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CESifo DICE Report

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Suggested Citation: de la Casa, Ana Herrera; Meduna, Michael (2006) : The New Directive on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States - What Changes Does it Bring?, CESifo DICE Report, ISSN 1613-6373, ifo Institut für Wirtschaftsforschung an der Universität München, München, Vol. 04, Iss. 4, pp. 3-7

This Version is available at:
https://hdl.handle.net/10419/166888

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The EU Directive on Free Movement

The New Directive on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States – what Changes Does it Bring?*

Ana Herrera de la Casa and Michal Meduna**

In the first days of the European project, only workers benefited from free movement as this right was initially conceived as an economic and professional right relevant to the Internal Market.

Throughout the years, this right was extended to all categories of Union citizens. A major breakthrough was reached with the introduction by the Maastricht treaty of citizenship of the Union which confers on Union citizens a number of civil and political rights amongst which the right to vote and to stand as a candidate in the municipal and in the European Parliament elections in the Member State of residence.

Citizenship of the Union also confers to Union citizens the right to move and reside freely within the Union. By virtue of Article 18 of the Treaty establishing the European Community every citizen of the Union has the right to move and reside freely within the territory of the Member States subject to the limitations and conditions laid down to give it effect.

The right to move freely is one of the most visible advantages that Community law offers to nationals of the Member States, and citizenship of the Union is destined to be their fundamental status.

In order to remedy previous sector-by-sector, piecemeal approach to the right of free movement and residence and to facilitate the exercise of this right, on 23 May 2001 the Commission presented a proposal for a directive. The text was adopted finally on 29 April 2004[1].

Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States replaced a complex legal regime consisting of nine directives and one regulation and integrated important case-law. This represents an advantage of legibility and transparency. It brings free movement rights under the umbrella of citizenship of the Union.

Main innovations of the Directive

The extension of family reunification rights for Union citizens

Those Union citizens who move to another Member State must be assured that their family may remain united. This touches directly upon the human dimension of the right of free movement.

Under previously applicable Community law, the family members were the spouse of the Union citizen, their descendants who are under the age of 21 years or are dependent and their dependent relatives in the ascending line.

The Directive extended the definition of family member who can accompany or join a Union citizen in the host Member State to the partner with whom the Union citizen has contracted a registered partnership on the basis of the legislation of a Member State if the legislation of the host Member State treats registered partnerships as equivalent to marriage.

In addition, with a view to maintaining unity of the family in a broader sense, the Directive provides that

* The opinions expressed in this article are authors' own and do not represent the position of the institution to which they belong.

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[1] OJ L 158 of 30 April 2004, p. 77.

Member States must facilitate entry and residence of other family members not covered by the above definition of family member. This obligation concerns not only any other family members who in the country from which they have come are dependents or members of the household of the Union citizen having the primary right of residence, as was the case under previous legislation, but also to those persons who require the personal care of the Union citizen for serious health grounds and the partner (irrespective of sex) with whom the Union citizen has a durable relationship duly attested. The Directive imposes on Member States an obligation to undertake an extensive examination of the personal circumstances and to justify any denial of entry and residence to these persons.

Facilitation of the right of entry

The importance the Community legislature attaches to the protection of family life is demonstrated in this Directive not only by the extension of family reunification rights to other family members but also by the obligation it imposes on Member States to issue family members who do not have the nationality of a Member State with a visa as soon as possible and on the basis of an accelerated procedure.

Another innovation is that the Directive has incorporated previous case law of the European Court of Justice stressing that the right to move and reside freely is granted directly to the beneficiaries of this right by virtue of their status of a Union citizen or member of his family who is not a national of a Member State, so, at the border, when they do not have the necessary travel documents or if required, the necessary visas, the Member State concerned must before turning them back, give them every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or prove by other means that they are covered by the right of free movement and residence.

In addition, the Directive provides that possession of a valid residence card issued exempts family members who are not nationals of a Member State from the visa requirement.

Simplification of the conditions and formalities linked to the right of residence

One of the main objectives of the Directive is the simplification of the conditions and of the administrative formalities linked to the right of residence. The basic idea is that additional obligations to those applicable to nationals of the host Member State should be limited to the strictly necessary. For periods of residence of up to three months no conditions or formalities apply except for the possession of a valid passport or identity card for Union citizens.

For periods of residence of more than three months and up to five years, the Directive maintains the conditions attached to the right of residence: Union citizens must be either workers or self-employed persons or else have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State (for students a declaration of resources suffices) and comprehensive sickness insurance coverage in the host Member State. However, the Directive has replaced for Union citizens the obligation to obtain a residence card by a simple registration with the relevant authorities of the host Member State. This requirement is considered sufficient to satisfy the legitimate interest of the host Member States to be informed with respect to population movements in their respective territories. The registration scheme is optional and already several Member States have decided not to subject Union citizens to any administrative procedures in this respect.

The deadline for registration may not be shorter than three months from arrival in the host Member State and a registration certificate shall be issued immediately on presentation of the documents proving compliance with the conditions attached to the right of residence, which are listed in an exhaustive manner in order to prevent that administrative practices or divergent interpretations become an obstacle to the exercise of the right of residence.

Family members who are third country nationals will continue to require a residence card.

Introduction of a right of permanent residence

The essential innovation of the Directive is the introduction of a permanent right of residence. This is acquired by Union citizens and their family members after five years continuous and legal residence in the host Member State. This right shall no longer be subject to any conditions. After a sufficiently long period it may be assumed that Union citizens have developed close links with the host Member State and that they have become an integral part of its

society. This justifies the granting of a right of residence which might be qualified as reinforced. In addition the integration of Union citizens who are durably installed in a Member State is a key element to promote social cohesion which is a fundamental objective of the Union.

New rights for family members

Another important innovation of the Directive is that it grants new rights to third country family members of Union citizens. The Directive provides that under certain conditions they maintain their right of residence in case of death or departure of the Union citizen and in case of divorce, annulment of marriage or termination of registered partnership.

By virtue of the Directive the Union citizen's death shall not entail loss of the right of residence in the host Member State of his family members who are not nationals of a Member State and who have resided there for at least one year before the Union citizen's death, provided they fulfil themselves the conditions attached to the right of residence.

In case of departure of the Union citizen, the possibility to retain the right of residence is foreseen only for children who follow a course of study in the host Member State and for the parent who has actual custody of the children.

In event of divorce, annulment of marriage or termination of registered partnership, third country family members can retain their right of residence in the host Member State only under certain strict conditions provided they fulfil themselves the conditions attached to the right of residence.

In all cases, they retain their right of residence exclusively on a personal basis.

Retention of the right of residence in case of non compliance with residence conditions

The Directive has preserved the possibility for Member States to terminate the right of residence of Union citizens if they no longer fulfil the conditions attached to their right of residence. However, it has introduced a series of guarantees: Member States may only expel inactive Union citizens who have become an *unreasonable* burden on their social assistance system and recourse to social assistance in the host Member State may not entail automatically an expulsion measure.

Member States thus have an effective tool to protect their public funds against welfare shopping of economically inactive persons. However, while exercising it, Member States must observe the procedural and material safeguards that apply for cases of expulsion on grounds of public order, public security or public health.

Right to equal treatment

The Directive recalls the right to equal treatment laid down in Article 12 EC and provides for two specific derogations to this right. Inactive migrant Union citizens and their family members are not entitled to social assistance during the first three months of residence. The host Member State is not obliged either before the acquisition of the right of permanent residence to grant maintenance aid for studies (loans or grants) to Union citizens other than workers, self-employed persons or their family members. Equal treatment applies fully to persons having the permanent right of residence.

Increased protection against expulsion on grounds of public policy, public security and public health

By taking on board a number of principles derived from case-law, the Directive circumscribes better the notion of public order and security and aims at flanking the right of residence with efficient guarantees. It also introduces a series of novelties with regard not only to issues of procedure but also of substance.

It refers explicitly, at the request of the European Parliament, to the principle of proportionality, so any measures taken on grounds of public policy or public security must comply with this principle and take into account the length of stay in the territory, age, state of health, family and economic situation and the social and cultural integration into the host Member State and the extent of links with the country of origin of the person concerned.

The Directive introduces a reinforced protection against expulsion. The host Member States may not adopt an expulsion decision against Union citizens or their family members irrespective of nationality who have the right of permanent residence on its territory except on serious grounds of public policy or public security. An even more extensive protection is afforded to Union citizens who have resided in the host Member State for the previous ten years or who

are minors because an expulsion decision may not be taken against them unless the decision is based on imperative grounds of public security.

The Directive also reinforces the procedural guarantees in particular by ensuring access to judicial redress against all measures restricting free movement on grounds of public order, public security or public health.

State of play regarding transposition of the Directive into national law

Member States had to bring into force the laws, regulations and administrative provisions to comply with the Directive and communicate them to the Commission by 30 April 2006.

The majority of Member States are experiencing serious delays in transposition of the Directive. The Commission opened infringement procedures in accordance with Article 226 EC against 17 Member States in June 2006 for non-communication of national transposition measures.

The Directive provides that the Commission shall submit a report on the application of the Directive to the European Parliament and to the Council no later than 30 April 2008 together with any necessary proposals notably on the opportunity to extend the period of time during which Union citizens and their family members may reside in the territory of the host Member State without any conditions.

National measures adopted so far have not yet been thoroughly checked by the Commission for compliance with the Directive. However, initial checks of adopted legislative instruments and the meetings with Member States' experts held to assist them with transposition have identified a number of provisions of the Directive which Member States might have difficulties to transpose correctly to the detriment of Union citizens and their family members.

As already stressed above, the Directive extended family reunification rights of Union citizens inter alia by imposing a clear obligation on Member States to facilitate, in accordance with their legislation, the right of residence of other family members and to partners. Member States might face problems with correct legislative transposition and administrative implementation of this rule in so far as it requires taking into account of legislative institutes sometimes unknown to them.

Although the Directive exempts family members from the visa obligation if they hold a valid residence card issued by any Member State, some Member States only exempt from the visa obligation family members holding a residence card that they themselves have issued.

As the Directive abolished residence permits and replaced them by a much simpler registration scheme and registration certificates, some Member States have difficulties with the format and possible lack of security of such documents.

Member States have also posed many questions on what is to be considered as an *unreasonable burden on the social assistance system of the host Member State* that could trigger an expulsion measure. What should be clear in this respect is that the Directive has listed the criteria laid down by the case law of the Court which may be used on a case by case basis by Member States for this purpose and forbids automatic expulsions following recourse to social assistance.

Another provision of the Directive that could trigger a number of problems with correct transposition is the Article providing for the right of equal treatment on grounds of nationality subject to specific derogations. The heart of the matter lies not only in correct evaluation whether the national rule or administrative practice really discriminate against Union citizens in comparison with nationals by treating similar situations in a different manner or different situations in a similar manner but also in the assessment of whether the difference in treatment can be justified and does not go beyond what may be proportionate.

Remedies open to Union citizens

Directive 2004/38/EC meets the requirements laid down by the Court to be directly applicable. Union citizens and their family members can therefore rely directly on the provisions of the Directive against any opposing national provisions and national courts are obliged to apply them. Making use of means of redress available at national level enable Union citizens as a rule to assert their rights directly and personally. Where they have suffered damage, for example, only the national courts can award them reparation from the Member State concerned. They may

also file a complaint with the Commission services which may open an infringement procedure.

An ever more popular and effective way of solving the problems of misapplication of Community law on free movement of persons is addressing SOLVIT with the problem. SOLVIT is a problem-solving network operated by Member States in which they work together to solve problems that arise from incorrect application of Community law concerning Internal Market by public authorities without recourse to legal action. The Commission provides the facilities for the whole network and can offer help to speed up the resolution of problems, if needed.

SOLVIT has been operational since July 2002 and has successfully dealt with hundreds of cases. More details can be found at *http://europa.eu/solvit.*

Conclusion

This Directive represents an important step in the definition of a strong concept of citizenship of the Union. It improves the previous arrangements and meets the concerns expressed by citizens in a number of ways. Firstly, by bringing together the content of the previous nine directives and one regulation as well as the relevant case-law into one single legislative instrument, it gives this right more transparency and makes it easier to apply both for our citizens and for national administrations. Secondly, it reduces administrative formalities. Thirdly, it extends Union citizens' family reunification rights and grants family members new rights in case of death or departure of the Union citizen or dissolution of marriage or registered partnership. Fourthly, it introduces a permanent right of residence after five years of uninterrupted residence and finally it reduces the scope for Member States to end the beneficiaries' right of residence and increases protection against expulsion.

The Directive has the potential to make an enormous difference for the good of the millions of Union citizens who currently reside abroad and the many more who will want to do so in the future. In the last four years the Union has achieved a great deal in the areas of security and justice. The new Directive represents an essential step in ensuring that we can say the same as concerns European citizens' freedom.