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**Article**

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## THE EU DIRECTIVE ON FREE MOVEMENT AND ACCESS TO SOCIAL BENEFITS

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The Maastricht Treaty, which established the European Union, like the preceding Treaty of Rome, did not challenge the legislative competence of EU Member States over their social systems. The entitlement to social benefits, particularly in the area of social welfare, has been and will remain for the foreseeable future a matter of national law. Harmonisation is basically limited to EC employment law aimed at providing common standards of protection throughout the Community.<sup>1</sup> Even among the EU-15, the different levels of income precluded any harmonisation of social welfare legislation. With the EU enlargement of 2005 and with the accession of Rumania and Bulgaria in 2007, the differences in social benefit standards have become even larger, thereby excluding any attempt of a communitarisation of social welfare legislation beyond the determination of minimum standards of social assistance, as laid down in the Charter of Fundamental Rights of the European Union in the chapter on solidarity.<sup>2</sup>

### The development of the legal system

This does not mean that EC law is completely irrelevant to the question of access to social benefits. Article 12 EC Treaty contains a general clause on the non-discrimination of all EU citizens “within the scope of application of the Treaty” and “without prejudice to any special provisions contained therein”. Such special provisions may particularly be found in the EC Treaty rules on movement of workers and other economically active persons, like self-employed

persons or service providers. There has never been any serious doubt that the establishment of the European internal market requires equal access in labour conditions as well as access to related social benefits. In addition, rules were soon enacted for a coordinated social security system with regard to typical “risks” like accidents, retirement, death, illness, unemployment, family, etc. for workers that make use of the freedom of movement.

Article 12 of the EC Treaty, however, has not been interpreted as a tool to expand equal access to social benefits to all EU citizens and their family relatives irrespective of their contribution to the tax yield of the host state. The basic distinction between economically and non-economically active Union citizens remained an essential feature even with the extension of free movement rights for students, retired persons and other non-economically active Union citizens by three directives between 1990 and 1992.

All three directives took great care to provide residents’ rights only for those who can support themselves, in order to exclude risks for the social systems in the Member States by immigration of persons who might become a burden on the social assistance systems of their host Member States. The debate was clearly focussed on the concern of some Member States that due to the substantial differences in the social systems of Member States the extension of free movement without additional requirements might create problems and provoke invitation to social welfare immigration.

### The European Court’s concept of social solidarity

Although the special provisions for equal treatment of workers were originally tied to conditions of employment and work, the European Court has used the equal treatment clause laid down in the basic regulation for workers not as a limiting system but as examples of a broader equal treatment clause by interpreting social advantages as benefits that 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

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<sup>1</sup> See Agreement on Social Policy, attached to the Maastricht Treaty, and the 1989 European Social Charter.

<sup>2</sup> See in particular Art. 7 ff., Meyer (2003, 323 et seq.).

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.<sup>3</sup> In addition, the Court enlarged the concept of discrimination by developing its rulings on indirect discrimination. The concept of “indirect discrimination”, applied in *O’Flynn* and other cases as a prohibition of measures which affect essentially migrant workers or the great majority of those affected as migrant workers, or where there is a risk that national measures may operate to the particular detriment of migrant workers has contributed largely to enhance the effectiveness of freedom of movement of workers.<sup>4</sup> Finally, the Court has interpreted the personal scope of application of the Treaty provisions on freedom of movement to workers as widely as possible, including also persons partially dependent upon social welfare, as long as they exercise a genuine and effective economic activity which is not of such a small scale as to be purely marginal and ancillary.<sup>5</sup>

In addition, the definition of workers was interpreted in a very wide sense, embracing also persons taking up a university study following a short period of work in order to subsequently claim social benefits for students. The danger of abuse has not really been considered as a serious objection against such extensions. Social benefits were even granted for university studies in the home country of migrant workers and their family relatives, although comparable social benefits for students might not exist. Recently, the Court has even extended such benefits under the initial Association Agreement between the EC and Turkey to Turkish nationals active in a labour market in an EU Member State.<sup>6</sup>

By and large, this development was accepted by the Member States particularly since the original concern that free movement might lead to incalculable burdens for their welfare systems proved to be largely unfounded, as non-economically active Union citizens remained outside of the scope of general welfare systems. This was confirmed by the Court in *Brown*,<sup>7</sup> which held that assistance given to students for maintenance and training fell in principle outside the scope of the EC Treaty for the purposes of the

non-discrimination principle. Similarly in *Lebon*<sup>8</sup> the Court ruled that jobseekers were entitled to equal treatment only with regard to access to employment but not with regard to social assistance benefits.

The path, however, changed with the Court’s use of the European citizenship concept enshrined in Articles 17-21 EC Treaty. Starting with the *Sala* decision, the Court eliminated step by step the distinction between workers entitled to full access to social benefits and non-economically active Union citizens who in principle are only entitled to residence subject to sufficient resources for living.

In *Sala*, a Portuguese national who neither qualified as a worker nor as a person entitled to free movement under the 1990 directives on free movement of non-economically active Union citizens due to the lack of sufficient resources, was nevertheless declared as being entitled to social benefits such as a child-raising allowance.<sup>9</sup> The Court did not only overrule its previous case law but in deviation from the explicit conditions of secondary Community law stated that all Union citizens “lawfully” resident were under the non-discrimination clause of Article 12 EC (ex-Article 6) entitled to social benefits, including benefits reserved under regulations No. 1408/71 and No. 1612/68.

In a sequence of judgements, the Court has relied upon Union citizenship as an instrument to overcome the distinction between economically active and non-economically active citizens. In *Grzelczyk*,<sup>10</sup> and more recently in *Bidar*,<sup>11</sup> the Court awarded assistance for students in the form of a minimum income under Belgian law and a subsidised loan provided under British law to cover maintenance costs. In *Trojani*, the Court decided that a French national residing in Belgium for some time at a campsite and subsequently in a Salvation Army hostel is entitled to the Belgium minimex, a kind of social welfare payment, although his work for the Salvation Army could clearly not be considered as work in the sense of Article 39 EC Treaty.<sup>12</sup> Finally, in *Collins* the Court decided that an Irish-American dual national was entitled to claim jobseekers allowance according to British law “in view of the establishment of a citi-

<sup>3</sup> See for instance case 207/78, 1979 (E.C.R.) 2019, *Even*, at para. 22.

<sup>4</sup> See Barnard (2004, 236 et seq.).

<sup>5</sup> See case C-237/94 (1996), E.C.R. I-2617, *O’Flynn*.

<sup>6</sup> See ECJ of 7.7.2005, case C-374/03, *Gürol/Bezirksregierung Köln*, NVwZ-RR 2005, 854; see also ECJ of 15.3.1989, case 389/87 and 390/87, *Echternach und Moritz*, Rec. Recueil, Rec. 1989, 723.

<sup>7</sup> Case 197/86 (1988) E.C.R., 3205, *Brown*.

<sup>8</sup> Case 316/85, (1987) E.C.R., 2811, *Lebon*.

<sup>9</sup> See case C-85/96, *Sala v. Freistaat Bayern* (1998), ECR I-2691.

<sup>10</sup> Case C 184/99 (2001), E.C.R. I-6193, *Grzelczyk*.

<sup>11</sup> *Bidar v. London Borough of Ealing*, case C-209/03 [2005] ECR I-2119.

<sup>12</sup> *Trojani v. Centre public d’aide sociale de Bruxelles*, Case C-456/02 [2004] ECR I-7573.

zenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union”, subject, however, to making entitlement to a jobseeker allowance conditional on a residence requirement.<sup>13</sup> In *Ioannidis*,<sup>14</sup> the Court awarded unemployment benefits for persons looking for employment that had been refused by the Belgian authorities on the grounds that the Greek applicant had received his professional training not in Belgium but in Greece.

The reasoning of the Court has basically followed the same line. Union citizenship is declared to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment under law irrespective of their nationality.<sup>15</sup> The Court follows from the fundamental status of citizenship that a citizen lawfully resident in the territory of a host Member State can rely on the non-discrimination clause of the Treaty in all situations that fall within the scope of the subject-matter jurisdiction (*ratione materiae*) of Community law. The Court then usually goes on to point to some provisions, whereby the particular activity of the persons in question is covered by some provisions of the Treaty, in the case of students by the harmonisation of laws and regulations aimed at encouraging the mobility of students and teachers. The Court argues that the situation of such persons is within the scope of application of the Treaty, in the case of students for the purpose of obtaining assistance whether in the form of a subsidised loan or a grant intended to cover maintenance costs.<sup>16</sup> Similarly, in the case of jobseekers, the Court argued in *Collins* that, in view of the establishment of citizenship of the Union, it is no longer possible to exclude from the scope of Article 48(2) of the Treaty – which expresses the fundamental principle of equal treatment, guaranteed by Article 6 of the Treaty – a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.<sup>17</sup> In *Trojani*, although briefly referring to the limitations under secondary Community law, the Court holds that a social assistance benefit, such as the Belgian minimum income, falls within the scope of application of the non-discrimination clause of the Treaty. Therefore, a citizen of the Union who is not economically active may rely on

Article 12 EC Treaty when he has been lawfully resident in the host Member State for a certain time or possesses a residence permit. In *Ioannidis*, the Court referred to the *Collins* judgment, arguing that social benefits for persons looking for employment are covered by the free movement of workers.<sup>18</sup>

In the decisions mentioned, the Court has not gone so far as to declare all limitations as non-existent. The Court has also avoided declaring secondary Community law provisions requiring sufficient means of subsistence as void or not in accordance with Article 18 EC Treaty. Starting from the basic assumption of equal treatment, new limitations and conditions, however, have been drawn that are not necessarily identical with the principles laid down by the Member States in secondary Community law.

In *Collins*, the Court points to the right of a Member State to make the grant of a jobseekers’ allowance dependent upon a “genuine link” that exists between the person seeking work and the employment market of that state.<sup>19</sup> In the case of students, for the granting of assistance to cover maintenance costs, a “certain degree of integration into the society of that state” is considered as a legitimate condition.<sup>20</sup> Although Belgium in *Ioannidis* was allowed to distinguish on the basis of the existence of a factual connection between the host state and the Union citizen, the Court considered it inadmissible to differentiate as to whether a school certificate had been obtained. This criterion could not be considered as evidence for a factual and effective connection of a Union citizen with the labour market of the relevant host country.<sup>21</sup>

The most remarkable feature of the Court’s reasoning is that the Court does not hesitate to attribute to Community law a different meaning than would follow from an interpretation on the basis of the objective wording of the provision, its systemic context and its purpose. Union citizenship and the principle of proportionality are used to promote what appears to be a postulate of migration policy instead of an interpretation of relevant primary and secondary Community law.<sup>22</sup> The reasons given for the disregard of secondary Community law are frequently unconvincing. In *Grzelczyk*, the Court relies on the

<sup>13</sup> *Collins v. Secretary of State for Work and Pensions*, Case C-138/02 [2004] ECR I-2703.

<sup>14</sup> *Office national de l’emploi v. Ioannidis*, case C-258/04, Europäische Zeitschrift für Wirtschaftsrecht, EuZW 2005 p. 663.

<sup>15</sup> See *Grzelczyk*, loc. cit. n. 4, para. 31.

<sup>16</sup> *Bidar*, loc. cit. n. 17, para. 42.

<sup>17</sup> *Collins*, loc. cit. n. 19, para. 63.

<sup>18</sup> *Ioannidis*, loc. cit. n. 20, para. 22.

<sup>19</sup> *Collins*, loc. cit. n. 19, para. 69.

<sup>20</sup> *Bidar*, loc. cit. n. 17, para. 57.

<sup>21</sup> *Ioannidis*, loc. cit. n. 20, para. 31.

<sup>22</sup> For a more detailed analysis of the Court’s rulings on student maintenance grants, see *Bode* (2005, 326–33).

Preamble of Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students (Students Directive),<sup>23</sup> which explicitly makes reference to the previous Court rulings to clarify that maintenance grants for students do not fall within the scope of application of the Treaty. The Court takes this explanation in the Preamble as a principle of a “certain degree of financial solidarity between nationals of a host Member State and nationals of another Member State”.<sup>24</sup>

Since *Sala*, the Court has relied on these statements irrespective of all objections by Member States based upon a danger of immigration into the welfare state. The most recent example concerns the Belgian practice of requesting proof of sufficient resources of a Union citizen by a written declaration if support is promised by third persons. The Court decided that a Member State may not require that a “partner” assuming financial responsibility has to subscribe to a formal legal obligation, arguing that the cessation of financial support is always a possible risk.<sup>25</sup>

### The Union Citizenship Directive 2004/38

Directive 2004/38/EC<sup>26</sup> has for the first time established a single legal instrument for all Union citizens regardless of their economic activity. The differences between economically active and non-economically active Union citizens have not been fully given up in favour of a uniform status of a “Union citizen”. For a period of up to three months, all Union citizens have the right of residence, subject only to the obligation of having a valid passport or identity document. However, after three months, for non-economically active Union citizens, the residence rights can be made subject to the proof of sufficient means of existence and health insurance. A new provision provides for a special right of permanent residence for Union citizens who have resided legally for a continuous period of five years in the host Member State. This right is not subject to the general conditions laid down in Chapter III of the Directive for a right of residence for more than three months (in case of non-economically active citizens, particularly sufficient resources for themselves and their family members to avoid becoming a burden on the social assistance system).

Directive 2004/38/EC of 29 April 2004 explicitly deals with the right of Union citizens to be granted social benefits under the equal treatment clause in Article 24. The principle of equal treatment of all Union citizens and their family members that have a right of residence or permanent residence is derogated for the first three months of residence generally or, where appropriate, for a longer period that jobseekers may be entitled to, as long as they are continuing to look for work and have a genuine chance of being hired.<sup>27</sup> The same rule applies with regard to students concerning maintenance aid, including whether they are obliged to provide maintenance grants for studies, including student loans, prior to the acquisition of a right of permanent residence. The only exception is made – according to the established rulings of the Court – with regard to workers or self-employed persons or their family members or persons retaining such status.

It would be premature, however, to conclude from this system a right to terminate the residence of Union citizens that become dependent on social welfare. Article 14 of the Council Directive 2004/38/EC of 29 April 2004 on the retention of the right of residence provides that the right of residence for up to three months is retained so long as they do not become an “unreasonable burden” on the social assistance system of the host Member State. The Preamble of the Directive provides little guidance as to the interpretation of this provision. According to the Preamble it is left to the Member States to decide whether they will grant assistance. In fact, however, a Member State may frequently not have much choice, since an “unreasonable burden” on the social system will be difficult to prove. Under national law, Member States will generally have to provide social assistance.

What criteria could be used to determine the unreasonableness of a burden? In any individual case it will hardly ever be possible to demonstrate this. The social system as such cannot be substantially affected by an additional beneficiary. “Unreasonableness” indicates a requirement to draw a balance between private and public interests. In case of disputes, courts, however, will hardly have many choices in order for quick decisions to be taken on preliminary residence rights.

<sup>23</sup> Council Directive 93/96/EEC of 29 October 1993, loc. cit.

<sup>24</sup> *Grzelczyk*, loc. cit. n. 4, para. 44.

<sup>25</sup> ECJ of 23.2.2006, C-408/03, NVwZ 2006, 918.

<sup>26</sup> Directive 2004/38/EC, loc. cit. n. 15.

<sup>27</sup> *Ibid.*, Art. 24(2). The extension of the three month limit for those seeking employment is contained in Art. 14(4)(b).

As to residence rights in the Union subsequent to the initial three months' period, Article 14 of the Directive in accordance with Article 7 on the conditions of entry and residence (sufficient resources) makes the "retention" of the residence right dependent upon fulfilment of the conditions contained in Articles 7, 12 and 13 ("as long as they meet the conditions therein"). Again, however, this does not mean that residence may immediately be terminated if non-economically active Union citizens no longer fulfil the requirements of Article 7. An expulsion measure shall not be the "automatic consequence" if a Union citizen or his/her family members take recourse to the social assistance system of the host Member State.<sup>28</sup>

The phrase taken literally from the *Grzelczyk* judgment is not explained further. The Preamble repeats the phrase in connection with the "unreasonable burden" test.<sup>29</sup> The host Member State, therefore, should examine whether it is a case of temporary difficulties and take into account the duration of the 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.

In summary, the Directive has taken up some of the European Court's decisions concerning the applications of Union citizenship regarding access to social benefits. Article 24 of the Directive states that all Union citizens residing on the basis of the Directive shall enjoy equal treatment with the nationals of that state "within the scope of the EC Treaty". Notwithstanding the repetition of this reservation as to the scope of the EC Treaty, which is laid down in Article 12 EC Treaty, the Directive to that extent is based upon the Court's assumption that access to all social benefits, including welfare grants and maintenance grants for students in principle falls within the scope of application of the non-discrimination clause of the Treaty. However, in contrast to the European Court's rulings, the Directive seeks to maintain the traditional distinction between economically and non-economically active Union citizens, making the residence right of the latter category dependent upon proof of sufficient means of subsistence and comprehensive sickness insurance. In addition, Union citizens for the first three months of residence, and jobseekers even for a longer period, are excluded from access to social assistance. Students

are not entitled to maintenance aid for studies before they acquire a right of permanent residence. These provisions will have to be interpreted by taking into account the Court's rulings relating to equal access to social benefits if there is a genuine link with the domestic labour market.

Article 12 EC Treaty prohibits discrimination on the ground of nationality of Union citizens only "within the scope of application of this Treaty and without prejudice to any special provisions, contained therein". While the Court has used Union citizenship to state that access to social benefits, including welfare benefits, are within the scope of application even for non-economically active persons, this does not yet mean unlimited access to social benefits. The Court, however, has adopted a methodologically doubtful path by interpreting the requirements of "sufficient resources for Union citizens and their family members not to become a burden on the social assistance system of the host Member State" as a clause that is subject to the principle of proportionality and interpreted in the light of the newly created principle of financial solidarity. The European Parliament's report of 15 December 2005<sup>30</sup> has taken up this reasoning. It emphasises that EU citizenship is linked, regardless of the country of birth or origin, to the granting of social rights, including the right to work and to study and the right to social protection (health, retirement and other benefits).

Unfortunately, the Member States that may well be subject to internal EU migration driven by social assistance motives have failed to state unequivocally that there is no economic, social and political basis for an uncontrolled immigration into the social welfare systems for non-economically active Union citizens and their family relatives. Instead, in an erroneous perception of the relationship between the legislator and the European Court, they have chosen to leave it to the Court to solve their disputes, incorporating in the Directive vague provisions like the clause referring to an unreasonable burden on the social security system of the host Member State. In addition, they have chosen to establish a system of rewards for those who have managed to secure a lawful residence for a continuous period of five years. According to the Court's rulings "lawful" by no means is to be interpreted as having resided even as a worker or on the basis of sufficient economic resources. Judging from the European Court's re-

<sup>28</sup> Ibid., Art. 14(3).

<sup>29</sup> Directive 2004/38/EC, loc. cit. n. 15, Preamble, recital 16.

<sup>30</sup> Report Committee on Civil Liberties, Justice and Home Affairs, Report Catania, A 6-0411/2005.

quirement on terminating a Union citizen's residence it is basically a question of time rather than of resources to require permanent residence status.

Whether this will lead to an instability of the social systems of Member States remains to be seen. Much will depend on the economic development within the new EU Member States and their ability to adjust to the level of wages of the old Member States. The economic consequences of such effects seem to have been largely neglected. The Court has never even considered the potential economic impact of its social benefits legislation.

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