benefit anymore.⁶⁷

For non-economically active persons the 'habitual residency test' is important. The test has been a concern of the European Commission since 2011. It has changed over time in response to policy changes and case law, but basically requires that one has the right to reside in the UK and proves that one intends to settle in the UK or Common Travel Area ((UK, Republic of Ireland, Channel Islands and Isle of Man) and make it their home – the 'habitual residence'.

⁵⁸ Department for Work and Pensions, *Adjudication and Operations Circular HB A3/2014 – Minimum earnings threshold* London, 2014 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284913/a3-2014.pdf.

⁵⁹ See for the criteria and the case law from which these were derived, Chapter 1.

⁶⁰ HMRC guidance sets out the process for applying the test: HMRC, *Child Benefit and Child Tax Credit - Right To Reside: Establishing Whether An EU National Is/Was A Worker Or A Self-Employed Person Under EU Law* (2014): available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288788/Met_guidance_for_gds.pdf

⁶¹ Apart for barring categories of EU nationals from benefit, the introduction of a weekly earnings threshold, which equals 24 hours a week at minimum wage level, is also criticised since it is indirectly discriminatory against women as they are more likely than men to be in part-time work, see D. Rutledge, *Could the earnings threshold for benefits be in breach of EU law?* Available at: http://www.gardencourtchambers.co.uk/wp-content/uploads/old_site/File/Desmond%20Rutledge%20LexisNexis%20interview.pdf. See also K. Puttick, 'EEA workers' free movement and social rights after Dano and St Prix: Is a Pandora's box of new economic integration and 'contribution' requirements opening?' *Journal of Social Welfare and Family Law*, 2015.

⁶² See also Puttick (2015), previous note.

⁶³ As a result of Part 1 of the Immigration (European Economic Area) Regulations (2006/1003) transposing Directive 2004/38 into UK law.

⁶⁴ D. Rutledge, 'Analysis of recent cases: Acquiring and retaining the status of a worker and the habitual residence test', *Journal of Social Security Law* 16 (3) 2009, D100.

⁶⁵ By Immigration (European Economic Area) (Amendment) (No. 2) Regulations (2013/3032).

⁶⁶ European Operational Policy Team (2014). *Jobseekers and retention of 'worker' status*. Issue 03/2014. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/309124/30748_-_Annex_17_-_Notice_03-2014_-_Retention_of_Worker_Status_-_redacted.pdf

⁶⁷ http://www.cpag.org.uk/sites/default/files/CPAG-Kapow-GPOW-APR2015_0.pdf

Habitual residency is assessed by a Department for Work and Pensions official, who after a series of questions makes a decision as to whether s/he believes the person a) has a right to reside and b) is habitually resident. Failure to satisfy the test means that the person will be refused most means-tested benefits.

The European Commission has started infringement proceedings against the UK on the habitual residence test since it is much more difficult to meet for EU migrant citizens than it is for UK citizens.⁶⁸

The UK mentioned the issue of access of persons in marginal employment to in-work benefits as a major problem and an issue to be addressed. In the attempt to persuade the UK not to leave the EU, in the Council meeting of 18 and 19 February 2016 an agreement was made. This entails that a proposal to amend Regulation No 492/2011 will provide for an alert and safeguard mechanism that responds to situations of inflow of workers from other Member States of an exceptional magnitude over an extended period of time. A Member State wishing to avail itself of the mechanism would notify the Commission and the Council that such an exceptional situation exists on a scale that affects essential aspects of its social security system, including the primary purpose of its in-work benefits system, or which leads to difficulties which are serious and liable to persist in its employment market or are putting an excessive pressure on the proper functioning of its public services. The Council can then authorise the Member State concerned to restrict access to non-contributory in-work benefits to the extent necessary. The Council would authorise that Member State to limit the access of newly arriving EU workers to non-contributory in-work benefits for a total period of up to four years from the commencement of employment. The limitation should be graduated, from an initial complete exclusion but gradually increasing access to such benefits to take account of the growing connection of the worker with the labour market of the host Member State. The authorisation would have a limited duration and apply to EU workers newly arriving during a period of seven years.⁶⁹

2.2.2 THIRD COUNTRY NATIONALS

In this report we will also discuss the position of asylum seekers and other third country nationals, even though they are not EU nationals. This gives a better picture of who is included or excluded and which criteria apply for this. In addition, although they are not EU citizens, they are citizens and if they are excluded this is relevant to the communities they live in.

In *Denmark* third country nationals have access to social benefits, including social assistance, on an equal basis as Danish nationals. Yet, they may in certain circumstances be less favourably treated than EU citizens and their family members. For example, where the law imposes a residence requirement, this may be lifted for Union citizens (as in the case of the general retirement pension and family benefits), but not for third country nationals. In addition, here again the problem arises whether they are lawfully residing in the country and have a cpr number/health card.

In *Estonia* third country nationals are, like EU nationals, not expelled on the ground of their claiming social assistance. Granting social assistance to EU citizens and third country nationals is not a topic of discussion in Estonia. EU citizens and third country nationals hardly ever ask for social assistance and therefore they are not viewed as a burden to the social assistance system.

In the *Netherlands* the *Koppelingswet* (The Act Linking Benefit to Legal Status) introduced a general principle in social security Acts in 1998, providing that only persons with a specified type of permit to stay are eligible for benefit. As a result, persons not having such permit are not entitled to social security benefits anymore, including subsistence benefits.

The residence status of persons legally residing in the Netherlands may be affected by applying for public assistance benefits, since they may lose their right of residence. If the permit of a third country national who resides in the Netherlands on the basis of a residence permit for a definite period contains the text 'claiming

⁶⁸ Puttick (2015).

⁶⁹ EUCO 1/16 of 19 February 2016.

public benefit may have consequences for residence rights', the residence permit can be withdrawn. Any application for assistance must therefore be reported by the municipality to the *IND* (Immigration and Naturalisation Service, the immigration authority).⁷⁰ The *IND* examines whether the residence rights of the third country national must be terminated as a result of the application for social assistance. In this examination the *IND* has to consider whether the effects of withdrawal are not disproportionate to the means necessary to serve the goals of the Aliens Act and it has to balance the interests of the individual and the costs for the community. In this respect Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) concerning the right to respect for private and family life has to be taken into account.⁷¹

After five years of residence or residing on the basis of the permit mentioned above, the person concerned has a right to permanent residence; a claim for assistance benefit will not affect the right of residence anymore. Third country national then have the same status as Dutch nationals.

From the *Polish* report it appears that third country nationals may receive benefits only if they have the right of permanent residence in Poland. Article 19(8) of the Act on social assistance provides, however, that the municipality has the task to help certain groups of foreigners having difficulties to integrate in society; this is, however, an underdeveloped area.

In *Spain* Article 14 of Organic Law 4/2000 regulates the eligibility for social assistance and social service welfare benefits of foreigners who are not EU citizens. Article 14(1) provides that foreign residents are entitled to social security services and benefits under the same conditions as Spaniards. This Article thus appears to include non-contributory assistance benefits and most likely also the national Back to work allowance. Article 14(1) makes no reference to immigrants without legal status and the national expert interprets this as their being not entitled to these benefits.⁷²

In *Sweden* the conditions on residence are also applied on third country nationals, and if they satisfy these they are treated in the same way as EU nationals.

In the *UK* the tests for EU nationals for eligibility for subsistence benefits are also applied on third country nationals. So apart from the rules on the right to stay, the legal position of third country nationals is the same as that of EU citizens.

2.3 THE PRACTICE FOLLOWED IF AN EU CITIZEN APPLIES FOR SUBSISTENCE BENEFIT

In *Denmark* EU citizens who qualify as workers or self-employed pursuant to EU law have access to social assistance on an equal treatment basis if they fulfil the conditions thereof (i.e. they cannot provide for their own needs and have no spouse/partner who can do so and if they have no capital). Yet, the Danish authorities seem to have a more restrictive concept of 'worker' than the Court of Justice, which might constitute a hindrance for EU citizens.

Another problem is that it is uncertain how long EU citizens can retain their status of worker or self-employed for the purpose of claiming social assistance.⁷³ Finally, it is still unknown how the Danish authorities will assess the Court's case law in *Alimanovic* on the definitions of the concept of worker.⁷⁴

⁷⁰ The right to assistance ends when the *IND* has withdrawn the right of residence.

⁷¹ 30 March 2015, Implementing /motion of the Parliament members Omtzigt/Schut-Welkzijn (Parliamentary papers 33 928, nr. 15).

⁷² This is demonstrated by J.L. Monereo Pérez and C. Molina Navarette in 'Article 14', Monereo and Molina (eds), *Comentario a la Ley y al Reglamento de Extranjería, Inmigración e Integración Social (LO 4/2000 y RD 557/2011)*, Comares, Granada, 2012, p. 262.

⁷³ See for example K. Ketscher, *Socialret – Principper, rettigheder, værdier*, 4. udg. (2014) DJØF p. 325-327.

⁷⁴ Also case C-507/12, *Saint-Prix*, see section 2.6, may lead to a different practice.

Entitlement to social benefits for all EU citizens lawfully residing more than three months in the country who are not workers or self-employed is assessed on a case-by-case basis.⁷⁵ The question is therefore whether a Union citizen is lawfully residing in Denmark,⁷⁶ an issue especially salient in Denmark in respect of homeless persons in shelter homes. According to Danish law, shelter homes, which are to some extent State funded, shall only accept persons who are legally residing in the country. In practice, lawful residence has in this respect been interpreted restrictively since undocumented citizens are excluded (i.e. those who do not have a registration certificate, a residence card or a Danish health card).⁷⁷ Such interpretation conflicts with the Directive as (1) all EU-nationals have an unconditional right of residence within the first three months and beyond when they are actively looking for employment (without registration document) and (2) the registration certificate is not constitutive of the right of residence, which might be documented by other means. The authorities' underlying rationale is that such persons are in any event not lawfully residing in Denmark since they request public support by using shelter homes. They thus do not fulfill the condition of self-sufficiency and are a burden on the social system. This rationale seems to conflict with the Directive, especially with its Article 14, the national expert argues.⁷⁸

In *Estonia* there are no serious obstacles reported on the practices of administering social assistance. Usually EU citizens come to Estonia for work, not for claiming social assistance, the national rapporteur writes. They are most often highly qualified workers, who keep their jobs and do not have to apply for social assistance.

In *Germany* the Federal social court ruled, as we have seen supra, that there is a right to social assistance benefits (pursuant to SGB XII) for securing a subsistence minimum, also in case where EU citizens are excluded from SGB II benefits. The social welfare offices must therefore review whether social welfare benefits should be granted as discretionary benefits. In the Federal Social Court's decision of December 2015, the court held that in the case of a stable residency of over six months, the discretionary powers of the public authority are practically reduced to 'zero', which means that at least social assistance benefits under SGB XII will generally have to be paid to the foreign national.

If an EU citizen applies for subsistence in the *Netherlands* after three months of residence, the municipality determines whether there is a right to assistance.⁷⁹ The municipality also decides whether the *IND* will be asked to check the residence status of the person in question and whether applying for subsistence has consequences for the residence rights. EU citizens are regarded as workers or self-employed by the *IND* if they earn more than 50 percent of the applicable public assistance rate⁸⁰ or if they work at least 40 percent of a fulltime working time (16 hours per week).⁸¹

Job seekers are allowed a period of three months for seeking work. That period can be extended if evidence can be provided that they are still seeking work combined with proof.

Since July 2011 job seekers who want to stay for more than three months in the Netherlands in order to seek work may stay only if they have concrete prospects of getting a job. This means that they must be able to

⁷⁵ Sect. 3 of the Aliens Act of 2013.

⁷⁶ See decisions of the Appeal Tribunal for Social and Employment Affairs (*Ankestyrelsen*) A-191-11 of 8/9/11, A-27-07 of 21/11/07.

⁷⁷ Information gathered from the Danish Charity organization, DanChurchSocial (*Kirkens Korshær*). In January 2013, the organization opened up a shelter home for homeless foreigners. Two-third of the users are from EU-countries and one-fourth from Romania. Most of the users ask for help in understanding and accessing the Danish labour market. For more information, see (in Danish): <http://www.kirkenskorshaer.dk/nyheder/flere-fattigdomsmigranter-s%C3%B8ger-%C3%A5dgivning>.

⁷⁸ It also conflicts with the Ministry of Justice own Briefing Note of 2011, on the possibility of expelling Union citizens who are requesting public support.

⁷⁹ This part is based on a telephone interview with the *IND*.

⁸⁰ www.rijksoverheid.nl/onderwerpen/bijstand/hoopte-bijstandsuitkering, checked on 7 March 2014.

⁸¹ B10, 2.2 *Vreemdelingencirculaire* 2000.

demonstrate that they, for example, are involved in an application process and are actually invited for an interview.⁸²

In *Poland* foreigners who want to claim social assistance face various obstacles, mainly of a language and cultural nature. These decrease when the period of residence has lasted longer due to the learning of the language and of the applicable procedures and work culture in Poland. There is no information on the policies that are applied if EU citizens or workers apply for subsistence or social assistance. Basically EU citizens are to be treated in the same way as Polish citizens.

In addition, Article 19(8) of the Act on social assistance provides that the municipality has the task to help certain groups of foreigners having difficulties to integrate in society. Moreover, according to Article 20(1)(1), the local government has to organise individual integration programmes for certain groups of foreigners. Benefits granted to these specific groups are in fact integration assistance. This support is the only form of integration and assistance available for refugees and third country nationals and for Polish migrants who have returned. However, there is no uniform integration policy and the existing integration policy is in fact marginal. The rules for access to social benefits are imprecise and often encourage abuse; there is a lack of access to information. The staff is often unfamiliar with the situation of migrants; there are language barriers; cultural barriers; religious and customary issues and discrimination issues.

In *Spain* the right to access to subsistence rights for Spanish and other EU citizens is the same. The legislation has not set specific rules for them. The obstacles and difficulties that they may face, when applying for assistance, are also the same as those faced by Spanish nationals.

In *Sweden* since the abolition of the registration requirement, the local welfare offices have to assess the right of residence for every EU citizen seeking social aid and subsequently whether or not a person can be considered *resident* in the municipality where s/he seeks social assistance.

For people who are not deemed to be resident in a municipality where they are staying temporarily, the social services have developed the practice that these persons are only entitled to assistance that helps them to overcome an acute emergency. This emergency aid is usually money for paying the expenses to travel back to the home municipality or, if there is no such municipality, to their home country.

In line with the changes to the status of jobseeker discussed above, in the *United Kingdom* there is now an effective three-month limit to the period of time during which jobseekers' allowance can be claimed by EU migrant citizens whose only right to reside depends upon this status. For a newly arrived EU jobseeker, the first three months of residence in the UK are now categorised as the three-month 'initial right to reside' period, whether or not the jobseeker is in fact actively looking for work at this stage. There is still no formal registration requirement. This seems in line with the *García-Nieto* judgment⁸³ of the Court of Justice.

For periods after the first three months of residence, the habitual residence test is applied. According to a press release of Department for Work and Pensions, the enhanced habitual residence test involves, inter alia, that claimants are required to provide comprehensive evidence of their circumstances, including the housing and family situation and the ties they still have abroad. They will also have to provide more evidence than before that they are doing everything they can to find a job. Officials ask claimants whether their language skills make it less likely that they would get a job in the EU, and whether this could be a barrier to them finding actual employment; they will also be asked about the efforts they have made to find work before coming to the UK.⁸⁴ From 9 April 2014, Job seekers allowance claimants are not always offered access to interpreting services anymore.⁸⁵ This may affect EU citizens whose level of English may be perfectly adequate for low-skilled work,

⁸² This corresponds to Art. 14(3-4) Directive 2004/38.

⁸³ Case C-299/14. EU:C:2016:114.

⁸⁴ <https://www.freemovement.org.uk/the-political-row-over-benefits-and-eu-migrants/>.

⁸⁵ <https://www.whatdotheyknow.com/request/219313/response/543161/attach/4/1.Interpreting%20guidance%203091.pdf>.

but who may struggle with the complex level of English required to pass a Job seekers allowance interview and are thus at risk of being either sanctioned (having benefits withdrawn due to perceived non-compliance with the conditionality rules) or being classed as not having a genuine chance of employment and thus not qualifying as a jobseeker.

Access to Child Benefit and Child Tax Credit is also potentially affected by the introduction of the minimum earnings threshold, since only those who qualify as workers or self-employed people are deemed eligible for these benefits.⁸⁶

Furthermore, since 1 July 2014, newly arrived EU jobseekers cannot claim child benefit or child tax credit since they are not considered to be habitually resident (and thus eligible) until they have lived in the UK for a minimum of three months (see above).

In 2015 Universal Credit was introduced, which is a new single benefit payment that will replace the existing benefits of Income-based Jobseeker's Allowance, Income-related Employment and Support Allowance, Income Support, Child Tax Credit, Working Tax Credit, and Housing Benefit in the UK. The regulations governing eligibility for Universal Credit state that a person who has only the right to reside as EU citizen or jobseeker is not eligible for a Universal Credit award as of 10 June 2015 anymore.

The Government considered that, for the purposes of EU law, Universal Credit is a social assistance benefit, and as such EU jobseekers can be denied it.⁸⁷ Initially this seemed contrary to the *Collins* judgment, but the *Vatsouras* judgment seems to support this view, apart from family benefits. Another issue is that the interpretation of the exclusion of jobseeker – including those who have already worked some time – is too broad and thus also families who have been in the UK for many years but fall out of work, those who have experienced family breakdown, and the homeless can be negatively affected.⁸⁸

2.4 IS SUPPORT AVAILABLE IF SUBSISTENCE BENEFITS ARE REFUSED?

In *Denmark* all citizens in need, regardless of their nationality, can be granted additional benefits such as a contribution to single-item expenses, to pharmaceuticals and dental treatment on a discretionary basis by the municipality pursuant to the Active Social Policy Act. This may therefore vary on the place of residence.⁸⁹ Yet, help to the poorest in society has dramatically shrunken over the last years.⁹⁰ In practice in most cases foreigners who are refused social assistance will only help to return home.

In *Estonia* there are no specific rules for the situation when subsistence benefits are refused. In such a situation one can still apply for extraordinary social assistance. The latter benefit is paid to every person staying in Estonia in case of need, whereas ordinary social assistance (benefits in kind and in cash) is provided only to those legally staying in Estonia.

We have already seen that in *Germany*, as a result of the constitutionally guaranteed human right to a subsistence minimum (Article 1(1) and Article 20 of the Basic Law (GG)) for EU citizens who are excluded from SGB II benefits, the Federal Social Court gave them access to minimum benefits.⁹¹ For citizens of the

⁸⁶ HMRC, *Child Benefit and Child Tax Credit*.

⁸⁷ See Kennedy, *Measures to limit migrants' access to benefits*, 2015, p. 24-28 for a discussion of responses by the Social Security Advisory Committee to the exclusion of EU jobseekers from UC.

⁸⁸ Gray, *The Universal Credit (EU Jobseekers) Amendment Regulations 2015: Letter to the Secretary of State for Work and Pensions*. London, Social Security Advisory Committee, 2015.

⁸⁹ Udvalg om Udlændinges ret til velfærdsydelse (Commission on foreigners' right to welfare benefits), Rapport om optjeningsprincippet ift. danske velfærdsydelser (Report on residence requirements for foreigners' access to Danish welfare services, March 2011, p. 126-127.

⁹⁰ Ugebrevet A4 (2015).

⁹¹ For a discussion of the right to benefits pursuant to the [German] Act on Benefits for Asylum Seekers (AsylbLG) in this context, see the Act on Benefits for Asylum Seekers at: http://www.gesetze-im-internet.de/asylblg/_1.html.

contracting states to the European Convention on Social and Medical Assistance, a right to equal treatment is derived from Article 1 of the European Convention on Social and Medical Assistance. In a notification to the Secretary General of the Council of Europe, the Government made a reservation that because the provisions in SGB II were 'new laws', citizens of the other contracting States did not have to be granted SGB II benefits. The extent to which this reservation is subject to debate.⁹²

In the *Netherlands* food is available for those in need from the food banks (*voedselbanken*). Access is based on strict criteria, laid down in a policy document of the Organisation of Food banks Netherlands (*Voedselbanken Nederland*), a (private) coordination organisation of most of the food banks in the Netherlands.⁹³ The most important criterion is that the amount of money which remains after all expenses for subsistence are disregarded does not exceed 180 euro a month.⁹⁴ The second requirement is being registered with the Civil Registry (Municipal Personal Records Database). Since for registration legal stay is required, persons not legally staying in the Netherlands cannot make use of the food bank service. Fulfillment of the conditions (financial condition, legal residence), however, does not automatically imply a right to actually receive food from the food bank, as in practice food banks often have a waiting list.

In *Poland* it is, generally speaking, in the interest of society that the needs of deprived persons are met. However, the absence in the social laws of a clear directive providing for an absolute obligation of the State to respond to the needs of these persons is used as a justification not to give such kind of assistance.

In *Spain* the last safety net of the Spanish social welfare system consists of 'aids of extreme necessity'. Such aids, discretionary and limited by the budget constraints, are awarded to anyone in an emergency situation, regardless of his/her nationality and administrative status. If this protection mechanism fails, the only thing left is access to private charity and the work of NGOs.

In *Sweden* persons are only entitled to assistance to overcome an acute emergency. In other words, they only have the right to emergency aid from the municipality where they are temporarily staying. The emergency aid usually means financial aid for the travel expenses to travel back to the home municipality.

In the *United Kingdom* for people who are not eligible for publicly funded benefits because they are 'subject to immigration control' (according to the Immigration and Asylum Act) but who are the carers of children under the age of 18, local authorities must decide whether or not to provide services on the basis of a Child in Need and a Human Rights Assessment. If they conclude that withholding or withdrawing support would breach the child's (and family's) human rights under the European Convention on Human Rights or their Community Treaty rights (in the cases of European Economic Area nationals), that is they would be subject to destitution, degrading treatment etc),⁹⁵ the local authority must provide them with basic support (including food and housing).

⁹² See for example the decision of the [German] Federal Social Court of 12 December 2013–B 4 AS 9/13 R, which assumes that the reservation is valid; as do the decisions of the same court of 3 December 2015–B 4 AS 44/15 R and B 4 AS 59/13 R.

⁹³ <http://voedselbankennederland.nl/nl/criteria-om-in-aanmerking-te-komen-voor-pakket.html>. Almost 160 food banks are member of the Dutch Association of Food Banks.

⁹⁴ Plus for every child – person under the age of 18 – and other adult(s) in the household respectively 50 and 60 euro's extra.

⁹⁵ See NRP Network, 2011.

2.5 CAN PERSONS BE EXPELLED IF THEY CLAIM SUBSISTENCE BENEFIT?

In Denmark decisions refusing or terminating the right of residence on the specific ground of lack of sufficient resources can only be taken within the first three months of arrival and by an administrative decision.⁹⁶ This possibility is regulated in the Aliens Act.⁹⁷ According to *Udenfor*, a Danish NGO dedicated to the protection of homeless people, 278 EU-nationals were expelled on grounds of lack of sufficient economic resources between 1 January 2009 and 30 June 2011.⁹⁸ According to this NGO a person who was in possession of less than 35 euros (corresponding to the price of a night at a hostel) was regarded as lacking sufficient resources and was expellable. A Briefing Note of 2011 from the Ministry of Integration referring to Article 14 of the Citizenship Directive and the *Grzelczyk* judgment seems to have put an end to this practice.⁹⁹ It follows that expulsion on grounds of lack of resources within the first three months can only be the consequence of the person requesting economic support from the State while this fact in itself is not sufficient for expelling him/her. The authorities have to assess on the basis of the personal circumstances of each applicant whether the person is an unreasonable burden. This can never be the case upon the person's first application for social benefits.

In respect of EU citizens and their family members who have resided for more than three months in Denmark, their right of residence may be terminated where they no longer fulfill the conditions for residence pursuant to EU law. The Aliens Act stipulates that illegal residence is a ground for expulsion.¹⁰⁰ It can thus happen that persons are expelled on the ground that they cannot be considered as economically active and do not fulfill the condition of self-sufficiency. There is no reported case law on this issue concerning EU citizens. However, some expulsions on grounds of protection of the public order are inherently linked to economic considerations. For example, fines for minor offenses, such as 'squatting', have justified expulsion on grounds of protection of the public order, but were subsequently annulled by the Supreme Court.¹⁰¹ Yet, there is evidence that expulsion on economic considerations has found place in respect of EEA citizens on the basis of the Nordic Convention.¹⁰² This convention has secured an extended right of free movement to the citizens of the five Nordic countries members already long before the Citizenship Directive came into force. Since EEA citizens are also protected by the Citizenship Directive, their expulsion should have been assessed in this light and might conflict with the Nordic convention.

Finally, a recent practice of the Danish police, especially targeted at Roma people, is to issue them with fines for illegal residence if they do not have a registration certificate after the first three months of their stay and detain them until they have paid their fine. The ground for detention is to facilitate deportation, but the persons concerned are in practice released upon payment of the fine.¹⁰³ Finally, it is still unknown whether the

⁹⁶ See also C. Jacqueson, *Union citizenship – Development, Impact and Challenges, Report on Denmark*, DJØF 2014, esp. p. 456-457.

⁹⁷ Art. 28 of the Aliens Act of 2013. In respect of jobseekers, the limit is 6 months or more provided that they can document that they are actively looking for a job and have serious chances of obtaining one.

⁹⁸ The numbers are based on the statistics of the Danish Immigration Service, see Benedicte Ohrt Fehler, *Udenfor*, 'Formanskabet bør sætte fokus på hjemløse EU-borgere' (The EU presidency shall focus on homeless EU-citizens), of 6 December 2012 on <http://udenfor.dk/dk/menu/om-projekt-udenfor/det-mener-projektudenfor/formandskabetborsattefokus-pa-hjemlose-eu-borgere>.

⁹⁹ Briefing Note of the Ministry of Integration of 30 June 2011.

¹⁰⁰ See Sect. 25(b) of the Aliens Act of 2013.

¹⁰¹ Judgment of the Supreme Court of 31 March 2013 in case 264/2010, reported in U.2011.1794H.

¹⁰² See K. Ketscher, 'Hjemsendelse af Nordiske borgere - en kritisabel dansk praksis', in K. H. Søvig, S. Eskeland Schütz and Ø. Rasmussen (eds) *Undring og Erkjennelse*, Fagbokforlaget 2013, 279-291. The author reports two cases, one concerning an Icelandic pregnant woman who had resided over one year in Denmark where she was living with her husband and had partly worked and partly received social help. She was refused the minimum means of subsistence benefit and was asked to leave the country. The other case concerned a Swedish national who suffered from psychological diseases linked to her previous situation as a Palestinian refugee. Pursuant to a court order, she had to leave the country as she was not self-sufficient and did not fulfill the condition of three years residence in Denmark pursuant to the Nordic Convention.

¹⁰³ Information gathered from the Danish Charity organization, DanChurchSocial (*Kirskens Korshær*).

European Court of Justice's recent *Brey* and *Dano* judgments will have an impact on the current practice in Denmark.

In the *Netherlands* in situations where an application for assistance is made before the person has a right to permanent residence, the *IND* can decide to withdraw the right of residence. In that case the person has to leave the country within four weeks.¹⁰⁴ If the person in question has not left the country on his or her own initiative, s/he can be expelled.¹⁰⁵

However, an application for public assistance will not automatically lead to termination of the right of residence. In case of an application the municipality will notify the *IND* of the claim for social assistance. The *IND* can then decide that the person is no longer allowed to stay in the Netherlands; until this decision the person remains entitled to social assistance provided the conditions for this benefit are met.

The Ministry of Justice has made extensive policy rules on how the *IND* has to act in case of EU citizens applying for social assistance.¹⁰⁶ According to these rules, claiming social assistance before having resided five years in the Netherlands does not automatically lead to an expulsion measure. If the residence period is longer than three months and shorter than five years the *IND* has to consider whether determining the right of residence as a consequence of claiming social assistance is proportionate. The proportionality principle requires that the *IND* has to take into account all circumstances, including the reason why the person concerned is no longer able to provide for his or her living and that of his or her family, whether this reason is of a temporary or a permanent nature, the nature of the ties with the country of origin, the family status, the medical condition, the age, other claims for social security, the level of social security contributions that have been paid, the degree of integration of the person and his/her family in Dutch society, and the future prospects of his/her claim to social assistance.

An application for benefit has in any case no effect on the right to residence if the EU citizen or his/her family member have become victims of domestic violence or victims of human trafficking.

Besides that, the *IND* does not end the residence rights if the EU citizen cares for a minor child admitted to general education and if the citizen performs work or has performed work as an employee.¹⁰⁷

According to the policy rules the longer EU citizens and their families claiming social assistance (benefit or lodging) have resided in the Netherlands, the less easy they are evicted. In other words, the longer they have stayed in the country, the less they are seen as an unreasonable burden.

Generally, unless personal circumstances oppose so, a request for social assistance payment in the first two years of residence means that one does no longer meet the conditions under which the permission to stay in the Netherlands was granted.¹⁰⁸ From the third year of residence onwards, it is possible to apply for social assistance without being expelled. No expulsion measures are taken if in the third year during less than two months for less than 50% of the applicable subsistence benefits rate is claimed; during less than three months supplementary assistance (for an amount which is up to 50% of the subsistence benefits norm); in the fourth year less than four months, respectively six months; and in the fifth year less than six months respective nine months. One can receive social assistance during less than fifteen months in a period of three years without the effect that one is expelled.¹⁰⁹

It is important to mention that the municipality does not have the authority to determine whether a person has no right of residence (anymore). This has to be decided by the *IND*.

Here there is a problem for the *IND*. Unlike in case of third country nationals who have to register with the *IND* in order to have a Provisional Residence permit and/or a residence permit, EU citizens are more difficult to

¹⁰⁴ Art. 62 Vw (Aliens Act).

¹⁰⁵ Art. 63 Vw (Aliens Act).

¹⁰⁶ *Vreemdelingencirculaire 2000* (Aliens Circular).

¹⁰⁷ *Vreemdelingencirculaire 2000* (B), B10, 2.3.

¹⁰⁸ *Idem*.

¹⁰⁹ *Idem*.

trace, as they are not obliged to register with the *IND*. Their lawful residence derives directly from EU law. Thus, with regard to lawful residence, municipalities have to consult the *IND* in case of a benefit claim.¹¹⁰ Until *IND* has taken a decision a person is lawfully staying the Netherlands.¹¹¹

In 2013, 170 EU citizens were requested to leave the Netherlands because they had made an application for social assistance.¹¹²

After a circular of the Minister of Social Affairs of 20 November 2014, municipalities began to consult more frequently the *IND* if they doubt whether the an application for social assistance may have consequences for the right to residence of an EU citizen.¹¹³

In the Netherlands there is now a debate on the problem that EU migrants claim social assistance benefits where it turns out later that their right of residence has ended as a result of the payment of benefit. After all, this is quite unfortunate if the person was not aware of this effect. The Government are now investigating a method by which the assessment of eligibility for assistance benefits coincides as much as possible with the assessment of the consequences for the right to residence. This will avoid the payment of assistance benefits in situations where it subsequently appears that the residence right ends due to the payment of the benefits.

In the Parliamentary year 2013/14 two Members of Parliaments submitted a motion requiring the government to regulate in an act that municipalities prior to the granting social assistance to an EU citizen must check with the *IND* the implications of the application for assistance for the lawfulness of the residence.¹¹⁴

In *Polish* law there is no regulation according to which an application for social assistance benefit would initiate a procedure to expel from the country a person who does not have the right of residence (or who lawfully stays in Poland). There are situations where the application for assistance results in illegal residence of the claimant and notification of this to the competent authorities. However such cases occur very seldom, mainly because of the fact that foreigners who illegally¹¹⁵ reside in the territory Poland rarely apply for assistance. There is no such provision specifying the period during which an EU citizen may claim benefits before expulsion.

In *Spain*, the provisions of the Citizenship directive ensuring a right of residence on the Spanish territory for a period of longer than three months if EU citizens are workers or self-employed persons or have sufficient resources are laid down in Article 7.1 b Royal Decree 240/2007. For the determination of the sufficiency of resources, there is no fixed amount, but the personal situation of the citizen is assessed. This amount shall not be higher than the threshold below which Spanish nationals become eligible for social assistance, or higher than the amount of the minimum Social Security pension (Article 7.7).

Article 9a of the Royal Decree provide that where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 8 and 9, competence authorities may verify if these conditions are fulfilled. This verification shall not be carried out systematically. The recourse to social assistance by an EU citizen will not have the automatic consequence of an expulsion measure. Both provisions are an implementation of the Citizenship Directive.

Until 2007 Spain applied the Citizenship Directive generously: in order to be granted the right to reside in Spain, it was sufficient to prove that one was national of an EU Member State. Expulsions of EU citizens took place only for reasons of public policy, public security or public health. The amended Act follows the Citizenship Directive literally and it is now possible that EU citizens do no longer have the right to reside after the initial three months. However, the Decree does not regulate expulsion for reasons different from those mentioned above (i.e. public policy, public security or public health), so claiming social assistance cannot be a ground.

¹¹⁰ CRvB 19 March 2013, NL:CRVB:2013:BZ3857.

¹¹¹ ABRvS 14 November 2007, NL:RVS:2007:BB7789.

¹¹² *Kamerstukken II* (Parliamentary papers) 2014/15, 29 407, no. 198.

¹¹³ *Idem*.

¹¹⁴ *Kamerstukken II* 2013/14, 29 407, no. 166.

¹¹⁵ NB. We will use the term illegal or illegally here in the study even though these are not very pleasant terms. Here they mean that the conditions for a right to residence are not fulfilled.

Expulsion is also regulated by Organic Law 4/2000 on the rights and freedoms of foreigners in Spain and their social inclusion. This applies, however, only to EU citizens in respect of those aspects that may be more favourable than those regulated by Royal Decree 240/2007. Clearly, expulsion is not more favourable than what is regulated in the said decree, so the Organic Act cannot, the Spanish report argues, be considered applicable to EU citizens. EU citizens can therefore not be legally expelled from Spain because of having insufficient means or claiming social assistance, the expert argues.

In *Sweden* EU citizens who do not have a right of residence can formally be expelled during the first three months from the country if they become an unreasonable burden on the aid system. EU citizens who have right of residence are not to be expelled during the first three months. In practice, EU citizens are very rarely expelled from Sweden. A first reason is that since the right of residence is no longer registered it is hard to prove how long an EU-citizen has been staying in Sweden. Second it is hard to realize expulsion since EU citizens can simply leave Sweden and then return to re-new their three-month period

On the *United Kingdom's* expulsion rules and practice no specific information was given in the national report.¹¹⁶

2.6 IS THERE NATIONAL CASE LAW ON THESE ISSUES?

In *Denmark* there is very little case-law on the issue of expulsion on grounds of becoming an unreasonable burden, so it is difficult to assess when the 'invisible' line is crossed and expulsion is ordered.

According to the Note of the Ministry of Integration of 2011, a first application will never lead to expulsion. When social assistance or benefits have first been attributed, it will depend on a case by case assessment when the payment of benefits will have to be terminated and the citizen will be asked to leave.

In *Estonia* so far there is no case law that concerns social assistance to EU citizens and third country nationals.

In the *Netherlands* foreigners residing legally in the Netherlands can lose their right of residence if they have applied for social assistance benefits. A recent example is that of a German who registered by 19 December 2012 with the Municipal Personal Records Database.¹¹⁷ As of 8 October 2013 she received a benefit under the Work and Public Assistance Act. This led to termination of the right of residence of the claimant as an EU citizen. According to the *IND* there was no right to stay longer than three months in the Netherlands. This was due to the fact that the claimant had not fulfilled the condition of having a real chance for work during and prior to the contested decision. Subsequently the court decided that the *IND* considered correctly that the claimant, relying on public funds, represented an unfair burden on the public resources. The personal circumstances of the claimant were not considered as valid grounds to waive termination of residence. This decision seems in line with the *Dano* case.

There are different other cases where claimants were not entitled to social assistance benefits because they did not comply with the condition that they were legally residing in the Netherlands. In 2006 the Administrative High Court decided that the lawfulness of residence directly arises from EU law, as laid down in the Treaty on the European Union.¹¹⁸ In that case, the municipality board rejected the request of a plaintiff for social assistance benefits. This was done since the *IND* had inserted a certain code at the person's name in the Personal Records Database, meaning that he was no longer entitled to a valid residence permit. The Administrative High Court decided that it is not sufficient to rely solely on the code in the Database. The municipality should have examined independently from the *IND* whether the applicant belongs to the circle of economic active citizens, set out in Directive 2004/38/EU.

¹¹⁶ See further <http://www.ft.com/intl/cms/s/0/0379858e-5b96-11e5-9846-de406ccb37f2.html#axzz40cAsk4rC>.

¹¹⁷ NL:RBDHA:2015:5204.

¹¹⁸ NL:CRVB:2006:AY3868.

In another case, the Municipality Board, that is responsible for social assistance, and the claimant were divided on the question whether a request for social assistance benefit terminates the legality of residence in the Netherlands.¹¹⁹ The Administrative High Court ruled that the Municipality Board had no jurisdiction to determine independently that by applying for social assistance there was no right of residence (any more). The Municipality Board should have entered on this question into consultation with *IND*. Thus, the contested decision was not prepared with the necessary care. The Municipality Board had wrongly based the rejection of the application on the ground that the applicant, as a result of having requested for assistance, no longer was residing legally in the Netherlands and therefore was no longer entitled to social assistance benefits. In this case article 21 TFEU, the right of free movement and residence of citizens, and Article 7, first paragraph, preamble and under b, Article 14(2) and Article 24(1) of Directive 2004/38 were invoked. The Administrative High Court decided similarly in other cases.¹²⁰

Another case concerned the interpretation of Article 21 of Directive 2004/38.¹²¹ The appellant, of Italian nationality, came to the Netherlands in 1983 and was in 1997 declared an undesired foreigner. As a result of a judgment by the European Court of Justice of 7 June 2007¹²², the declaration of undesirability was removed, starting from 24 August 2007. The Italian returned to the Netherlands on 3 May 2011 and requested on 4 May 2011 a social assistance payment. The judicial question at stake was whether the claimant had a right of permanent residence based on Article 16(1) of Directive 2004/38. The court firstly stipulated that the decision of removal *until* 24 August 2007 could be – and has been – lawfully executed.¹²³ Therefore, given the wording of Article 21, the period of residence is not continuous. The court added that even if one supposes that the claimant could derive a permanent residence right from Article 16(1), he will lose this right because of the time of absence, as laid down in Article 16(4) of the Directive: the appellant returned after more than two years after his departure, namely almost four years.¹²⁴ The claim for social assistance benefits has rightly been rejected.

In recent case law judges at the administrative courts are inclined to interpret the criteria laid down in Directive 2004/38 rather strictly, especially in terms of evidence, requiring that it must be unambiguously clear that all criteria are met. An example to illustrate this¹²⁵ is that of a claimant with Bulgarian nationality who requested for a social security payment on 8 March 2012. The claimant had been staying in the Netherlands for more than 3 months and less than 5 years. The claim was rejected by the Municipality Board. The claimant stated that she was a self-employed person and economically active and therefore entitled to reside in the Netherlands. This argument was dismissed by the court on the basis of not fulfilling the criterion – deriving from EU case-law – of performing effective and genuine activities, that is the activities should not be marginal and ancillary.¹²⁶ The claimant's performed activities, such as driving her ex-partner to his work and helping in loading and unloading goods, were – in the view of the court – not sufficient to satisfy the afore-mentioned criterion.¹²⁷ The claimant stated that after her divorce she has been self-employed in her one-person business in cleaning and she submitted two bills, amounting to a sum of 500 euros. The court decided that the claimant had insufficiently proven that she actually performed those activities and that the bills were actually paid.¹²⁸ Finally, the claimant referred to article 8 of the European Convention on Human Rights. She stated that the vulnerable position of

¹¹⁹ NL:CRVB:2013:BZ3857.

¹²⁰ NL:CRVB:2013:BZ3853, NL:CRVB:2013:BZ3854 and NL:CRVB:2013:BZ3855.

¹²¹ NL:CRVB:2014:2352.

¹²² Court of Justice EU 7 June 2007, C-50/06.

¹²³ NL:CRVB:2014:2352, 4.6`.

¹²⁴ *Idem*, 4.6.

¹²⁵ NL:RBAMS:2013:BZ5689.

¹²⁶ See for example: Court of Justice June, case C-139/85 (Kempf).

¹²⁷ NL:RBAMS:2013:BZ5689, 3.10.

¹²⁸ *Idem*, 3.15.

herself and her daughter would require special protection.¹²⁹ The court concluded that the claimant had no lawful residence in the Netherlands in the disputed period and therefore did not belong to the circle of beneficiaries under the *WWB* (Participation Act). The Municipality Board was therefore obliged to reject the requested social assistance benefits.

In *Poland* there is no case law known on the topic of social assistance and foreigners.

In *Spain* a non-European citizen, having a registered partnership with a Spanish woman, applied for residence for a period of more than three months as family member of a EU citizen under Article 7 of RD 240/2007.¹³⁰ The authorities refused the request on the grounds that the applicant had no own income and that his female partner received only a non-contributory benefit of 357.70 Euros, that was not sufficient to prevent the applicant from becoming a burden on the Spanish social assistance. The judge, on application of the Citizenship Directive, considered those arguments insufficient and noted that the Administration should have developed a more detailed study of applicant's personal situation, taking into account other factors and not just the amount of non-contributory pension.

In *Sweden* no case law is known.

In the *United Kingdom* one of the most famous cases taken to the European Court of Justice in relation to 'worker' status and the right to reside was *St Prix v DWP* (C-507/12). The issue concerned whether Ms Saint Prix, a French national, who worked in the UK and became temporarily unable to work due to pregnancy and childbirth (and had no continuing employment rights) could still retain her status as a 'worker' in EU law and therefore her right of residence in the UK and hence her right to claim income support on grounds of pregnancy. Her claim for Income Support was rejected by the DWP on the grounds that she had lost her status as worker and therefore the right to reside. She appealed and the UK Supreme Court made a reference to the European Court of Justice. The Court ruled (on 19 June 2014) that a woman who gives up work, or is seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth, retains the status of 'worker' under EU law. Retention of worker status in this case was because the concept of 'worker' has to be interpreted broadly. Free movement allows the right of people to move freely within the EU and to stay there to seek employment in other Member States. Hence classification of 'worker' does not necessarily depend on the actual or continuing existence of an employment relationship. The Court accepted that a Union citizen would be deterred from exercising her freedom of movement within the Union if, having given up work due to pregnancy, she risked losing her worker status, and further noted that EU law gave special protection for women in connection with maternity, such as that continuity of residence was not affected, amongst other things, by an absence of up to 12 months for 'important reasons such as pregnancy and childbirth'. This judgment was followed in several national cases before UK courts.

2.7 ANALYSIS AND RECOMMENDATIONS

2.7.1 GENERAL

It is interesting to see that there are important differences between the countries of our study in respect of their regulations and practices on subsistence benefits. In some of the countries there are hardly or no specific rules or practices concerning EU citizens claiming subsistence benefits, e.g. Estonia and Poland. These countries require that, in order to be entitled to social assistance, one has to be lawfully residing in the country and registered in the Civil or the Population Register. In practice in these countries few persons claim public assistance. It seems that these two countries have in common that apparently only persons having sufficient work to earn a sufficient income in the host country go and stay there. Benefit rates are low and do not really

¹²⁹ The vulnerability – according to plaintiff – results from being a single parent with a minor school going child, decided to leave her ex-partner due to domestic violence.

¹³⁰ Judgment no. 220/2013 of 18 June 2013, of the Court of Administrative Litigation No. 1 of Santander.

guarantee a subsistence level, so this might be another reason that persons seek alternatives to having to rely on subsistence benefit. The result is that these countries have little regulation, case law and information on EU citizens claiming social assistance.

To some extent this relationship between few immigrants and few claims is reflected in the Spanish situation, on which the national report remarks that some regions have a much larger influx of foreigners than others, and that such popular regions have much stricter laws than others (strict in the sense of imposing conditions on nationality or period of prior residence). Of course, this relationship is not really surprising, but it is worthwhile to point at this here, since it explains the considerable differences in the descriptions of the systems of the countries in the previous sections.

Countries with many types of subsistence benefits and (tax) supplements, such as the UK, have particular problems with mobile persons claiming these, in particular since the jobs in which mobile persons work in often have low wages and they can often only find part-time work.

A recommendation following from this is that this relationship between streams of mobile persons, benefit system and labour markets is a good reason for Member States to consider, in the first place, whether they can make their labour market more robust against immigration by persons with very weak prospects on their labour market. An important way to do this could be to take general measures that workers have substantial jobs with decent incomes, so that no longer considerable numbers of workers (both nationals and EU citizens) have to be subsidized by means-tested benefits or supplements. Examples are raising the level of statutory minimum wage, lowering or removing minimum thresholds in social security contributions and strengthening dismissal law. Of course it is the Member State's exclusive area of law making, but in our view Member States that face particular problems with mobile persons could implement more structural approaches than respond to the problem than continuously strengthen the tests for benefits.

We can also see important differences in how countries approach EU law. For instance, German courts systematically raised questions to the Court of Justice to make sure what the position was of EU citizens in the first period (first three months (*Nieto*), after three months (*Dano*) and after losing (marginal) work (*Vatsouras*), even though they could have decided the cases otherwise. In as far as I can see they could also have decided to simply refuse unemployment benefit to a person not seeking work. But now they had this answer of the European Court of Justice and systematically the several roads to benefit tourism were closed. And after this was made sure, it was decided that persons in a *Dano* like case were to be given social assistance on the basis of the Convention on Social and Medical Assistance. Also the Netherlands follows EU law very closely. Other countries try – as was seen in the national reports – to solve their problems themselves, without making all use of the possibilities given in the Citizenship Directive and case law of the Court of Justice and national rapporteurs write about nontransparent situations and a lack of knowledge of EU law. Of course, it is very difficult to know to what extent this is the case, but it is worthwhile for countries to consider this. After all, it now seems that sometimes they do not award benefits where this is required and they pay benefits when it is not required.

2.7.2 THE DEFINITION OF WORKER AND FORMER WORKER

We will now go into some differences in interpretation of crucial elements of the applicable law.

1. Worker

Workers within the meaning of EU law have the right to stay in the host country and must not be discriminated against on the ground of nationality from the very beginning of their stay. If they claim subsistence benefit they cannot be expelled from the country as long as they are still a worker.

However, what is meant by the term ‘worker’? Although there is not a definition of worker in the EU Treaty and Regulation 492/2011, the Court of Justice explicitly adopted a broad approach and we can see in most national reports that this definition plays a role in national discussions. However, we can also see deviations from this. The British rules require that one has an income above the minimum earnings threshold, i.e. 155 British pounds (circa 207 euros) a week. Since the hourly minimum wage for persons over 21 is 6.70, this means 23 hours a week for minimum wage earners. This threshold is quite high, since in the *Vatsouras* judgment the Court considered that a person who earned, according to the Advocate General, circa 100 euros a week did not earn such a small wage that he was disqualified as a worker. It cannot be said that the British rules are against EU law, however, since in the assessment there is also a second step for persons who do not meet the threshold: during this step it is investigated whether a person can despite not meeting the minimum earnings threshold be a worker. In the *Netherlands* EU citizens are regarded as workers or self-employed. if they earn more than 50 percent of the applicable public assistance rate, i.e. more than 50% of 1,524 euro a month for a couple or more than 50% of 1,060 euro for a single person in 2016, or if they work at least 16 hours per week.¹³¹ This requirement is in principle lower than in the UK, but it seems still to be higher than in the *Vatsouras* judgment.¹³²

In *Sweden* there is no minimum number of working hours applied for the recognition of worker. For other countries this information is not given, although some of the rapporteurs remark that they think that in the practice of their countries also higher requirements apply than following from the case law.

Although it is not possible to draw very sharp conclusions from this, it is clear that the uncertainty on the concept of worker can create legal uncertainty. This can certainly have a negative impact on the right to free movement. It is therefore recommended that the term worker is defined in EU legislation, of which Regulation 492/2011 is most appropriate, in order to realize more transparency and legal certainty.

Another issue is that the legal position of a worker is relevant to various purposes. The UK rules provide, for instance, that being a worker is not only relevant to having the right to stay, but also to eligibility to some benefits, which are not all subsistence benefits.

It is recommended that a distinction is made between these effects, since a measure to restrict eligibility for benefit by raising the number of hours a week one has to work can otherwise also lead to shorter periods for the right to stay. Distinguishing these two elements makes it also more easy to define in which situations a person is eligible for benefit and in which s/he is not.

II. Persons who lost their work

Persons who worked during a certain period and then become unemployed or disabled retain, according to the Citizenship directive, during a certain period their position as worker; consequently they also retain their right to stay for a certain period and can invoke the non-discrimination provision of Regulation 492/2011.

From the cases that led to questions to the Court of Justice it appeared already, see section 2.1, that Member States have been reluctant to respect these rules in case of persons who work for a short period only or who have a low income (e.g. *Vatsouras* judgment). This reluctance appeared also in the case of a woman who went with pregnancy leave (*St Prix* judgment, discussed in section 2.6). The Court of Justice follows a consistent approach: the right to free movement entails that the term worker has to be interpreted broadly, with the result that also the right to stay following from this approach is to be treated generously.

¹³¹ B10, 2.2 *Vreemdelingencirculaire* 2000.

¹³² In the chapter on education we will see that the criteria for ‘worker’ in the rules on student grants are different than in those on subsistence benefits.

From the British report it appears that the British rules were changed: as from January 2014 persons who worked for less than a year retain the status for six months without – as was before the case - a chance of extending this period by showing that they have a genuine chance of finding work again. Other country reports did not go detailed into this issue. There may be considerable legal uncertainty for the persons concerned.

2.7.3 RULES ON ELIGIBILITY FOR SUBSISTENCE BENEFITS

2.7.3.1 THE CONDITION THAT YOU MUST STAY LEGALLY IN THE COUNTRY

A common condition in all the countries of this study is that one is eligible for social assistance only when one is legally residing in that country. This condition is in principle consistent with EU law, as was confirmed by the Court of Justice in the *Dano* judgment.

‘In principle’, since important is, of course, how the term ‘legally residing’ is defined. For this purpose the Citizenship directive is relevant, which defines how long the categories of persons distinguished in the directive have the right to stay. These distinctions are between (a) persons who are not in work, (b) persons who are in work and (c) persons who were in work.

- (a) The first category has the right to stay, but during the first five years one must have sufficient resources not to become a burden for the public assistance system. A major factor of uncertainty is what is meant by ‘sufficient resources’. There is no general definition of this requirement and from the national reports it appears that most countries do not have general and hard rules, but consider this on a case by case basis. This can create legal uncertainty.

This is the more relevant now the Court of Justice has connected the applicability of the non-discrimination rule to the right to stay according to the Citizenship directive. Thus, where Ms Dano had the right to legally stay in Germany according to her German residence permit, she did not have this right to stay according to the Directive and thus could not invoke the non-discrimination provision. This discrepancy is not very fortunate.

- (b) Persons who are workers within the meaning of EU law have the right to stay. That is also true in case of marginal work and if they have to apply for social assistance. If Member States deny such status by having a high threshold for qualifying a person as a worker, this affects their right to legally stay in a country.
- (c) The third category was discussed in the previous section as well. We have seen that there is pressure on narrowing this group and also here there is legal uncertainty.

2.7.3.2 THE CONDITION THAT ONE HAS TO RESIDE IN THE COUNTRY

The Citizenship directive mentions the conditions for having a right to stay and the possibility to exclude persons from the right to social assistance. Residency as such is not mentioned in the Citizenship Directive as a condition that can be required for eligibility for social assistance.

The requirement that one has to reside in the country can be argued to be a form of indirect discrimination, since it affects mainly foreigners. However, it suffices to refer to case law of the Court of Justice on special non-contributory benefits (*Kersbergen-Lap* judgment – see Chapter 1), where the Court argued that the non-export of these minimum benefits is justified since they are closely linked to the socio-economic situation in the country that provides them, since they are based on the minimum wage and the standard of living in that Member State. Thus the Court has in the past accepted that the grant of benefits closely linked with the social environment may be made subject to a condition of residence in the State of the competent institution and therefore this condition is not problematic.

2.7.3.3 THE CONDITION THAT ONE HAS RESIDED A MINIMUM PERIOD IN THE COUNTRY

Another type of condition is, however, that one *must have resided a particular period in the community* (country, municipality, region) concerned.

Article 24 of the Citizenship directive gives Member States the right to exclude persons during the first three months of their stay from social assistance. The condition on the duration of residence is thus limited to this period. If a longer period is required, there is a suspicion of indirect discrimination, since the condition can be easier satisfied by own nationals than foreigners.

In that case it has to be investigated whether there is an objective justification for this requirement, i.e. whether it is adequate and proportional. For labour market schemes, such as job seekers allowances, and for study grant schemes the Court accepted that Member States can pose conditions requiring a real link between the job-seeker and the community (e.g. *Förster*, *Vatsouras* judgments). This case law does not concern social assistance.

Whether the justification that one has to have a link with the society also applies to social assistance is unclear. Given the approach of the Citizenship directive and the nature of social assistance it is doubtful whether a minimum period of residence can also be required for subsistence benefits. After all, when one is in need one has to be helped immediately and there is nothing in the nature of the scheme that is an argument for a requirement on prior residence, apart from that already mentioned in the directive.¹³³

2.7.3.4 FURTHER CONDITIONS ON REGISTRATION AND RESIDENCY

From the national reports, it appears that national laws contain additional elaborations of residence conditions that may be problematic for the free movement of workers and persons and that have as such not been subject of case law before the Court of Justice yet. We can distinguish the following elements.

Residence is defined by being registered in a register

In two countries (Denmark, Sweden) registration as resident is a very important condition of the whole national social security system. In Sweden the Population Register is a way to determine whether an individual is to be considered resident in a municipality or county. For social assistance, the assessment on where an individual is resident can be made also on other grounds (whether the person has a postal address, employment, family members, is able to prove that s/he has lived in a municipality for a while etc.). However, Sweden registers only persons with the prospect of being in Sweden for at least one year. Certainly in the case of workers this is a problematic requirement. Although Article 45 TFEU requires equal treatment of foreign workers with Swedish nationals from the beginning of their work, this is not guaranteed due to this condition on the registry for persons with a contract for less of one year. Benefit authorities (certainly if they have a sense of the applicable EU law) may in practice award workers still the rights they are entitled to, but national law makes this uncertain and it depends to a very large extent on the official who has to assess the situation and decide. This leads to considerable legal uncertainty.

Note that this requirement of legally staying in Sweden and registered can also be a posed in the case of a person who has already been for considerable time in Sweden, without having relied on social assistance, but who cannot prove that s/he stayed there according to the rules. Thus it can even be difficult to acquire a permanent right to stay and equal treatment after five years of staying in the country. Note that this exclusion is not only relevant to social assistance, but also to some other residence schemes. Registration is also relevant to other facilities such as opening a bank account, so that a worker who has a short-term contract may even have problems with this.

Denmark registers only those who can document their permanent residency, e.g. by landlords, utility bills. This suggests that one must reside at a certain place, whereas the condition of residence in a country should not

¹³³ In this respect it is remarkable that between 2002 and 2011 in Denmark the condition was 7 out of 8 years, which is far beyond the five year period of the Citizenship directive, when a claim for social assistance cannot affect the legal position anymore.

hindered by the fact that one moves from place to place in order to find or perform work. Consequently whether this condition of registration in a particular place is consistent with the directive depends very much on how strict this condition is applied, but in any case the uncertainty it creates is an obstacle. It appears in any case that persons who have not settled yet (e.g. they are in temporary accommodation) may have problems satisfying this condition, even if they are already working or already for some longer time in Denmark.

Registration depends on the prospect of staying at least one year legally in Sweden

As we have seen, the Swedish condition for registering in the Registry that one has the prospect to legally stay in Sweden for at least one year may mean in practice that persons employed for less than one year are not treated in the same way as Swedish nationals. This seems to be contrary to Article 45 TFEU and Article 7 of Regulation 492/2011.

Also for non-economically active persons this condition may be problematic. They may have difficulties in making clear that also in the future they will have sufficient resources. This may be difficult to prove.

The condition of being a habitual resident in a particular community

Another element is that in several countries the municipalities or regional communities are responsible for social assistance (or have taken the responsibility to make a(n additional) scheme) and require residence for some time in that particular community. This is the case in Sweden and Spain. It is very doubtful whether it is consistent with the directive to require that one has stayed in a particular community to be eligible for benefit. After all, according to the Citizenship directive, it is the Member State that can require a link between the person and its community, and the local community is mentioned nowhere in the Directive. By linking this condition to the local community the right to free movement of a national of another Member State is infringed, since if this person moves from one local community to another to work or seek work, s/he does not establish a permanent residency in a particular community and is thus not protected. The rationale behind such rules – allocating the costs of the residence scheme to the community where one belongs – does not seem to be an objective justification for this effect.

Conclusion

In the national reports we can find quite many deviations from the Citizenship Directive. This can mean that also persons who are for a longer period in a country or even employed persons in a country are not eligible for subsistence benefit or other benefits, such as family benefits. This directly affects their right to free movement.

2.7.4 PRACTICE AND CASE LAW ON BENEFITS AND EXPULSION

In most country reports very little is reported on the practice of awarding benefits to EU nationals and to expulsion. It is not clear yet what the reason is for this. One reason may be that in case of refusal of benefit or expulsion claimants may – also due to their marginal position – not have the possibilities or will to challenge such decisions. It may also be the case that persons with insufficient sources remain ‘under the radar’ and that Member States do not take the trouble to actually expel them. Some countries have not regulated this issue and in some countries expelling does not seem to be possible (see for instance the Spanish report).

Exceptions are the UK and the Netherlands. In these country reports several cases before court on refusal of (jobseekers) assistance and expulsion were discussed; in these reports also the detailed policy rules for the immigration authorities are mentioned for awarding public assistance and (in the Netherlands report) also on expulsion. The Dutch policy rules follow the Directive and the case law of the Court of Justice closely, e.g. by referring in the provision on social assistance directly to the directive and elaborating the criteria for expulsion in the policy rules. It is worthwhile to mention that the Dutch report also mentions that the official route – one is eligible of social assistance, but this can lead to expulsion – is not found satisfactory anymore by Parliament in the case of claimants who were not aware of this possible effect. Giving them good information in advance is therefore recommended.

2.7.5 SPECIFIC GROUPS

Roma persons from other EU Member States, such as Romania and Bulgaria, constitute a major point of discussion in Sweden, since these persons often do not find work in Sweden and sometimes move from community to community. In principle they can be expelled if they do not have sufficient resources. However, this is hardly ever done; instead they are confronted with the refusal to register them in the Population Register, and that means that also after a considerable period of actual staying in Sweden, say for five years, they have not any protection as resident. So although Sweden has the right to refuse public assistance to them during their first period of stay or to expel them if they have insufficient means, the general exclusion from residence schemes is not consistent with the directive and the conditions on residence are therefore problematic.

2.7.6 THIRD COUNTRY NATIONALS

Third country nationals legally residing in a Member State are basically treated in the same way as EU nationals. There are some exceptions, such as in laws of Regional Communities of Spain.

However, for them it will be more difficult to enter a Member State and, in case of loss of work, to stay than for EU nationals. Probably there will be a relatively larger share of illegally staying third country nationals (thus as refugees who were refused a status) than illegally staying EU nationals in several countries. Illegally staying persons are living most often in very marginal circumstances and that raises questions of respecting human dignity. However, since the project is focused on EU citizenship this topic is not further addressed here.

2.7.7 CONCLUSIONS

Having to pay public assistance to persons from other Member States is one of the bigger fears of Member States that have such systems and considerable flows of immigration. In the Citizenship Directive rules are laid down that exempt Member States from doing so (the first three months, and in case a person is a job seeker).

If a person is a worker s/he cannot be refused social assistance and s/he cannot be expelled. If a non-economically active person still claims social assistance during the first five years of his/her stay then s/he can lose the right to stay.

Between the countries of this study there are important differences. In respect of workers it is important that conditions on their residence period, habitual residence and prospects of future legal residence restrict their eligibility and seem contrary to EU law.

Conditions on residency (such as the conditions on documenting this) can also frustrate the acquisition of permanent residence (after 5 years).

It is not recommended that countries link eligibility for benefit directly to the status of worker, since in that case the right to stay may be more than necessary restricted by countries that wish to reduce benefit claims.¹³⁴

¹³⁴ It can also be that benefit is paid in case where this is not required. As such that is not a problem except when this would lead to later policies or rules that are more restrictive.

3. HEALTH CARE

There are various types of barriers for access to health care for persons not having the nationality of the State where they want to health care. Below, in Section 3.2, we will first discuss the situation of EU citizens who need health care in the country where they live: under which conditions do they have access to health care? Secondly, in Section 3.3, we will discuss the position of their family members. Section 3.4 concerns access to health care by third country nationals. Section 3.5 addresses the situation of persons not residing in the country where they need health care.

3.1 PERSONS RESIDING IN THE COUNTRY WHERE THEY CLAIM HEALTH CARE

In *Denmark* all persons residing in Denmark (i.e. those who have registered and thus have a cpr number providing them with a Yellow Health Card) have full access to health services. This includes free access to private medical doctors, both general practitioners and specialists as well as hospitals. Treatment by a dentist, physiotherapist, chiropractor, foot specialist or psychologist is paid by the patient with some support from the public health system. In addition, EU citizens also have a right to treatment in Denmark pursuant to EU law even though they do not reside there (Blue EU Health Card).

The most obvious barrier to receiving health care is the lack of Yellow Health Card or cpr number. Without such card or number, there is no access to treatment unless there is a need of emergency care. For example, non-insured pregnant women only have a right to treatment for suddenly arisen illness in connection with their pregnancy and sudden birth before week 37 in the pregnancy period.¹³⁵ That means that doctors and other health personnel are not entitled to treat a person who cannot document that s/he is covered by the Danish health system or needing emergency care. This situation has led to the establishment of two private clinics especially dedicated to undocumented/irregular migrants.

Migrants who are covered by the Danish health system may experience problems in accessing the Danish health system due to language barriers. Therefore, pursuant to the Health Act, people in need are entitled to an interpreter for free for the purpose of assistance in case of treatment at a doctor's practice or at the hospital. From 2001 onwards, a fee is due by persons who have resided for more than 7 years in Denmark. In 2009, the total costs for interpreters (including sign language) used in the health care sector amounted to approx. 6,094,852 euros.¹³⁶

In *Estonia* in order to be protected under the health insurance scheme, a person – irrespective of his or her nationality – must fulfill two conditions: s/he must be legally residing in Estonia and be insured in the health insurance system. The Health Insurance Act provides that a person is insured if s/he is a permanent resident; resides in the country on the basis of a temporary residence permit; or is legally staying and working based on a temporary ground for stay. Contributions must be paid either by the employer or by the person him- or herself. Only if contributions have been paid to the health insurance fund is there protection under the health insurance system.

In *Germany* basically anyone who - within the territory of applicability of the Social Code - is employed or self-employed or has his or her domicile or habitual residence there has access to social insurance. Employees have to be insured if their gross regular wages exceed € 450 euros per month and the so-called annual wage ceiling - a specified maximum annual amount - is not exceeded on a regular basis (€ 52,200 in 2013 and € 53,550 in 2014). According to the 'catch-all' provision in Section 5(1) no. 13 SGB V, every person whose habitual residence is in Germany and who does not have any other health care insurance is obliged to be insured by the

¹³⁵ Ministry for Health and Prevention, *Sundhedsydelse til uregistrerede migranter*, (Report on health care for unregistered migrants), 25 September 2014, p. 6.

¹³⁶ *Udvalg om Udlændinges ret til velfærdsydelse* (Commission on foreigners' right to welfare benefits), *Rapport om optjeningsprincippet ift. danske velfærdsydelse* Report on Residence Requirements for Foreigners' Access to Danish Welfare Services) March 2011, p. 134-135.

statutory health insurance. For EU citizens there is an exception: citizens of another Member State are not covered by the compulsory insurance if the existence of a health insurance is a requirement for having the right to residence in Germany.

According to the Insurance Contract Act, basically every person residing in Germany is, since 1 January 2009, obliged to conclude or maintain private health insurance if they are not already otherwise insured under the statutory health insurance plan or by another insurance plan. The minimum that such a health insurance plan must provide is the reimbursement of the costs of outpatient and inpatient medical treatment pursuant to which the absolute and percentage-based retentions – that were agreed for the benefits provided by the plan – for outpatient and inpatient medical treatments are limited for each insured person to an effective amount of 5,000 euros per calendar year. Despite this, there are still approximately 120,000 persons living in Germany without health insurance. Because of the constitutionally guaranteed right to human dignity derived from Article 1 of the Basic Law, these persons will always be provided emergency care in emergency situations.¹³⁷

In the *Netherlands*, all citizens, irrespective of their nationality, staying legally or working in this country are obliged to buy health insurance. The insurance is administered by private insurance companies; these companies have the obligation to accept all persons who are obliged to be insured¹³⁸ and to apply a uniform contribution rate (which is a fixed amount, not income related) for all persons covered by their insurance.

In addition, all residents of the Netherlands are compulsorily insured under a national insurance, the *Wet Langdurige Zorg* (Act on long-term care). This Act covers major medical risks (care), i.e. those parts of medical care that cannot be privately insured or can only be insured at very high, in fact prohibitive contributions. This concerns long-term and chronic care, e.g. home care costs, prolonged hospitalisation, stay in a nursing home or care for the mentally disabled.

For persons who came to stay in the country a waiting period applies of one month for each year that s/he was not insured, up to a maximum of twelve months, if they ask for intramural care which is deemed to be 'indicated' at the start of the insurance, by which is meant that the care was already established as necessary at the time of entering the country, or care that is expected to be needed in the foreseeable future. This does not mean that this person is excluded from care during the waiting-period, but the cost cannot be borne by the Act on long-term care.

According to the *Polish* Constitution equal access to publicly funded health services shall be ensured to citizens, irrespective of their financial situation. According to the Act of 27 August 2004 on publicly funded healthcare services, Polish citizens are entitled to healthcare services. If they are not insured, they have to be resident in Poland and satisfy an income criterion, i.e. they receive social assistance benefit. Further, the right to healthcare services is granted to minor Polish citizens residing in Poland. Women who do not satisfy this condition, but who are overage, Polish citizens and who reside in Poland are entitled to healthcare services also during the period of pregnancy, childbirth and confinement.

In *Spain* public healthcare is provided either at a reduced rate or for free. It is provided irrespective of nationality to anyone having the status of 'insured' or 'beneficiary' (Royal Decree 1192/2012). 'Insured' are employees and self-employed persons who pay social security contributions, pensioners within the social security system and persons receiving certain State benefits (e.g. unemployment benefits).

EU/EEA nationals who do not fulfill those requirements are insured if they earn less than € 100,000 per year and do not have their healthcare covered by other means, on condition that they are registered in the Central

¹³⁷ Decisions of the Federal Constitutional Court of 23 July 2014–1 BvL 10/12 and of 13 June 2012–1 BvL 10/10 and 1 BvL 2/11.

¹³⁸ The acceptance obligation means that no one is excluded based on income, status on, for example the labour market, such as civil servant or self-employed, the state of his or her health, and inability to pay.

Register of Foreign Nationals or have a legal and valid authorisation to live in Spain, or are under 18 and under tutelage of the public administration.

The following persons have the status of 'beneficiary': legal residents with a marital or analogue relationship, ex-partners with an allowance from the ex-partner who is insured, family members of the insured up to 26 (or older when disabled) living with or who are economically dependent on the insured person (i.e. children, brothers, sisters), residing temporarily in Spain because of being in charge of a person temporarily working in Spain that pays Social Security contributions.

Children, whether or not registered, are always protected by the public system and are treated as if they are insured.

In *Sweden* health care is given for free to all residents. It is not defined in terms of legal rights, but as an obligation for the county councils and municipalities as laid down in law. In order to be considered as resident, registration in the Population register is an important condition. As was discussed in Section 2.2.1, one is registered in this register if one can show that one will have the right to legal residence in Sweden for at least one year. This can be proven by an employment contract or a certificate of studies for more than one year. Thus this condition may hinder access to health care also for persons working in Sweden for less than a year.

According to the Swedish report there are two groups that have problems with getting registered in the Population register:

- EU nationals without work, because they do not meet the one year requirement and because they do not have a right of residence for a full year ahead;
- EU citizens who have an employment contract for less than one year: they do have a right of residence, but may be denied registration in the Population registry for failing to meet the one-year requirement.

In the latter case they may still be granted health care as they are known by the social insurance administration,¹³⁹ but this is not laid down in a regulation. This lack of transparency situation can constitute a barrier for having access to health care according to the national report.

For persons not having a contract of employment it may be difficult to prove that they reside in Sweden and this may be a reason to dispute their legal stay in Sweden even if they have been there for a long period. This is, according to the national report, in particular the case of migrating Roma people (Roma persons from other EU countries such as Romania and Bulgaria).

Also the *UK* National Health Service is a residence scheme, that is free of charge, although for some treatment and services (such as dental treatment) some charges are made. Anyone lawfully resident in the UK who ordinarily lives here is entitled to free NHS treatment. Furthermore, any family members of the legally resident person are also eligible to NHS treatment and care provided they are lawfully allowed to live in the UK.

EU/EEA-nationals can access the NHS if they have a European Health Insurance Card (EHIC). The entitlement to free NHS is contingent on the length and purpose of residence and not on nationality. If there is an entitlement to treatment and care within the NHS there is no qualifying period. This also includes family planning services. If charges are made, the amount is the same for all nationals. In practice, free primary care services via a general practitioner may be contingent on the willingness of the practitioner to register a person and the availability of places.

In line with its wider attempts to impose restrictions on access to welfare support and services, the UK Government have stated their intention to 'crack down on health tourism' and that the NHS cannot be an

¹³⁹ Thomas Erhag, 'Under Pressure - Swedish Residence Based Social Security and EU Citizenship', Section 4.1, to appear in EJSS 2016, no 2.

'international health service'¹⁴⁰ are they are looking into how GPs and hospitals can restrict free treatment to those who have been 'ordinarily resident' in the UK for at least one year.

The Immigration Act 2014 gave the UK Government the power to introduce an immigration health charge – an annual subscription (£150 for students and dependents; £500 for those applying for leave outside the immigration rules; and £200 for all other applicants). The regulations clarify who is liable to pay for National Health services in England. Nationals from the EEA, EU and Switzerland with a right to reside will continue to be exempt from these charges as will people with an Indefinite Leave to Remain (ILR). However, those who lose the right to reside, or have it contested may be forced to pay charges for NHS treatment and care.

3.2 FAMILY MEMBERS

In this section we deal with family members living with the insured person in the host country.

Basically the position of family members is regulated by Regulation 883/2004. This means that a family member of a person subject to the legislation of a State who is not insured directly by the legislation of the host country (e.g. as resident or employee) is still subject to that system.

Problematic is the situation if the person from whom the family member is dependent for coverage is not protected in the host country, in particular if that person does not meet the residence conditions.

In *Denmark* no distinction is made on nationality, legal status, employment status or residence, so family members need to be a separate category. Yet, only foreigners who are lawfully resident *and* registered in the national registry (in possession of a personal/cpr number) have access to the whole range of health care services on equal treatment with Danish nationals (meaning for free for most health services).

In *Estonia* the family members of an EU citizen and third country nationals receive protection for health care through the family member who is already insured in the Estonian health insurance system.

In *the Netherlands* family members of compulsorily insured persons who live in the Netherlands have to take out an insurance of their own.

In *Poland* the status of the insured is granted to: (i) family members (residing in the territory of a Member State of the European Union or EEA) of persons covered by mandatory or voluntary health insurance who are nationals of a Member State of the European Union or EEA and reside in the territory of the Member State of the European Union or EEA; (ii) family members (residing in the territory of a Member State of the European Union or EEA) of persons covered by mandatory or voluntary health insurance who are not nationals of a Member State of the European Union or EEA and legally reside in the territory of the Member State of the European Union or EFTA, other than Poland. Therefore, entitled to health insurance as a family member may be a child of a Dutch citizen for example, who is employed in Poland and was covered by the Polish social and health insurance. It is not necessary that the child resides in Poland.

In *Spain* family members are covered by Royal Decree 1192/2012 provisions: if they have the status of 'insured' or 'beneficiary', healthcare is provided either at a reduced cost or for free.

In *Sweden* the right of residence for family members (children and accompanying spouses) is derived from the family member being registered as resident in the Swedish Population register. The entire costs of non-emergency healthcare have to be paid by the patient unless a certificate is submitted indicating that the country of affiliation will pay for the bill (based on Regulation 883/2004). In case that certificate is submitted, only the ordinary fee has to be paid by the patient. Patients can also opt for paying the entire cost of healthcare and applying for reimbursement by the Member State of affiliation.

¹⁴⁰ *Daily Telegraph*, 5 March 2013.

In the *UK* any family members of the legally resident person are also eligible to NHS treatment and care provided that they are lawfully allowed to live in the UK (and in most cases will need to be sharing residence in order to qualify).

3.3 ACCESS TO HEALTH CARE BY THIRD COUNTRY NATIONALS

3.3.1 THIRD COUNTRY NATIONALS LEGALLY RESIDING IN THE HOST COUNTRY

In *Denmark*, as was said before, all foreigners legally residing in Denmark are covered by the statutory health scheme, including third country nationals, legally residing and registered in the country.

In *Estonia* third country nationals are treated equally with Estonian nationals if they reside in the country on the basis of a residence permit, that may also be temporary. Family members of third country nationals receive protection through the family member who is insured in the Estonian health insurance system.

In *Germany*, subject to any provisions to the contrary in the Social Code (Section 37 SGB I), third-country nationals have the same entitlements as Germans to social assistance as long as they habitual residence in Germany. Under certain conditions and depending on their particular type of residence title, third-country nationals are excluded from certain benefits.

In the *Netherlands* all citizens residing legally in this country and persons not staying in the Netherlands but working in this country, are obliged to take out health insurance, irrespective of the nationality – thus Dutch and third country nationals are treated equally.

In the Act on long term care the waiting period is one month for each year that a person (whatever the nationality, so including Dutch nationals) was not insured, up to a maximum of twelve months.

In *Poland* third country nationals residing in Poland with legal documents, such as visa, are covered by health insurance. Also covered are third country nationals if they are employed in Poland and reside legally in another EU/EEA Member State; for example a Russian national who legally resides in Lithuania and is employed in Poland is subject to the mandatory social insurance and has thus access to health care in Poland.

The following categories exist in Poland: (i) third country nationals (citizens of non-EU and non-EEA Member States) who do not reside in the territory of any of those states, if they are subject to Polish health insurance and are also covered by pension insurance or farmers' social insurance, (ii) non-EU and non-EEA students and doctoral students studying in Poland, members of religious orders who stay in the Republic of Poland under relevant documents and take a Polish language course or a preparatory course to start studies in this language if they take out a voluntary insurance in Poland, (iii) foreigners who undergo an adaptation period subject to voluntary Polish health insurance.

Persons not mentioned in the list of persons covered by general mandatory health insurance who are residing in Poland may take out a voluntary insurance on the basis of a written application filed with the National Health Fund (NFZ). The contribution to be paid into the account of the National Health Fund is dependent on the period during which the person not covered by mandatory insurance was not insured. Access to healthcare is not dependent on the duration of residence.

In *Spain* there is no particular position for third country nationals: the right to care depends on whether third country nationals have the status of 'insured' or 'beneficiary', according to the Royal Decree 1192/2012.

In *Sweden* the rules of the Health and Medical Services Act concerning access to health care make no distinctions with regard to nationality, employment status, duration of residence, legal status etc. Instead, as was mentioned supra, references are made to the Population Register as a way of defining residents. Third-country nationals legally residing in Sweden therefore have access to health care and medical services in the county where they reside.

In the *UK* third country nationals who have an Indefinite Leave to Remain are entitled to primary care (GP, NHS dental and optical care, community based nursing) and secondary care (hospital based treatments).

3.3.2 ASYLUM SEEKERS

In Germany asylum seekers are only entitled to interim treatments, which does not include a permanent medical support. From this follows, that this group of underprivileged beneficiaries have substantial difficulties to get access to services. This changes only if their residence status changes or if they take up a job connected to obligatory social insurance membership

In the *Netherlands* categories of third country nationals, such as asylum seekers, have a right to essential medical care, including examination, treatment and routine care which are deemed necessary on medical grounds.¹⁴¹

In *Sweden* asylum seekers who have not yet turned 18 have the same rights as residents. Asylum seekers from the age of 18 are offered urgent medical care, maternal health and abortion rights.

In the *UK* asylum seekers are entitled to all NHS healthcare. Refused asylum seekers are more restricted to health care (see emergency health care). They can register with a GP at the GP's discretion, and can finish hospital treatment they started before being refused. Categories of refused asylum seekers are entitled to free hospital treatment. Treatment can be charged for and non-necessary treatment can be refused if the patient does not pay for it. Refugees, those with Humanitarian Protection and Discretionary Leave are entitled to all health services

Refused asylum seekers have access to emergency services. They receive care in case of certain transmissible diseases and immediately necessary treatment. Treatment can be charged for.

3.3.3 UNDOCUMENTED PERSONS

In the *Netherlands* undocumented people are obliged to pay for the delivered care, while they, at the same time, are excluded from obtaining a health insurance.¹⁴² As doctors have a duty to care towards everyone irrespective of their residency status, a health care provider can turn to the ZIN (Zorginstituut Nederland) – a government agency – to ask reimbursement of 80% of the costs if the claimant cannot pay for the care.¹⁴³ Some costs are not claimable, like dental care, dietician care, physiotherapy, optician care and interpreters.¹⁴⁴

In *Poland*, all foreigners who are in health emergency situation will be provided with free of charge healthcare services in the form of medical rescue actions. Such services will be provided outside a hospital by medical emergency teams under the Act of 8 September 2006 on State Emergency Medical Services. Such services are financed by the State budget.

In *Sweden*, the Parliament passed a law in 2013 giving 'undocumented migrants' the right to health care. This follows in the lines of the Swedish tradition of an open and universal health care system. The county councils have the responsibility to offer undocumented migrants the same access health care and medical services as asylum seekers, regardless of their legal status. This is according to the Law on Health Care and Medical Services to foreigners staying in Sweden without necessary permits.¹⁴⁵

Citizens who do not have right of residence and cannot be considered residents, third country nationals who are not residents but are in acute need of medical care shall be offered such by the county council, according to the Health and Medical Services Act.

¹⁴¹ *Regeling verstrekkingen asielzoekers en andere categorieën vreemdelingen 2005, Stcrt. 2005, 24.*

¹⁴² Parliamentary papers (*Kamerstukken II 2007/08, 31 249, nr. 3, 1*).

¹⁴³ N. van Egmond, 'Caught between rights and restrictions', www.ep.liu.se/ecp/097/008/ecp12097008.pdf.

¹⁴⁴ ASKV, *Dokters van de Wereld, Het Wereldhuis, Passport of Amsterdam*, Amsterdam 2012, 6-13.

¹⁴⁵ Lag (2013:407 om hälso- och sjukvård till vissa utlänningar som vistas i Sverige utan nödvändiga tillstånd.

In the UK visitors and undocumented migrants are more restricted to healthcare. Treatment can be charged for. Non-necessary treatment can be refused if the patient does not pay for it. GPs can use their discretion to register visitors and undocumented migrants.

3.4 PERSONS ASKING HEALTH CARE WHILE STAYING IN ANOTHER COUNTRY

3.4.1 INTRODUCTION

Persons residing in another country may claim medical care in two different situations. The first is when care becomes necessary in the country where they stay. The other is that they go to a country in order to get care in that country. For our purpose the latter aspect is most important, so that is discussed here. Since the Directive on cross border health care (to be discussed below) is most relevant now for EU citizenship we will not discuss the rules of the Coordination Regulation on planned health care, in order to keep the extent of this report within reasonable limits.

The Court of Justice has in several cases interpreted Article 56 TFEU as allowing persons to obtain health care abroad without authorisation from the authorities. Directive 2011/24 on the application of patients' rights in cross-border health care¹⁴⁶ is meant to implement this case law. This directive obliges Member States to allow patients to seek healthcare in another Member State, and only for specific care authorisation is required (see below). A primary condition is that the persons wanting to make use of this possibility would have been entitled to this care in their State of residence; therefore they cannot obtain care that is not covered by the insurance or services in their State of residence. They are reimbursed the costs up to the amount that would have been paid had they obtained that treatment at home, and thus they bear the financial risk of any additional costs arising. The latter aspect is different from the situation when they ask authorisation and the Coordination Regulation is applicable: in case authorisation is obtained the full amount is borne by the competent institution.

According to the Directive on cross border healthcare, healthcare that is subject to prior authorisation shall be limited to healthcare which:

- a) is made subject to planning requirements relating to the object of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources and:
 - i. involves overnight hospital accommodation of the patient in question for at least one night; or
 - ii. requires use of highly specialised and cost-intensive medical infrastructure or medical equipment;
- b) involves treatments presenting a particular risk for the patient or the population; or
- c) is provided by a healthcare provider that, on a case-by-case basis, could give rise to serious and specific concerns relating to the quality or safety of the care, with the exception of healthcare which is subject to Union legislation ensuring a minimum level of safety and quality throughout the Union.

Member States shall notify the categories of healthcare referred to in point (a) to the Commission.

¹⁴⁶ OJ 2011, L 88/45. See also F. Pennings, 'The Cross-Border Health Care Directive: More Free Movement for Citizens and More Coherent EU Law?', *EJSS* 2011, p. 424-452.

3.4.2 IMPLEMENTATION OF THE DIRECTIVE AND FIRST EXPERIENCES

In *Denmark* the Think Tank *Europa* showed that very few EU citizens living abroad had received a *scheduled treatment* at a Danish hospital in 2014.¹⁴⁷ With the implementation of Directive 2011/24 at the end of 2013, Denmark has ensured that Danish hospitals can treat people for scheduled operations upon payment even if they do not have a Danish health card and have not requested emergency treatment pursuant to the Blue EU Health Card. This did not seem to be the case before the implementation of the Directive as Danish hospitals were prohibited from receiving payment.

The Danish authorities have been very slow in 'accepting' and 'implementing' the case-law of the Court of Justice on the right to receive treatment abroad. In fact, it is only since the implementation of the Directive, that patients covered by the Danish health care system can freely choose to be treated in another Member State and get the costs reimbursed afterwards. Still the definition of treatment which is subject to prior authorisation seems to contradict the spirit and wording of the Directive, since *all* treatments which need overnight accommodation and *all* treatments which are centralised at State and regional level are subject to a prior authorisation. The national authorities seem to argue that since the listed treatments are only practiced on a little number of patients, restrictions on treatment abroad can be justified on the need for planning and especially the need for maintaining the competence of doctors. Yet, planning is only one of the two conditions which must be fulfilled in order to exempt a treatment pursuant to Article 8(2)(a) of the Directive. The second cumulative condition is that the given treatment shall necessitate highly specialised and cost-intensive equipment or infrastructure or require at least one night accommodation. Therefore, the national expert doubts whether the Danish practice fully complies with Article 8(2)(a) of the Directive.

Finally, a recent study shows that Denmark has not adequately implemented Article 4 of the Directive on information of foreign patients by services providers and the obligations imposed on national contact points.¹⁴⁸ Indeed, on the webpage of the main national hospital in Denmark, it is simply stated that 'Regrettably the Rigshospital does not have the necessary capacity to treat private and/or foreign patients, even if they are willing to pay for their treatment themselves'.¹⁴⁹ According to a recent study, the outflow of patients is limited.¹⁵⁰ Between 1 January 2014 and 20 October 2014, 900 patients made enquiries to the authorities of their possibility to receive treatment abroad. Only 64 patients asked for reimbursement pursuant to the Directive on cross-border healthcare (and 21 obtained reimbursement) for treatment not subject to authorisation. Concerning treatment that required prior authorisation, 61 made such a request while only fourteen were successful in obtaining it. Inflow of patients for scheduled treatment is even more limited.¹⁵¹ Thus free movement of patients is not a reality yet and therefore does not seem to have significant effects on costs and planning.

In *Estonia* changes in the Health Insurance Act were necessary in order to clarify the competence of the Health Insurance Fund and to concretize the rights of the patients when the Directive on cross-border healthcare was implemented.

According to the statistical data of the Health Insurance Fund given to the national rapporteur the implementation of the Directive did not cause any pressure on the budget of the Health Insurance Fund. Also

¹⁴⁷ Report on health care in other Member States (*'Behandling i andre EU-lande'*), 13 September 2014, Think Tank *Europa*, p. 3.

¹⁴⁸ D.S. Martinsen and N. Vasev, 'A difficult encounter- National health care models and the EU', 49 *Social Policy and Administration* 2015, p. 435-436.

¹⁴⁹ *Ibid.* at p. 435.

¹⁵⁰ D.S. Martinsen and J.A. Mayoral Diaz-Ascensio, 'A judicialisation of health care policies in Denmark and Spain' (2015) Working Paper No 30, i-court, Copenhagen, Denmark, at p. 20, http://politicalscience.ku.dk/staff/Academic_staff/?pure=files%2F143050793%2FMartinsen_MayoralicourtsWP2015.pdf (last visited 14 December 2015).

¹⁵¹ D.S. Martinsen and N. Vasev, 'A difficult encounter- National health care models and the EU', [49] *Social Policy and Administration* (2015) p. 435-436.

the insured persons were not negatively affected. In other words, the impact of this Directive is modest on the Estonian budget.

However, the Directive has stimulated a quite intensive movement of patients from Finland to Estonia. Many Finish patients go to Estonia to receive medical services because the quality is good, but the prices are twice or even more times lower.

In *Germany*, the rules of reimbursement apply to members of the statutory insurance scheme only.¹⁵² The Ministry of Health sees the Directive as beneficial since it contributes to transparency, but also states that it did not really change the situation for persons insured by the German statutory health insurance, since the case law of the Court of Justice had already been implemented in German law in 2004. Still, some important provisions of the Directive were implemented in German law through the *Patientenrechtegesetz* (Patients' rights act) of 2013. The Ministry clarified that the German health care system profits from the directive since the German system can attract new customers.¹⁵³

Though the Ministry stated that the Directive did not have many effects on German law, it has to be noted that Germany was requested by the European Commission to 'notify full implementation of cross-border healthcare rules' because the Directive had 'been partially implemented (...) but certain provisions of the Directive still appear(ed) to be missing' in 2014 (infringement procedure).¹⁵⁴

In the *Netherlands* the Directive had relatively little impact, since the insurance policies offered by the private insurance companies give the freedom to get healthcare from authorised health care providers. However, for the reimbursement it is relevant what type of policy the insured person has. Insured persons can choose between a reimbursement policy (by which treatment costs are reimbursed); or an in kind policy (in which treatment is given in kind) or a mixed policy. A reimbursement policy is more expensive than a mixed one and even more expensive than an in kind policy. In case of a reimbursement policy, the insured person can obtain care abroad under the same conditions as in the Netherlands, i.e. for the same type of care and under the same reimbursement rules. In case of in kind policies the reimbursement rate is often lower if the care is not obtained from a hospital with which the insurance company has a contract.

A recent trend is that companies offer cheaper strict in kind policies, meaning that one can get health care only from a health care provider with which the company has made a contract. In that case reimbursement is not possible anymore. The insured can still buy a policy that gives more choice, but these are more expensive.

There was a lot of opposition to the strict in kind policy and its fate is not entirely clear. One element of discussion is that, although an insurance company can make a contract also with health care providers abroad, it will in practice make most contracts with health care providers in the Netherlands. Secondly the lack of free choice in strict in kind contracts can be considered to be contrary to the Cross border patient directive, since that Directive gives the choice to obtain health care abroad. Of course, a person who buys a strict in kind policy makes a deliberate choice for this policy, and has, as a result, also less choice in contacting health care providers in the Netherlands itself. Restricting this choice also to particular health care providers abroad is therefore, in my view, not inconsistent with the Directive, but it does certainly not promote cross border health care.

Insurance companies have made contracts with hospitals in the regions just across the border in Belgium and Germany in order to provide opportunities to obtain care for Dutch patients. They seem to have a preference to organized (contracted) across border health care rather than on an individual basis.

EU citizens mainly come to the Netherlands for hospital care. There are no signs of an influx of persons of other Member States receiving healthcare in the Netherlands and thus there are no significant effects on the system. It are especially hospitals in the border area that attract foreign patients According to a recent report hospitals

¹⁵² <http://www.bmg.bund.de/glossarbegriffe/p-q/patientenmobilitaetsrichtlinie.html>.

¹⁵³ <http://www.bmg.bund.de/glossarbegriffe/p-q/patientenmobilitaetsrichtlinie.html>.

¹⁵⁴ http://europa.eu/rapid/press-release_MEMO-14-470_en.htm.

in the Netherlands outside the border region do not undertake particular efforts to becoming attractive for people from abroad in order to 'export' their services.¹⁵⁵

In *Poland* the Act on publicly funded healthcare services includes provisions concerning planned treatment outside Poland. The treatment or the diagnostic tests may be carried out in any EU or EEA Member State. To be eligible to healthcare services abroad it is necessary to obtain an approval of the president of the National Health Fund. Such approval may be obtained for the following purposes: for treatment or diagnostic tests abroad - in case of treatment or diagnostic tests which are provided domestically, as well as to cover the costs of transport to the location where the services are provided (this applies mainly in situations where the waiting time for such tests or treatment in Poland is long and the tests must be carried out fast, which can be done in another EU or EEA State); for treatment or diagnostic tests abroad - in case of treatment or diagnostic tests which are not provided domestically, as well as to cover the costs of transport to the location where the services are provided, for continuance of treatment or diagnostic tests abroad and to cover the costs of transport to the location where the services are provided. The approval of such treatment is issued following an investigation carried out by a regional branch of the National Health Fund - which is initiated by filing a respective application to a regional branch of the Fund competent according to a place of residence. The purpose of such investigation is to confirm that the following conditions are jointly met:

- (i) the applicant cannot undergo treatment domestically within a timeframe necessary for his health condition (too long waiting time),
- (ii) the treatment applied for is a guaranteed service, i.e. covered by one of the lists of guaranteed services included in regulations of the Minister of Health, issued under article 31d of the act on healthcare services.

Upon completion of the investigation, a director of the regional branch of the Fund, in a form of an administrative decision, will give its approval for the requested healthcare service or its continuance in other EU or EEA Member State. The director of the branch of the Fund may refuse to grant the approval if the requested healthcare service:

- (i) may be provided domestically by the service provider having a contract for provision of healthcare services, within a timeframe not exceeding the acceptable waiting time of the service recipient for the requested healthcare services, or
- (ii) (ii) the service is not a guaranteed service, i.e. it is not covered by one of the lists of guaranteed services included in regulations of the Minister of Health issued under article 31d of the act on healthcare services. It is also possible to apply for coverage of costs of treatment or diagnostic tests received abroad - in the EU or EEA State or in other state - when they are not provided domestically.

The costs of treatment or diagnostic tests not provided domestically and received in a state other than EU/EEA State are covered by a branch of the Fund against an invoice issued by a foreign medical facility. On the other hand, the costs of treatment or diagnostic tests not provided domestically but received in other EU or EFTA state are covered by the branch of the Fund against an invoice issued by the foreign medical facility in the case where the requested treatment or diagnostic tests were carried out by a foreign medical facility with which the branch of the Fund cannot settle the costs in accordance with the principles mentioned above and governed by the provisions on coordination of the social security systems. No information is provided on the implementation of the cross-border directive, influx of persons, etc.

¹⁵⁵ *IBO, Grensoverschrijdende zorg*, The Hague 2014..

In *Spain* legislation had to be changed in order to fully implement Directive 2011/24. The main piece of legislation was Royal Decree 81/2014. Certain healthcare (identified in Annex II and related for instance to overnight hospital accommodation, radiotherapy, disabilities support and reproduction treatments) is subject to a prior authorization.

Finally, the principle of non-discrimination on ground of nationality for EU citizens is laid down in the decree and it further establishes that public and private healthcare providers must apply the same scale of fees for healthcare for patients from other Member States as for domestic patients. An important point to be outlined is that, due to the severe dimension of the financial crisis in Spain, all the provisions of the Royal Decree must be put into operation without any increase of public costs.

There is a large influx of persons from other Member States receiving health care from Spanish public health provision services. This - what is called by the national rapporteur - 'health tourism' implies severe costs for Spanish institutions.

On closer inspection, however, I do not think this is health tourism, but it concerns persons entitled to this care according to the Coordination Regulation (e.g. pensioners). The problem is that the Spanish institutions are not always able to get the due reimbursement from the competent authorities of the patient.

In *Sweden* the Directive was implemented through a new law,¹⁵⁶ that gives all patients who are entitled to have their medical treatment paid for by public means the possibility to apply for compensation for medical costs originating from medical services in another Member State. The law also gives the right to apply for an advance from the Swedish Social Insurance Agency for these costs.

The interest among Swedish citizens to make use of the right to receive health care in other Member States is, according to the Swedish Social Insurance Agency (*Försäkringskassan*), quite low. Each year, about 700 people apply for advance notices to finance medical services abroad of which 200-300 are granted. Two groups are identified among the ones applying: (1) patients who have some kind of connection to the Member State in question (previously residing there, have relatives, speak the language and so on) and (2) patients with a rare disease who cannot get the appropriate care in Sweden, but can get that treatment abroad. No information is provided in respect of influx of persons of other Member States to Sweden.

In the *UK* there is no centralised information on people leaving or arriving in the UK making use of the Directive. Estimates are produced by the Department of Health of the financial value of inflows and outflows of patients from the NHS. For some time the UK government has expressed its concern about the discrepancy between the amount of gross income for treatment provided to chargeable visitors and non-residents which could/should be recovered, and the amount that is in fact recovered. For example, a 2012 review (acknowledging the weaknesses in available data) estimated that the NHS was recovering gross income of £15-£25 million for treatment provided to chargeable visitors and non-residents and that this represented 20% of actual chargeable costs. Since administering the system of recovering costs from other countries was estimated to cost £15 million, the net gains may actually be none or negligible. These concerns may partly explain the current policy direction intended to restrict access to NHS treatment by EU Citizens by increasing the length of time required in the country before access to free healthcare is secured and limiting the length of time that people can continue to access treatment should they become unemployed.

¹⁵⁶ Lag (2013:513) om ersättning för kostnader till följd av vård i ett annat land inom Europeiska ekonomiska samarbetsområdet (Ersättningslagen), loosely translated as Law on Compensation following costs for health care in another EEA Member State.

3.5 CONCLUSIONS

Systems of Health Care and Differences in Access

An important difference between the health care systems is that between a free system of health care and a contributory system.

Denmark, Sweden and UK have (basically) a free system of health care. In both systems one has to satisfy a period of residence or conditions for registering (for which strict conditions apply) in order to be eligible for care.

Since these systems sometimes do not have a way to calculate costs and receive payments for health care (in some cases were not even allowed to receive money (Denmark)), there is a close connection to being resident and having access to health care treatment. Thus, for non-residents according to the national criteria, access is refused and they have to go to private hospitals.

The Polish, Dutch, German, Spanish and Estonian systems require – even though these are residence schemes – that claimants have paid contributions in order to be eligible for health care. The obligation then rests on the employee or resident – depending on the nature of the system – to pay contributions. In such systems it has to be ensured that the insured indeed pay contributions and measures have to be taken in case this did not happen. However, a contributory system has the advantage – from the view of EU citizens – that a ‘simple’ condition on residence suffices (in fact countries want the eligible persons to be included in the system), so residency need not be ‘habitual’ or for a certain period or on basis of registration in a Civil Registry.

Thus, in a contributory system the insurance institution will be keen to insure the persons falling within the scope of the insurance, so that it can collect contributions. In case of a free health care system the responsible institution has to protect the system against claims. So there is an important difference in approach due to the way of financing the care.

Countries with specific requirements on residency (e.g. that one is registered in a Register) are in particular problematic for persons who are economically active and still have problems to register as resident or satisfy a more strict resident condition (‘habitual resident’).

Some systems have waiting periods. Waiting periods are barriers for EU citizens to have access to health care coverage and make – indirectly – a distinction between nationals and non-nationals. This may be contrary to, in particular, Regulation 883/2004, since it may be indirectly discriminating. Whether this is an objective justification and whether the periods are proportional remains to be seen.

Contribution conditions may constitute a threshold for persons without an income or with a low income. However, as was seen in the description of the countries, the countries find a solution by exempting categories of persons from liability to pay contributions (Poland: social assistance recipients; Polish minors legally residing in Poland; Polish women in case of pregnancy, Spain: benefit recipients. persons with an income below 100,000 euro; Netherlands: persons under 18); others may pay a compensation for the contributions for low incomes (Netherlands).¹⁵⁷ Of course, such exemptions must not distinguish on ground of nationality, since this is contrary to Article 4 of Regulation 883/2004.

For EU Member States it may be interesting to investigate whether some systems cause fewer problems in view of mobile EU citizens than others. Their systems were not specifically designed with a view to that mobility would increase. Now problems occur, ad hoc measures are taken to keep EU citizens out of the system or to create barriers. In some situations, it is ‘merely’ difficult because of administrative reasons to get the due reimbursement from other countries. It is clear that this is not easy to change and may have a large impact on

¹⁵⁷ A problem of a different nature is that some insurances, in particular private supplementary ones, may require checks on the health condition when one applies for insurance. In case of deteriorated health position one may have to pay a higher contribution or one can be refused in case one reapplies. For that reason one may be inclined to maintain an insurance during their stay abroad.

the national system. It is however recommended that Member States reconsider how their own system can be made robust to negative effects of patient mobility and instead they can even profit from it, as some other Member States do.

Third country nationals

Third country nationals have access to coverage of health care if they are legally residing in a country and, in some countries, if they satisfy the condition on residence or registering in the Civil or the Population register. More differences concern the undocumented migrants, where some countries treat them in the same way as legally staying persons (Sweden and Spain), whereas in other countries the health care system only covers restricted care that is necessary.

Going to a Member State to receive planned care

Also for care that becomes necessary in case one stays in another Member State the Coordination regulation gives adequate rules. The rules and practices in case of planned care give more complications. This is an important area, since the right to obtain health care in another Member State is seen as an advantage of the free movement rules that applies to all EU citizens.

Also here there are important differences between the countries. Some countries seem to have relatively few or no patients leaving the country, but only receive patients and thus increase their 'market' and thus benefit from this (Estonia). Although a UK patient has led to a famous case before the Court of Justice (*Watson* judgment), the report does not mention a problem with outgoing patients. However incoming patients are reported to cause a problem because the country is not able to charge the ensuing costs to the competent institution and thus suffers a loss. This is due to the system of health care financing and leads to restrictions which seem inconsistent with the Directive on health care, such as posing a waiting time before giving access to treatment.

Other countries are more open to receiving and sending patients. The Netherlands has taken the remarkable approach of organizing such movements by making contracts with hospitals in border areas abroad. Border hospitals in the Netherlands receive foreign patients. There is a tendency to restrict unorganised movement, that is for those with cheaper policies.

Some of the Member States are still reluctant to promote or support cross border health care, even though they and their citizens could benefit from it. Some of the national rapporteurs could find little information on the practice in their country.

4. STUDY GRANTS

4.1 INTRODUCTION

Although in the countries of our study education as a whole was investigated, we will focus on this chapter on study grants and loans for higher education, since these are the most relevant to mobile EU citizens, as also appears from the ECJ's case law on EU citizenship.

4.1.1 WHEN STUDENTS ARE WORKERS

As we have seen, Article 45 TFEU and Regulation 492/2011 provide that those who fall within the personal scope of these provisions cannot be discriminated against on ground of nationality in the area of social advantages. Study grants fall under the material scope of Article 7 of Regulation 492/2011 and indeed several cases on study grants have been brought before the Court of Justice.

In relation to study grants it is important to mention that the interpretation of the term 'worker' is of special importance, since those invoking this article are students who work next to their study, so they work part-time by definition. If work is only ancillary to the study it does not qualify a person as a worker. This appeared in the case of the student-trainee Brown who could not invoke Article 7(2) of Regulation 1612/68 (the predecessor of Regulation 492/2011) since his training (during which he performed work) was regarded as an obligatory part of his technical studies and thus ancillary to his status as a student.¹⁵⁸ This is one of the few cases where the Court decided itself on the application of the criteria of worker. This leaves the problem unanswered of students who are working a couple of hours next to their study. When is this sufficient to qualify as worker? We will see some national interpretations in the following section.

Job seekers and former workers cannot invoke Regulation 492/2011 in relation to study grants, also not for their children (see *Esmoris Cerdeiro-Pinedo Amado* judgment).¹⁵⁹

However, if a person is a worker, his or her family members cannot be discriminated against on nationality if the advantage can be regarded as a social advantage *pertaining to the worker*. In determining this, it is important whether the employed person actually supports the family members in question (*Meeusen* judgment).¹⁶⁰

Although the Court had ruled in consistent case law that the term worker is to be interpreted broadly and only a person doing marginal and ancillary work is excluded, the Danish authorities considered a person who came with the purpose of studying to Denmark and then accepted a job (first full-time, then part-time) not to be a worker in the sense of Article 45 TFEU. In a preliminary ruling on this interpretation, the *LN*-ruling (see section 4.2), the Court considered that the enjoyment of that freedom may not be made contingent on the objectives pursued by a EU citizen to enter the territory of a host Member State, provided that he pursues or wishes to pursue effective and genuine employment activities. This same approach could already be found in consideration 21 of the *Levin* judgment (1982).¹⁶¹

It has to be emphasised that although Directive 2004/38 gives the possibility to exclude study grants, this is not the case for workers.

4.1.2 STUDENTS WHO ARE NOT A WORKER

¹⁵⁸ Case C-197/85, [1988] ECR 3205. Persons in the position of Lair and Brown may at present benefit of Articles 18 and 21 TFEU, see below.

¹⁵⁹ Case C-33/99, [2001] ECR I-4265.

¹⁶⁰ Case 337/97, [1999] ECR I-3289.

¹⁶¹ Case 53/81 *Levin* [1982] ECR 1035.

Students who do not satisfy the criteria for being a worker have to rely on Article 21 TFEU if they want to claim that the refusal of study grants is based on ground of nationality.

One of the first cases before the Court of Justice concerned the British maintenance assistance for students in the *Bidar* judgment.¹⁶² The Court ruled that Member States are permitted to ensure that the grant of assistance does not become an unreasonable burden upon them. However, the criteria for these have to be justified. Thus requiring that one has a link with the employment market is not appropriate, since the students are not following a study for the purpose of entering the local job market. Requiring that a person has resided a certain period in the country is acceptable as a criterion to show a degree of integration. In the law relevant to *Bidar*, however, it was required that one has settled at least three years in the UK, for which purpose one must have paid tax during these years. In practice that would exclude foreigners, even if they have integrated in society, the Court considered.

In the *Förster* Judgment¹⁶³ the Court accepted the conditions set for determining integration. The disputed rule in this case was that Dutch study finance may be granted to students who are national of a Member State if, prior to the application, they have been lawfully resident in the Netherlands for an uninterrupted period of at least five years. The Court considered that a requirement of five years can be justified by the objective of the host State's policy of ensuring that students who are nationals of other Member States have to a certain degree be integrated into its society.

Directive 2004/38, Article 24(2) provides that Member States are not obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families. Thus Member States are not obliged to extend grants or loans for maintenance to students from another Member State, unless they have been living there for five years. However, once a student, after five years' residence, has obtained the right of permanent residence, he or she has exactly the same rights as a national student.

4.1.3 EXPORT OF STUDY GRANTS

A specific issue is that of export of study grants. The cases before the Court of Justice have so far been mainly focused on the children of workers (in which case Regulation 492/2011 may be applicable), in particular of frontier workers, since these may wish to receive study grants in the country where they live, i.e. not the country where their parent(s) work(s).

This issue was the topic of the judgment *European Commission v. the Netherlands*.¹⁶⁴ The disputed scheme provided that export was available to students who are eligible for full funding of studies in the Netherlands and who have resided lawfully in the Netherlands during at least three out of the six years preceding enrolment at a higher education establishment abroad. The European Commission started an infringement procedure against the Netherlands since this rule also affected children of frontier workers. It claimed that there was therefore inconsistency with Article 45 TFEU and Regulation 492/2011.

¹⁶² Case C-209/03 [2005] ECR I-2119

¹⁶³ Case C-158/07, [2008] ECR I-8507. For discussion see O. Golynger, 'Case C-158/07, Jacqueline Förster v. Hoofddirectie van de Informatie Beheer Groep. Judgment of the Court (Grand Chamber) of 18 November 2008', *CMLR*, vol. 46, 2009, p. 2026 and M.P. Andrés de Saenz de Santamaría, 'Student mobility and Union: an analysis through the case law of the ECJ', in *Revista de Derecho de la Unión Europea. Madrid ISSN 1695-1085. nº 27 - julio - diciembre 2014, nº 28 - enero - junio 2015*, p. 231-258.

¹⁶⁴ Case C-542/09, EU:C:2012:346.

The Court of Justice considered that the 'three-out-of-six' rule can indeed cause tensions with (what are now) Article 45 TFEU and Article 7(2) of Regulation 492/2011; study finance constitutes, for the migrant worker, a social advantage, where the worker continues to support the child that receives study grant. The *Bidar* and *Förster* judgments concerned students who were not migrant workers or members of their families; these judgments are therefore not relevant here, according to the Court.

Now the Court had to explain why there is a difference between economically active persons (workers) and economically non-active persons (EU citizens). It argued that workers have participated in the employment market of a Member State and this establishes, in principle, a sufficient degree of integration with the society of that Member State, allowing them to benefit from the principle of equal treatment with national workers, as regards social advantages. The degree of integration arises from, inter alia, the fact that, through the taxes which he pays in the host Member State by virtue of his employment, the migrant worker also contributes to the financing of the social policies of that State and should profit from them under the same conditions as national workers. The Court continued that infringement on freedom of movement for workers can be justified only if it is appropriate for attainment of the legitimate objective pursued and if it does not go beyond what is necessary in order to attain it. In this respect according to the Court the 3 out of 6- rule is too exclusive: by requiring specific periods of residence in the territory of the Member State concerned, the 'three out of six years' rule prioritises an element which is not necessarily the sole element representative of the actual degree of attachment between student and that Member State.¹⁶⁵

Later in the *Giersch* judgment¹⁶⁶ the Court gave more specific guidelines. Since they have participated in the labour market of a Member State, Migrant workers have in principle created a sufficient degree of integration with the society of that State, allowing them to benefit from the principle of equal treatment. However, in case of frontier workers certain grounds of justification are possible concerning legislation which distinguishes between residents and non-residents, depending on the extent of their integration in the society of that Member State or their attachment to that State. The frontier worker is not always integrated in the Member State of employment in the same way as a worker who is resident in that State. This case concerned export of Luxembourg study grants and the Court considered that a condition of residence could make it reasonably likely that the student will return to Luxembourg, after completing his or her studies. The Luxembourg Government regarded this return necessary in order to attain the legitimate objective pursued.

However, the next question is whether this condition does not go beyond what is necessary to reach the purpose of the measure. The Court considered that a condition of residence may be disproportionate if it is too exclusive in nature because it favours an element which is not necessarily representative of the real and effective degree of connection and excludes all other representative elements. For instance, the child of a migrant worker who resides with his parents in a Member State bordering upon Luxembourg and who would like to study in Luxembourg is not entitled to receive State financial aid for higher education studies. In addition, even if their parents reside in Luxembourg, students who are not resident there when they make their application for aid are not entitled to receive that aid even if their parents continue to support them. Furthermore, the effect of the system of financial aid at issue in the main proceedings is to exclude the children of non-residents workers who have been working in Luxembourg for a significant period of time from receipt of that aid. Therefore the system is too exclusive in nature.

The Court subsequently mentioned some alternatives. It suggested that where the aid was a loan, whose grant or its non-reimbursement was conditional on the return of the student to Luxembourg after his or her studies

¹⁶⁵ See also F. Pennings, 'EU Citizenship: Access to Social Benefits in Other EU Member States', In *The International Journal of Comparative Labour law and Industrial Relations* Vol. 28 (2012), Issue 3, p. 307-333.

¹⁶⁶ Case C-20/12, EU:C:2013:411.

abroad in order to work and reside there, it could attain the objective pursued, without adversely affecting the children of frontier workers.

Thus the Court made suggestions for Luxembourg to make a scheme that complies with EU law, by accepting improvement of the level of education as objective justification. It thus accepted in principle a residence condition and gave suggestions for alternative ways to ensure that that the investment is to the benefit of Luxembourg.

Let us now look at how the Member States of our study have dealt with these issues.

4.2 THE ACCESS OF EU CITIZENS TO STUDY GRANTS

In *Denmark* only pupils and students of Danish nationality, EU citizens who work in Denmark and foreigners who have a permanent right of residence in Denmark are entitled to a maintenance grant.¹⁶⁷ Until 2013 EU nationals who worked in Denmark along their studies were not entitled to student grants. On several occasions, the Danish authorities refused to recognize them as workers, especially if they had first arrived to enroll for a study. They were considered as students and thus not entitled to maintenance help pursuant to Article 24(2) of the Citizenship Directive. Thus the authorities relied on the intention of the EU citizen: arrival with the purpose of studying in Denmark disqualified them as workers. The Danish Ombudsman reacted to this uncertain practice of the authorities and of the Appeals Board for the Students' Grants and Loans Scheme recalling their EU law obligations. The Appeals Board then asked the Court of Justice whether full-time students who were working along their studies should be regarded as workers and should thus be entitled to the student grant on an equal treatment basis. The Danish government argued that with the adoption of the Citizenship Directive, the EU legislature intended full-time students to be covered by the exception to the principle of equal treatment in the Directive.¹⁶⁸ The Court of Justice disagreed with this interpretation in the *LN* case, discussed in the previous section. The practice was then changed.¹⁶⁹

Following the *LN* ruling, the Danish study grants authorities became strict in their assessment of the status of worker. Complaints were made to the Appeals Board for Student Maintenance Grants and Loans. This Board annulled a decision of the authorities denying the status of worker to a person on the ground that the salary received was symbolic.¹⁷⁰ It found that the citizen had been working 60 hours a month and was subsequently paid a salary which could not be seen as marginal. He was therefore entitled to the grant as a worker.¹⁷¹

In *Estonia* EU nationals have access to study grants. There are no differences between workers, non-workers and family members. According to the Study Allowances and Study Loans Act pupils and students have the right to a basic allowance if they are Estonian citizens or stay in Estonia on the basis of a long-term or temporary residence permit or on the basis of a permanent or temporary right of residence.

In the *Netherlands*, the Student Finance Act 2000 as amended (*Wet studiefinanciering 2000 – WSF 2000*) provides student loans for the cost of study and living expenses (introduced in 2015, earlier study grants were payable). Study loans are paid at a low interest rate and in case of a low income in later life they are remitted. Students from other EU Member States (and EEA and Switzerland) have to satisfy the following criteria to be eligible to receive these study loans if they study at a Dutch university: they must have been be resident in the Netherlands for a continuous period of five years or more.

¹⁶⁷ Act on the State's maintenance grant for studies ('*SU*'), *LBK nr 39 af 15/01/2014* and bekendtgørelse (executive order) No 792, 25 June 2014.

¹⁶⁸ See further C. Jacqueson, 'For better or for worse? Transnational solidarity in the light of Social Europe' in *Resocialising Europe in times of crisis*, CUP, October 2013.

¹⁶⁹ Case C-46/12, *LN*. Negative decisions within the last 3 years can be reassessed in the light of the ECJ's ruling.

¹⁷⁰ Decision of the Appeals Board, KEN nr 10426, 15 December 2014.

¹⁷¹ See also Decision of the Appeals Board, KEN nr 10423, 15 December 2014

If the student is employed or self-employed and works for more than 56 hours a month¹⁷² s/he is entitled to study loans even if s/he does not meet the residence condition. So this is the definition of worker in the Netherlands in relation to study grants. In case of freelance or on-call work the applicant has to show that s/he has worked 56 hours or more in the past three months. Until January 2014 32 hours a week were sufficient to qualify as worker, but the requirement of 56 hours was introduced to limit the number of eligible persons. The 56 hours were taken as threshold since they correspond with 40% of the average number of working hours per month, which was seen as a reasonable interpretation of 'worker'. Students have to show that they worked in the past month by sending in pay slips and employers' statements. If a student is ill or on holiday in a month, such month is taken into account as a month worked.

If a student does not satisfy the criterion, the Education authorities (DUO) investigate the individual circumstances of the case. In this investigation the objective criteria and all circumstances related to the nature of the activities and the employment relationship have to be taken into account. For this purpose many factors are relevant including the nature of the employment contract, the number of guaranteed working hours a month and the level of the wage. This is a purely individual approach and therefore there is no information on the precise criteria used.

In *Poland* citizens of a EU/EEA Member State and their family members who have funds necessary to cover the costs of subsistence during the studies, may take up and participate in higher studies under the terms and conditions applicable to Polish citizens. However such persons are not entitled to financial aid, special financial aid for disabled persons or allowances.

In *Spain* the requirements to be granted study grants are established in Royal Decree 1721/2007. In Article 13 it is laid down that students from another EU Member State are eligible for a study grant if they have fulfilled a period of prior uninterrupted residence for five years in Spain or if they are a worker. The Spanish grants system consists of a combination of criteria based on need-based criteria and academic merit criteria. Like Spanish nationals, in order to be eligible for a grant, students from another EU country must fulfil parental income requirements. The amount of the grant and the types of grant that students can obtain depend on the parental income.¹⁷³ Due to the economic crisis the average amount of grants has decreased and the minimum level of academic performance has become higher in order to reduce the number of beneficiaries. As family incomes have decreased at the same time, the number of beneficiaries is more or less the same, but the amount received has been considerably reduced. Only 25% of students in Spain get a grant and of these the majority only receives exemption for tuition fees.

In *Sweden* universities do not require fees from EU citizens. Since 2011 there are fees for third country nationals studying at a Swedish university. EU/EEA citizens receive student grants after living or working in Sweden for at least two years. The *Centrala studiestödsnämnden* (CSN) approves and distributes financial aid for studies, which includes study loan and study allowance. According to their annual statistical report of 2013 the total number of granted study financial aids for the EU-27 countries was 3,989.

In the *UK* access to tuition fee loans and student living and student loans is contingent on having the *right to reside* in the UK. EU nationals, family members of EU nationals, EEA migrant workers, and children of Swiss nationals or Turkish workers can access student finance (tuition fee loans) at the same rate as British students

¹⁷² Policy rules of the Minister of Education of 13 December 2012, nr. HO&S/463528, *Beleidsregel controlebeleid migrerend werknemerschap*.

¹⁷³ When the relevant income exceeds certain income thresholds it is not possible to get a grant. (i.e. for a 4 member family there are three income thresholds: under 14,600 euros per year per family unit, you can get the maximum amount; under 36,000 euros you can get the normal amount (the average amount of a grant is 3,000 euros for University studies); under 40,000 euros you can only get exemption from tuition fees.

provided they have resided in the UK for at least three years before applying for the student loan.¹⁷⁴ EU nationals or family members are not eligible for maintenance loans for living costs, maintenance grants for living costs or special support grants.

In practice, however, a number of practical barriers have been identified by the National Union of Students (NUS personal correspondence, October 2014). The difficulties lie in proving residency for three years prior to taking up study. Documentary requirements necessary to prove residency are complex and sometimes difficult to fulfil.

For workers residence conditions do not apply, but currently the interpretation of 'worker' in the UK (such as how many hours work are required etc) is unclear and it is difficult to find information. According to the national expert at the time of writing it was not possible to identify any relevant case law relating to this specific point.

4.3 EXPORT OF STUDY GRANTS

In *Denmark* Danish nationals, EU citizens who are considered as workers or self-employed pursuant to EU law and their family members can export study grants for studies in other Member States after a period of two years of residence in Denmark or where other factors of attachment to the country are fulfilled.¹⁷⁵ All other Union citizens are first entitled to the aid after five years of residence (permanent right of residence) after which they can also 'export' the grant to study in the Member State of their choice. The conditions to be fulfilled for Danes and economically active Union citizens and their family members is that one has fulfilled two years of residence. Yet, other criteria than residence may serve to demonstrate a specific link with the Danish territory. This may include that one has followed school in Denmark and/or has close family ties to Danish citizens.¹⁷⁶ These additional criteria show the impact of the Court's case in *C-542/09 Commission v The Netherlands*.

In *Estonia* the reporter did not find any restrictions to export the study grants to abroad.

According to the *German* Federal Act on Individual Educational Assistance (BAföG), financial assistance for education is basically granted for educational studies in Germany. Students and apprentices whose permanent domicile is in Germany will be granted financial assistance for education for attendance at an educational institution in a foreign country if: (1) such attendance is educationally beneficial at the particular stage of education and, with the exception of German secondary schools with a so-called 'gymnasiale Oberstufe' and technical secondary schools, at least one part of these educational studies can be credited to the prescribed or usual educational programme period, or (2) on the basis of a cross-border cooperation between a German and at least one foreign educational institution, the coordinated teaching units of a single educational programme are being offered alternatively by the cooperating German and foreign educational institution, or (3) education studies are being commenced or continued at an educational institution in an EU Member State or in Switzerland.

The educational studies must be for a period of at least six months or one semester; studies that are taking place at an educational institution with which a cooperation agreement exists must be for a period of twelve weeks.

In the previous section we discussed the *Commission v. Netherlands* judgment.¹⁷⁷ This judgment led to a change of the *Dutch* rules, so that the 3 out of 6 rule does no longer apply for children of frontier workers.

¹⁷⁴ <https://www.gov.uk/student-finance/continuing-fulltime-students>, brochure on terms and conditions.

¹⁷⁵ Bekendtgørelse (executive order) nr. 792, 25 June 2014, §1-2.

¹⁷⁶ Bekendtgørelse (executive order) nr. 792, 25 June 2014, §2.

¹⁷⁷ Case C-542/09, EU:C:2012:346.

Since the new rules could lead to more claims, the Act was also changed to allow the minister of Education to determine a ceiling (in euros) for study loans to be exported a year.¹⁷⁸ In this respect foreigner and Dutch students are treated in the same way: applications are dealt with in the order of receipt by the administration. This means that when the limit is reached no longer study loans are exportable. The Minister also lies down the criteria for institutions where one can study with receipt of the study loan. For others than the children of frontier workers categories the 3 out of 6-rule still applies.¹⁷⁹

As a rule, in *Poland* studies of Polish citizens abroad cannot be financed from the State budget.

In *Spain*, according to the regulation of the Grants General System established in Royal Decree 1721/2007 only student enrolled at a Spanish University can apply for a grant and does not allow to export the study grant except for Erasmus students. For compulsory education it is possible to obtain a grant for Spanish students enrolled in Spanish education centers abroad.

Since in *Sweden* students are considered to still reside in Sweden while studying abroad, both grants and loans can be granted and are exportable.

In *the UK* if UK citizens decide to study in another Member State they are eligible to lower financial support/study grants than if they remained in the UK to study. They are entitled to a tuition fee loan capped at £1,350 a year (compared to £9,000 if they remained in the UK). They are also entitled to a travel grant and grants for dependents. They may also be eligible for a maintenance loan which is calculated at an overseas rate (approximately £6,500 for a continuing year of study and £5,000 for a final year of study). Students studying in another Member State are not, however, eligible for any maintenance grant which they may be entitled to if studying in the UK.¹⁸⁰

4.4 THE POSITION OF THIRD COUNTRY NATIONALS

In *Denmark* third country nationals are entitled to Danish maintenance grants and loans if they fall within one of the categories mentioned in the Executive Order.¹⁸¹ This will encompass those who have stayed in Denmark for more than five years provided that they have not come to the country for the purpose of study, foreigners who have only stayed in Denmark for two years but who are either married to a Dane or have had substantial work in the country. Third-country nationals who are not family members to an EU national do not have the possibility to export the maintenance grant while studying abroad, cf. the Executive Order. Finally, third country nationals have free access to universities if they have a permanent right of residence in the country or are likely to get one or have been granted a 'free place' to study.¹⁸²

In *Estonia* the position of the third country nationals is the same as that of EU nationals.

In *Germany* according to Section 8 of the Federal Act on Individual Educational Assistance (BAföG), financial assistance for education is also granted to the following persons: foreign nationals whose habitual residence is in Germany and who outside the Federal territory are recognized as refugees within the meaning of the Convention Relating to the Status of Refugees of 28 July 1951 and whose residence entitlement in Germany is

¹⁷⁸ *Wijziging van de Wet studiefinanciering 2000*, Amendment on the Study grants Act for maximizing portable study finance (Parliamentary Papers 2012/13, 33.453), The ceiling is 45 million euro per year, the same as was spent so far on study grants.

¹⁷⁹ It was disputed in the Martens case, 26 February 2015, Case C-359/13, ECLI:EU:C:2015:118.

¹⁸⁰ Personal communication of the British experts with Student Finance UK (June 2015)

¹⁸¹ Bekendtgørelse (executive order) nr. 792, 25 June 2014, §9.

¹⁸² Report on residence requirements for foreigners' access to Danish welfare services, (*Rapport om optjeningsprincippet ift. danske velfærdsydelse*), March 2011, Commission on foreigners' access to welfare benefits (*Udvalg om Udlændinges ret til velfærdsydelse*), at p. 182.

not merely temporary. Other foreign nationals are granted financial assistance for education if their permanent domicile is in Germany and they have a permanent specified residence permit.

In the *Netherlands* third country nationals who have a certain type of residence permit¹⁸³ are entitled to study finance if they have resided in the Netherlands for at least five years. In that case they are assimilated with Dutch persons. Those who do not satisfy these conditions (so either not the nationality nor the 5 years condition) can apply for a loan for the tuition fee. In case of a full-time course in secondary vocational (mbo) or adult (vavo) education, the contribution to course fee is a gift. Their tuition fee is between € 10,000 and € 20,000 a year.

In *Poland* specific groups of foreigners as determined in the Act can follow education. However for them no study finance from Poland is available. Some groups of foreigners may, however, be subsidised if they fall under the so-called Polish Charter. This concerns foreigners with Polish roots.

In *Spain* third country nationals must have had legal residence during five years in Spain in order to be entitled to study grants for university studies. third country nationals, even if they do not have the legal right of residence, have the right to access, which is free, to Primary and Higher Education till the age of eighteen.

In *Sweden* third-country nationals who have a status as long-term residents, according to directive 2003/109/EC, have right to study grants on the same conditions as Swedish citizens.

In the *UK* people with refugee or humanitarian protection status may be eligible for tuition fee loans and those who have had unaccompanied minor status may also be eligible for educational support from local authorities under the Children (Leaving Care) Act, 2000.

In terms of access to further education, eligibility for courses funded by the Education Funding Agency (EFA) and the Skills Funding Agency (SFA) in England depends on immigration status of third country nationals. There are currently no legal restrictions on asylum seekers or refugees studying in the UK (subject to the normal entry requirements). However prospective students must show that they are able to pay the course fees – likely to be prohibitive for those not eligible for support to attend EFA or SFA funded courses.

Measures announced on 1 September 2014 by Minister Greg Clark include extending the time from three to five years non-UK EU students have been living in the UK prior to being eligible for a tuition fee loan. The rationale for this shift was to bring the rules for living costs support in line with those applied to visiting EU students in other EU countries.

The move to extend the required time of residency in the UK has been introduced in the context of a forthcoming abolishment of student number controls (in 2015-2016) and fears that the government will be obliged to provide tuition fee loans to several thousand extra EU students once this cap on students is removed. Recent figures from UCAS indicate that the number of EU undergraduates accepted by UK universities has risen by 9% in the current academic year compared to a rise in students from England of just 3%.

4.5 CONCLUSIONS

Study grants are in several aspects a category different from subsistence benefits, since the recipients of study grants are persons whose free movement is basically encouraged. It is not relevant whether, as is the case with jobseekers that they have a prospect of finding work in the host country. A second difference is that there are, more than with subsistence benefits, large differences between the Member States: some States do not have study grants at all, so the discussions and case law of the Court of Justice on this topic are not even familiar to the countries and the national experts as appears from the reports.

¹⁸³ <http://www.duo.nl/studiepunt/nationaliteitenschema/natschema.asp?taal=en>.

Still study grants have had an important meaning for the development of the concept of EU citizenship, since for this benefit the Court had to develop an argument under what criteria EU citizens can refused this benefit. Apparently it is relevant that the amount of this benefit is large enough and payable long enough to take the trouble to exclude persons from this and for mobile students to take the trouble to challenge the refusal, and for this purpose it is an ideal social right.

In this light the link approach – a person must have a degree of integration with the host State – has been developed by the Court of Justice. The Court had to decide which criteria are allowed for having to show this link. Interesting is that a distinction remains between workers and non-economically active persons, and between workers and frontier workers. In case of frontier workers working does not constitute a sufficiently strong link with the host State if they have a small job or in case their children are the claimants for a right; in such cases additional criteria to show the link are allowed. For economically inactive persons the link can be shown in various ways.

It is interesting to see that in the case law EU citizenship has been developed as the possibility to have access to social rights in the host State in terms of degree of integration into the latter State. This approach has several advantages. It leaves the national systems intact and a Member State can define itself the criteria and level of protection. This approach does not make use of nationality as criterion, which would be unacceptable for a concept as EU citizenship, but instead provides a serious level of protection. However, the Member State must have a consistent set of rules on how it assesses the degree of integration in its society. The disadvantage of this approach is the lack of legal certainty and the continuous stream of cases necessary to develop this concept further. Remarkable is that the EU legislature has left this issue completely to the Court of Justice and has not developed its own criteria.

5 HOUSING SUBSIDIES

There is little or no case law of the Court of Justice nor EU legislation on the right to housing benefits, so this chapter does not have a general introduction. The main EU rules here are the already mentioned Article 45 TFEU and Regulation 492/2011, that are relevant to workers, and the Citizenship Directive for others.

5.1 THE NATIONAL LAW ON HOUSING ALLOWANCES

In *Denmark* the Housing Allowance Act does not discriminate on ground of nationality. Citizens who have their main residence in Denmark are entitled to housing benefits provided that they fulfil the conditions thereof. In addition, Danish law provides for *housing subsidies* to persons and families with low income in order for them to access and remain in decent housing. The level of the subsidy is defined in accordance with the levels of rent and income as well as the surface of the place and the number of persons living there. Generally subsidies are only given in respect of rented housing with the exception of retired people who might be entitled to the subsidy even if they own their home. Persons with a retirement pension from other Member States are put on an equal footing where the pension is covered by Regulation 883/2004. It is in addition a condition for obtaining the subsidy that the person is genuinely using the accommodation, which cannot be a summer house.¹⁸⁴ In addition, when the Act contains specific rights and conditions for pensioners, it puts on the same level citizens who receive a pension from other Member States. The Act does not distinguish between persons in employment and persons outside with the exception of pensioners. The Act thus complies with the EU Treaty provisions.

In *Estonia* there is no housing policy and there are no subsidies for accommodation.

In the *Netherlands* formally there is no distinction between Dutch and European citizens. One must, however, legally stay in the Netherlands. This implies that non-economically active persons within the first 5 years of their stay must not have received social assistance benefits, since if they do, the right to residence can be terminated and consequently there is no right to housing allowance. All citizens, independent of their nationality, can claim mortgage rent deduction from income tax.

In *Poland* no distinctions are made on nationality in case of persons seeking accommodation. According to Article 75(1) of the Constitution public authorities are obliged to pursue policies conducive to satisfy the housing needs of citizens, preventing homelessness, promoting the development of social housing and supporting activities of the citizens aimed at getting an own apartment. According to consistent case law this obligation does not involve a claim on the authorities and citizens can therefore not claim accommodation.

In *Spain* the right to housing is not considered as a strong right, so neither Spanish nationals nor nationals from other EU Member States have a real right to decent and adequate housing. In recent years, the Statutes of the Autonomous Regions of Catalonia, Valencia and Balearic Islands recognize in a stronger way a right to housing for their own residents, but budgetary restrictions are conditioning the extent of the right.

Housing benefits are very limited. In Spain the majority of citizens have their own property (about 85%), there are only 2% of houses for social renting. This constitutes a great problem for people with low economic resources and persons who recently entered Spain and leads to overcrowded flats and inferior accommodation.

In *Sweden* the Constitution states that the State should envisage to secure all citizens a right to accommodation, but this does not give Swedish citizens an individual and enforceable right to accommodation. Instead, the responsibility for providing emergency housing lies with the municipalities and the local social services. This responsibility also includes helping people in need of more long-term housing.

¹⁸⁴ See further, *bekendtgørelse af lov nr. 128 om individuel boligstøtte*, 18 February 2015.

There is no social housing in Sweden, but there are housing benefits for categories of financially vulnerable groups, i.e. persons in the ages 18-28 with a low income (usually students), families and persons with impaired health and seniors.

To be eligible for housing benefit an individual has to be considered resident and fulfil certain criteria to the scheme in question. The criteria for being a resident are strongly connected to the Population Register and, as seen above, registration requires not only that one has the intention of staying in Sweden for a year but also that one proves that one has the right to legally reside in Sweden during that period of time.

A survey, done by the *Socialstyrelsen, Hemlöshet bland utrikesfödda personer utan permanent uppehållstillstånd i Sverige*, shows that the regulations concerning EU citizens' right to housing and the obligations of the authorities need to be clarified. There is a lack of knowledge and uncertainty about which rules apply and how they should be interpreted, such as the right to residence, the right to subsistence benefits and how the coordination rules are used.

There is one case from the Supreme Administrative Court regarding the right to housing benefits for EU citizens. The case concerned a British couple that had moved to Sweden in 2009 and applied for housing benefits in 2010. At the time of the application, the Social Insurance Agency determined that the couple did not have right of residence, and therefore was not qualified for housing benefits. The decision was appealed all the way to the Supreme Administrative Court, where the Court made the judgement that since there is no requirement for right of residence in the Social Insurance Code no such assessment of the applicant's right of residence should be done by the Social Insurance Agency. Since the couple was registered in the Population Register, it was found to meet the requirements for residency according to the Social Insurance Code.¹⁸⁵

In the UK the Allocation of Housing and Homelessness (Amendment) (England) Regulations (2004/1235), which came into force on 1 May 2004 provided that 'a person who is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland is not eligible for an allocation of housing accommodation or housing assistance' and further stipulated that 'a person shall not be treated as habitually resident if he has no right to reside in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland', thereby linking habitual residence to a qualifying right to reside for housing. The Allocation of Housing and Homelessness (Eligibility) (England) Regulations (2006/1294) prohibited allocations to EU citizens whose had only an initial three -month right to reside, and also prohibited allocations to EU migrant citizens who were not either habitually resident or exempt from the habitual residence test as people who hold a qualifying status of worker, self-employed person, their family members, or those who have a permanent right to reside. EU migrant citizens who could only rely on their initial three-month right or as a jobseeker were also ineligible for homelessness assistance. In line with their general conditions of registration, A8 citizens were only eligible for housing allocations or homelessness assistance if they were self-employed, or as workers either whilst actively working during their first 12 consecutive months of registered work or after completion of the 12 month period.

Compared to the multiple amendments made to the regulations governing welfare benefits, there has been comparatively little change regarding the eligibility of EU migrant citizens for allocations of housing and/or homelessness assistance since 2010. The principal changes stem from the Localism Act 2011 and to a lesser extent the Immigration Act 2014. The housing provisions of the Localism Act 2011 arose out of a public discourse initiated in 2007 which alleged that migrants of all kinds were taking up an unfair amount of social housing at the expense of British citizens. The Act, and the subsequent guidance to allocations which followed it, introduced an expectation that in setting their allocation schemes, local authorities will include 'a local residency test'. The guidance adds that 'the Secretary of State believes that a reasonable period of residency

¹⁸⁵ Högsta Förvaltningsdomstolen, mål nr 2785-13, dom 2014-04-15.

would be at least two years'¹⁸⁶. In practice, many local authorities have put in place requirements which go beyond two years.¹⁸⁷

Under the Immigration Act 2014, landlords who rent accommodation to private tenants are required to check that all new adult occupiers are either 'relevant nationals' or have the 'right to rent'¹⁸⁸.

Prior to April 2014, EU migrant citizens in receipt of Jobseeker allowance were also entitled to claim housing benefit.¹⁸⁹ Since April 2014, the link between Jobseeker allowance and housing benefit has been removed for EU jobseekers. In addition, eligibility for housing benefit is one of the income-related benefits potentially affected by the minimum earnings threshold test (see above); EU workers and self-employed EU people who fail the minimum earnings threshold test may be found to be ineligible for housing benefit. The same applies for council tax reduction, for which eligibility largely resembles housing benefit eligibility. People who were in receipt of housing benefit prior to April 2014 are protected from the changes until such time as their circumstances change. Since housing benefit (and council tax reduction) claims are assessed by the local authority, moving to a new local authority area will result in the need to put in a fresh claim for housing benefit (and council tax reduction), at which point their eligibility for housing benefit will be assessed under the new regulations.

A number of homeless charities have noted that the withdrawal of housing benefit for EU jobseekers is likely to impact on homeless and economically inactive EU citizens in the UK, since most hostels and night-shelters for the homeless require their occupants to be eligible for housing benefit as a form of payment for their bed space. Homeless EU citizens may have been in the UK for a number of years, and may have worked for a considerable part of their period of residence, but not have acquired retained worker status or a permanent right to reside (and thus a qualifying R2R HB) due to the irregular nature of their work history.

5.2 CONCLUSIONS

Like in the case of study grants there are also here important differences between the Member States in how they have organized support for their citizens and this affects, of course, also EU citizens. Countries may be concerned that providing accommodation (or subsidies for accommodation) to persons from other Member States may negatively affect their own nationals. After all, in some countries or areas there is serious scarcity in adequate accommodation.

However, this does not take the need away that the criteria for access to advantages in this area have to be consistent. The connection between the requirement of a long period of residence in the country and/or having to specify the conditions of the Population Registry make that also persons already staying for a long time in a country and/or persons working in the country have problems in accessing housing subsidies or accommodation.

Thus if residence definitions prevent persons who are already a considerable period in a country or who are working in a country from being allocated accommodation or subsidy this should be redressed. This is an important conclusion and lack of transparency and legal certainty should be addressed, first by the Member State itself, but otherwise also by the EU Commission.

¹⁸⁶ Department for Communities and Local Government (2013). *Providing social housing for local people: Statutory guidance on social housing allocations for local authorities in England*. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/269035/131219_circular_for_pdf.pdf

¹⁸⁷ W. Wilson. *Allocating social housing (England)*. Standard Note SN/SP/6397. London, House of Commons Library, 2015.

¹⁸⁸ Home Office, *Immigration Act 2014: Landlord Checks*, London 2014. Available at: <http://www.worcester.gov.uk/documents/10499/3862788/Immigration+Act+2014+Landlord+Checks.pdf/c48775f2-b878-455c-8bfc-ece0863c63e1>. In secondary legislation, the Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations (2012/2588) made Zambrano carers, whose right to reside was confirmed in SI 2012/2560's amendments to the EEA Regulations, into a category of EU citizens which is nonetheless *ineligible* for housing allocation (as determined by the Secretary of State).

¹⁸⁹ Regulation 10 (3B)(K) of the Housing Benefit Regulations.

6 CONCLUSION

6.1 THE RELEVANCE OF ACCESS TO SOCIAL RIGHTS TO THE CONCEPT OF EU CITIZENSHIP

In this report access to specific social rights for EU citizens in our countries of study was discussed and this was confronted with the applicable EU law. The social rights discussed are subsistence benefits, housing benefits, study grants and health care. Of course, this implies that several social rights were not addressed. Among these are important social rights, such as the work related social security benefits (disability benefit, unemployment benefit) and access to work. However, from the very beginning – i.e. from 1958 onwards - European Community legislation included already a regulation to promote the freedom of economically active persons (workers) that dealt with a specified number of work related benefits. Consequently the law on coordination of social security (Article 48 TFEU) and the law on non-discrimination in working conditions (Article 45 TFEU) has been well developed and this law is well analysed in literature.¹⁹⁰

The social rights selected for the present study are supplementary to the benefits for economically active persons, since they are very important for non-economically active persons who want to make use of their free movement. Therefore they are essential to European citizenship, since especially for them the rules on citizenship were made and a considerable deal of the case law of the Court of Justice on EU citizenship is addressed on such areas. By doing so we entered the areas that are of particular interest for the development of EU citizenship.

Access to social rights by persons making use of free movement has become highly controversial in some countries; it was, for instance, one of the hot issues in the negotiations between the UK and the European Council to avoid Brexit. However, since the concept of EU citizen was introduced exactly to include economically non-active person within the sphere of the EU Treaty and to award them also explicitly the right to free movement (article 21 TFEU), discussion of access to social rights is not farfetched, but essential to learn more about the concept of EU citizen.

The case law of the Court of Justice on social rights and European citizenship focuses especially on subsistence benefits (benefits for jobseekers) and study grants¹⁹¹, and this is not accidental. The amount of money involved in these cases can be considerable and therefore the fear of benefit tourism is most prominent here. Therefore this case law is most interesting for our purpose.

6.2 THE DEVELOPING CONCEPT OF EU CITIZENSHIP

Article 20 and Article 21 TFEU do not define what is a EU citizen and nor have they introduced a system of social rights for EU citizens. Instead the concept of EU citizenship has been importantly developed in the case law of the Court of Justice, in particularly by connecting citizenship with the non-discrimination (nationality) rule (now Article 18) of the Treaty .

Excluding a person from another Member State from social rights purely on basis of nationality would be contrary to EU citizenship and the non-discrimination rule of the Treaty. Instead, Member States are allowed to mention objective justifications to exclude persons in order to have a justified protection of their social rights, and gradually, in a series of cases, the ‘link approach’ was developed: Member States are allowed to require a citizen to have developed a certain link with the host country, which shows that there is a certain degree of integration in that host country.

¹⁹⁰ See, for instance, F. Pennings, *European Social Security Law*, Antwerp 2015, sixth edition.

¹⁹¹ H. van Eijken, *EU citizenship and the constitutionalisation of the European Union*, Europa Law Publishing, 2015.

Consequently EU citizens do not have from the beginning of their stay in a host country the same rights as nationals; only those having a certain degree of integration with the host State have access to social rights. This is a development that, in principle, fits well with the present situation of the EU: the lack of harmonization of welfare systems and the large differences in prosperity between countries cannot simply give an open door to mobile persons, since otherwise social tourism would threaten the systems. On the other hand, simply excluding all persons from other Member States on ground of nationality would make the right to free movement senseless. The idea that after one has integrated in a particular society one has to be treated in the same way as the nationals of that country is useful to reconcile protection of a system and mobility of EU citizens.

Workers have had access to social rights on the basis of their making use of free movement (since 1958 on the basis of Coordination Regulation 3/58 to the specified employment benefits and 1968 to all social rights on the basis of Regulation 1612/68, the predecessor of Regulation 492/2011). When EU citizenship was introduced and the Court had to explain why differences exist in the possibilities to exclude the economically and non-economically active persons respectively from social rights. The Court now defined also the access of workers in terms of the link approach: having an economic activity in the host country is already a sufficient link, because of the contributions and taxes paid. For the economically non-active persons the link has to be gradually developed on basis of their duration of stay. Problems then arise with persons in very small jobs, job seekers and former workers: when can it be said that their link is not really stronger than that of an economically non-active person? This is still an area with a lot of sensitive questions.

From the foregoing we can conclude that the discussed case law has developed a meaning of EU citizenship vis-à-vis social rights: to have access to another country's social rights on condition of *having a certain degree of integration* in that country (and, of course, after fulfilling the national conditions).

6.3 PROBLEMATIC CRITERIA FOR DEFINING THE DEGREE OF INTEGRATION

Thus Member States are allowed to require a certain degree of integration of non-nationals in their country; in addition access to social assistance and study grants is also governed by the Citizenship Directive. However, from the analysis of the national reports underlying this comprehensive report it appears that there are also criteria for defining the degree of integration that cause tensions with the Citizenship Directive and the case law of the Court of Justice.

These are the major issues identified in the previous chapters.

- In some countries thresholds for considering persons as workers were raised, in order to exclude them from access to social rights. In other countries there is no information on the practice of who is considered a worker. The thresholds cause tensions with the case law of the Court of Justice (*Vatsouras* judgment, for instance). In addition the uncertainty on the concept of worker can create legal uncertainty and this can have a negative impact on the right to free movement.
- In some countries, such as the UK, the criteria for job seeker and former worker that are, according to the Citizenship directive, relevant to the right to stay in a country, are also used for defining access to benefits. Connecting these elements may sometimes mean that benefit is paid where it is not required (as was the case for some time for Jobseekers allowance) and that otherwise the right to stay is restricted more than necessary if not benefit is to be paid. This connection was also seen in respect of former workers.
- In addition we have seen that the requirements on residency are sometimes problematic. Although requiring legal residency in order to be eligible for social rights is consistent with the case law of the Court of Justice, requiring *a particular period in a particular community* (country, municipality, region) is problematic and can frustrate legitimate rights of citizen, and 'even' of workers. Moreover this does not only affect subsistence rights, but also other rights, such as housing benefits or medical care.

- Also the condition that residence is defined by being registered in a registry and specific conditions that apply for such registration is problematic, such as that one has the prospect to stay at least a year legally in the country, or that a person has a postal address, employment or family members. This requirement can also be problematic for persons working in the country or persons have already stayed for a considerable time in the country. In theory it may for some people difficult to show their residence even after more than five years if too strict criteria apply.
- Denmark, Sweden and UK have (basically) a free system of health care. In these systems one has to satisfy a period of residence or conditions for registering (for which strict conditions apply) in order to be eligible for care. Since these systems sometimes do not have a way to calculate costs and receive payments for health care, there is a close connection between residency and having access to health care treatment. The Polish, Dutch, German, Spanish and Estonian systems require – even though these are residence schemes - that claimants have paid contributions in order to be eligible for health care. The obligation then rests on the employee or resident – depending on the nature of the system – to pay contributions. In such systems it has to be ensured that the insured indeed pay contributions and measures have to be taken in case this does not happen. However, a contributory system has the advantage – from the view of EU citizens - that a ‘simple’ condition on residence suffices, so residence need not be ‘habitual’ or for a certain period or on basis of registration in a Civil Registry.
- Another difference is that in a contributory system the insurance institution will be keen to insure the persons falling within the scope of the insurance, so that it can collect contributions. In case of a free system the responsible institution has to protect the system against claims. So there is a difference in approach. Contribution conditions may constitute a threshold for persons without an income or with a low income. However, this can be solved by exempting categories of persons from liability to pay contributions or by income subsidies.
- Interesting is also the relationship between the system of health care financing and cross border health care (e.g. on the basis of the Cross border health care directive). If one has a system in which patients/insurance companies have to pay for the costs influx of patients can be seen as ‘a market’ and having economic advantages (Estonia, Netherlands). Countries with a free health care system or a system that has problems in calculating the costs and/or having its invoices paid have many more problems with planned health care, both of incoming or outgoing patients. In some countries there seems to be little policy or information on this issue.

We will now investigate whether these findings can be explained by the characteristics of the national systems.

6.4 Is there a relation between the nature of a system and difficulties in accessing social rights?

The executive summary of the previous report in this project (WP 6.1)¹⁹² concluded *inter alia* that:

‘The specific welfare regime of a country does not seem to be of great importance for EU migrant citizens accessing social rights. In practice, access largely depends on meeting residency and/or registration requirements and on the propensity of individual Member States to implement rules limiting access of these rights for EU migrant citizens.’

This is further elaborated on page 23 of the report:

‘Some observers argue that EU migrant citizens might have easier access to social rights in non-contributory, i.e. liberal or social-democratic, welfare states than in conservative welfare states, as the latter heavily rely on social insurance contributions for citizens/workers to qualify (cf. Economist 2013). These arguments however neglect the fact that most established welfare states have social safety nets or social assistance

¹⁹² Cecilia Bruzelius, Elaine Chase and Martin Seeleib-Kaiser, *Social Rights of EU migrant Citizens: A Comparative Perspective* (WP 6.1) Oxford 2015 (see beUcitizen .website).

programmes that provide support solely based on need. Hence, until newly arrived migrants fulfil the contributory requirements for social insurance, they are most likely to be dependent on social assistance in times of need, should they fulfil the residency requirements, irrespective of welfare regime. Furthermore, universalist welfare states may also use residency registration as a way to control access to benefits and services, as it is the case in Denmark and Sweden. In other words, irrespective of the welfare state regime, for EU migrant citizens, who have no (or very low) income, social assistance is potentially the only form of social transfer they might be eligible for, if they do not have children.'

In Table 1 of the WP 6.1. the welfare systems of the countries were classified as follows. We have maintained also the classification of intra EU immigration, since this may be a factor influencing particular schemes.

Table 1: Welfare state regimes and degree of intra-EU immigration

Welfare State Regime	Degree of Intra-EU Immigration		
	Low	Medium	High
Mediterranean			Spain
Residual/liberal	Estonia		UK
Conservative	Poland	Netherlands	Germany
Social Democratic		Netherlands Denmark	Sweden

Let us now also list the countries to the extent that they have difficulties to define access to their systems. For this purpose we took the specific rules of a country into account that limit access to social rights, and specifically where there are tensions with the case law of the Court of Justice, of which the main problematic ones were listed in Section 6.2.

Table 2: The strictness of the conditions on access to social rights

Degree of restrictiveness of access to the scheme		
Low	Medium	High
Poland	Spain Netherlands	
Estonia	Germany	
		UK Sweden Denmark

Although it is certainly true that all systems have a social assistance scheme, as was remarked in WP 6.1, this conclusion does not explain why some countries – although belonging to different regimes – have similar problems with protecting their system. Therefore it is useful that the research was continued by this comprehensive study.

The degree of intra-EU immigration seems at first sight an explaining factor, but this immigration may explain solely that a country takes measures to protect its system, not the similarities and differences between the way this is done. For instance, both Sweden and the UK have complicated rules to define that one is habitually resident in the country, whereas these belong to different social welfare families.

If one restricts oneself to subsistence benefits, there is at first sight some logic in the requirement on habitually residency. After all, Member States are allowed to require a certain degree of integration in the country, and that may be in terms of duration of staying legally in that country.

However, if we also look at the other rights, we can see consistencies in approaches in some countries that are problematic. For instance, not only for subsistence benefit it is required to be habitually resident in the UK, but also for the right to medical treatment. Comparable approaches exist in Sweden and Denmark. Also the right to housing benefits is connected to habitual residency.

If we then look closer at the systems, we can see that here are important characteristics that divide the systems. The best can this be seen in relation to health care schemes.

Table 3: Nature of the scheme and complicated access conditions

	Low complicated access	Medium complicated access	High complicated access
Contributory	Poland Estonia	Spain Netherlands Germany	
Free			UK Sweden Denmark

The distinction is not exclusively between residence based systems and employment based systems, since health care is in some of the contributory systems mentioned above covered by a residence scheme. However, the financing is very important, since in case of a free scheme it is more difficult to keep persons with an insufficient link with the country out of the system than in contributory systems.

We have seen that EU citizenship, as developed in the case law of the Court of Justice, means that a person has to be admitted to social rights of a country when s/he has a certain degree of integration in the host country. Member States can define the conditions for this certain degree, but there are tensions if these are so strict that they exclude persons who have established a link, or who are working in a country.

The countries with complicated conditions on residency have a system that provides for free health care benefits. The UK and Nordic countries have both free residence schemes. The difference between the liberal system of the UK and the social democratic system of the Nordic countries is that in the former system benefits are lower than in the latter, and consequently the role of subsistence benefits in the UK that are needed to reach a subsistence minimum is larger. Consequently for more social rights there are tensions when EU citizens claim social rights.

This residence approach also influences areas where benefits are by nature non-contributory, such as public assistance. If residence is an important condition for, let us say health insurance or basic old-age benefit, specific criteria are developed for residency and specific registration methods are developed for these benefits, but they have an impact also on purely solidarity benefits, such as public assistance. And such specific conditions can cause problems with EU law, such as that duration of residence in a specific municipality is relevant instead of in a country or that workers have difficulties in having access to these social rights.

This is a fundamental issue and flowing from important and traditional characteristics of a system as is explained for several authors.¹⁹³ This is seen as – what Erhag calls - a ‘normative issue’: these residence systems are based on solidarity within the national community. As a result these systems are seen to belong to the national traditional values and culture and not easy to change. However, such systems have a problem with increasing mobility. In the following section some scenarios are discussed how to approach this.

6.5 SCENARIOS TO RESPOND TO THE BARRIERS FOUND IN THIS STUDY

I. The problem of the frictions between national systems and migration

¹⁹³ See Erhag (2016) and Harris (2016). In these works also references are made to other authors on this issue.

It has traditionally been a fundamental starting point of treatment of social policy in the EU that Member States have remained exclusively competent in shaping their social security system. There are good reasons for this exclusive competence. However, we can also see that some systems have more problems with free movement of EU citizens than others. Partly this is related with economic factors, with a country having better prospects for migrants than other countries or with the simple fact that a country does not have many social rights at subsistence level.

However, the tensions with free movement of citizens can also be connected with the characteristics of a system. We have seen that there are also important values connected to the system adopted by a country. However, that does not mean that no changes are possible that maintain both values and mitigate the tensions. Therefore some scenarios are sketched.

Scenario 1. Keep the system as it is

Member States which have complicated rules on residency as discussed in Section 6.2 may have important reasons to keep their systems as they are. However, this means that:

- there is a continuing pressure on the system by non-economically active persons that has to be restricted by sharpening the access conditions, in particular by the criteria for when a person is a resident of the county or local community.
- this leads to a lot of legal issues that have to be solved and tensions with EU law; it leads to difficult bargaining processes to adjust EU law, such as with the agreement between the UK and European Council on Brexit. As we have seen the agreement does not really address the problems we have identified, so there will remain a continuous tension.
- national authorities and judges are working with a system that is not fully consistent with the criteria of the Citizenship Directive and case law of the Court of Justice. This means that they will further elaborate their own criteria and rules and that there will often be a lack of transparency and lack of knowledge¹⁹⁴ This may also mean that social rights are paid in situations where this is not required and that in other situations the barriers to benefit eligibility are too high.

Scenario 2. Reconsider the national system

An alternative scenario is to investigate thoroughly by which means a system can be adjusted to maintain both the values adhered to by the country and to protect the system against 'social tourism' without creating disproportionate barriers to free movement. For instance, a contributory system for health care for all residents, with income subsidies for those with a low income, is a possible way to reconcile the two mentioned objectives. It is of course up to the Member States to decide which system suits them best. In this report various systems were described and these may be helpful in this operation.

The European Commission can provide technical help to those Member States that want assistance in such operation.

II. The problem of legal uncertainty and complicated concepts in EU law

¹⁹⁴ Erhag gives quite a number of such situations in his article (Erhag 2016). Also in the UK the jobseekers allowance was initially paid in situations where this was not required. Of course Member States are free to do so, but if this is unintentional, or if such practice at a later point of time leads to more radical reform of the system than otherwise needed, this is problematic.

A second major element is that the law in the areas described is very complicated, both the EU rules and case law and also the national rules. For the national experts it was often difficult to find the precise rules and practices, and for understanding the developing EU law on EU citizenship a lot of study is required.

This is particular true for the position of persons who are in work, who are seeking work and who stopping working, since they can, in addition to the rules of the Citizenship directive, also invoke Article 45 TFEU. Member States are inclined to exclude persons in very marginal employment or those seeking work for a long time and with bad prospects on the labour market from social rights. In other words, by sharpening the criteria for worker they can shift the persons to the category of non-economically active person.

In this area there are few hard EU rules, and the criteria of the Court seem to consider many more persons as worker than some of the Member States. All in all this also leads to problems with legal certainty and transparency for workers and also here there are several options.

Scenario 1 Leave it as it is

The first scenario is that no changes are made in EU instruments to define more sharply who is a worker, a jobseeker and who keeps rights as a former worker. In that case there is a tension between some national laws that keep tightening their definitions and the case law of the Court of Justice. It will remain leading to agreements such as between the UK and the European Council to reduce rights in emergency situations. However, regardless of the merits of this agreement, it will not lead to a structural approach.

Scenario 2 Proactively regulating free movement

The Court of Justice has given an interpretation of worker under EU law, which is a very broad one. This is not absolutely the only possible interpretation under Article 45 TFEU. Certainly, it is clear that a definition of worker cannot be such that it restricts free movement seriously. However, setting a threshold and thus creating more legal certainty is a possibility that could be investigated and Regulation 492/2011 is an appropriate instrument in which such definition can be given.

A possible way is that a person is a worker for the purpose of the application of free movement law only if s/he works at least a number of hours a month as specified in Regulation 492/2011. Possibly the threshold is what is currently required in the UK and the Netherlands (i.e. 40% of a full-time job). This threshold is higher than now mentioned by the Court of Justice but has the advantage that clarity is obtained. It will also avoid differences in requirements between the countries, and within a country depending on the type of benefit that is claimed. This thus creates more transparency, and makes the division between worker and EU citizen clearer.

III. The Responsibilities of the Member States

Free movement of persons who are not a worker or self-employed is often instigated by bad prospects in the country of origin and even discrimination of particular ethnic groups. Roma people are often mentioned as such group. There are also other persons who have little prospects in the host country and poverty and homelessness are then imminent. Although it is embarrassing for the host country that it is not able to provide adequate protection, most often there will be no permanent solution in this country. This means that the country of origin should come into the picture, so see what this can do for rehabilitation of these persons. To some extent this already happens by ngo's, for instance helping Polish workers who have no work and prospects in a country to go home. But Member State could also have a role in this.

The European Commission could start a discussion on this issue and make an inventory of good practices in this area.

6.6 FINAL REMARKS

As we have seen the concept of EU citizenship is still developing, and since, apart from Directive 2004/38, the essential criteria are to be found in the case law, description of EU citizenship is a quite complicated topic. We found, however, that the link approach – i.e. that a Member State can require a certain degree of integration of

an EU citizen before s/he has to be granted a social right - is a useful and appropriate way to identify the relation of EU citizenship and social rights, and this link approach is also able to explain why some countries have more problems with access of EU citizens than others.

It is then up to the Member States to investigate, within the limits of relevant EU law, to see whether they can create protection of their national systems without impeding free movement more than allowed under EU law, while at the same time realising a less complicated and more transparent system and moreover also more legal certainty for EU citizens.

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