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Freedom of movement and residence of EU citizens

Access to social benefits

IN-DEPTH ANALYSIS

Author: Eva-Maria Poptcheva
Members' Research Service
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This paper seeks to provide an overview of the residence and benefits rights of EU citizens in a Member State other than their own, examining in particular criticisms of the current arrangements. Furthermore, it sets this issue in a wider context, providing statistical information on intra-EU immigration and access to benefits, as well as on the macro- and microeconomic impact of free movement within the EU.

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http://www.eprs.ep.parl.union.eu
http://epthinktank.eu
eprs@ep.europa.eu

EXECUTIVE SUMMARY

Over the past few decades, the focus around issues of free movement has shifted away from workers and towards EU citizenship, whereby worker status is no longer the only route opening access for EU citizens to social benefits in a host Member State. The two EU enlargements in 2004 and 2007, as well as the economic crisis, have led to a sharper discourse against intra-EU immigration amid claims that it burdens national welfare systems. Several national governments increasingly point to 'abuses' of the freedom of movement by some EU citizens whose goal of availing themselves of a more generous welfare system in the host Member State is termed 'benefit tourism'. Whilst the European Commission and many experts defend the current EU rules on free movement and social coordination as providing effective instruments to combat abusive behaviour, several Member States, as well as representatives of local communities, have called for a strengthening of intra-EU immigration rules, such as the introduction of a re-entry ban for EU citizens who have abused free movement provisions.

The terms 'abuse' and 'benefit tourism' are often used not to refer to any abusive behaviour but rather to the exercise of free movement rights as allowed under the current legal framework. It seems that the criticism directed towards the consequences of intra-EU immigration on national welfare systems refers to the residence and benefits rights of economically inactive persons, demanding a conceptual change in the EU rules in order to deter 'poverty immigration'. At the centre of the debate are therefore the access of EU citizens seeking work in another Member State to jobseeker's allowances and housing benefits; low-income workers' rights to supplementary benefits and child allowances, even for children not living with them in the host Member State; and pensioners' rights to claim a supplement to their lower pensions received from their Member State of origin. All these rights granted to EU migrants are seen by many as being at odds with the main limitation imposed on the freedom of movement for economically inactive citizens: self-sufficiency, i.e. having sufficient means so as to not to place an unreasonable burden on the national social assistance system, and sickness insurance. The Court of Justice of the EU has been criticised for having allegedly overstretched the free movement provisions, and so some Member States are calling for a change to the EU rules. This change would make both residence and access to benefits of those EU migrants unable to support themselves in the host Member State dependent on strict conditions, including e.g. waiting times before being entitled to certain benefits. In this context experts have proposed a compensatory mechanism, according to which the Member State of origin would reimburse the host Member State for the costs arising from benefits paid to economically inactive citizens and jobseekers.

Conversely, those defending current free movement rules point to a lack of reliable statistical evidence for the alleged 'benefit tourism' and 'abuses', and highlight the positive impact of intra-EU immigration on national economies and business. Whilst studies indeed show a low incidence of EU migrants relying on the social systems of host Member States in absolute numbers, challenges are reported at local level where the concentration of EU migrants lacking financial means presents a burden on local infrastructures. The issue of access to benefits by EU migrants is embedded in a wider discussion about solidarity in the European Union and more integrative models, such as common unemployment insurance schemes in response to uneven economic difficulties in the Member States. These questions need to be dealt with within a more far-reaching debate on the future path of European integration.

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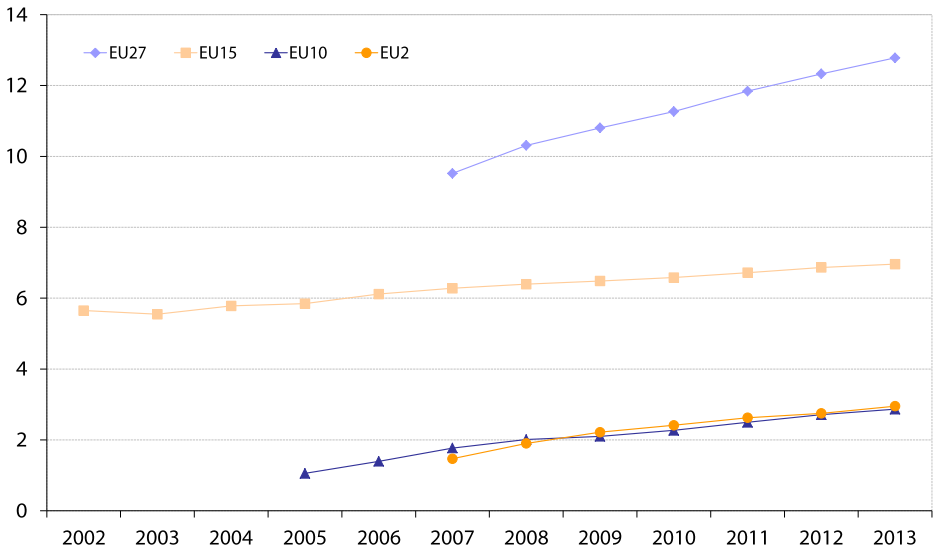
1. Framing the issue

Freedom of movement for workers and other EU citizens across the EU has long been the most prominent of citizens' rights in the Union context[1] and one of the cornerstones of the European Union. This freedom, notably, makes the EU different in nature from other forms of international economic integration, such as free trade zones.[2] However, that very essence of the EU single market was subject to controversy following the 2004 and 2007 enlargements, which intensified the already existing phenomenon of people from 'new Member States' moving elsewhere in the EU to search for a job. Moreover, the financial and economic crisis induced citizens of certain 'old Member States' such as Greece, Italy, Spain and Portugal to seek better living conditions in another Member State. At the same time voices became louder claiming that some EU citizens misuse their freedom of movement solely to the end of availing themselves of higher standards of social protection in the host Member State without genuinely intending to contribute to the production process there, a pattern seen as putting pressure on public budgets.

Figure 1 - EU nationals living in another Member State (in millions)



Data source: Eurostat

The debate over so-called 'benefit tourism' intensified as 31 December 2013 approached: the date on which the restrictions on the right of Romanian and Bulgarian citizens to work in certain Member States were to be lifted. Some politicians warned against a possible 'flood' of immigration from these countries. In April 2013, four ministers, from Austria, Germany, the Netherlands and the UK, wrote to the Irish Presidency expressing their concern regarding abuses of freedom of movement. Bemoaning the impact on their social welfare systems, the four governments called for new legal tools to prevent 'benefit tourism.[3] Conversely, 'new Member States' criticised

[1] Flash Eurobarometer 365, 2013, p. 29.

[2] See K. Nowrot and B. Struckmeyer-Öner, "Sozialtourismus in Europa?: Unions- und sozialrechtliche Anmerkungen zu einer aktuellen Debatte", in *Policy Papers on Transnational Economic Law*, No 40, February 2014, p. 3.

[3] Letter from Johanna Mikl-Leitner (Minister of the Interior, Austria), Hans Peter Friedrich (Minister of the Interior, Germany), Fred Teeven (Minister for Immigration, Netherlands) and Theresa May (Home Secretary, UK) to the EU Council Presidency and to Commissioners Viviane Reding, Cecilia Malmström and László Andor.

these claims for being populist and not based on facts. In this context, the Czech Republic, Hungary, Poland and Slovakia made a joint statement highlighting the positive impact of immigration within the EU on national economies, as well as drawing attention to the existing EU legal framework for fighting abuses of rights by EU migrants.[4]

The debate surrounding the 'benefit tourism' issue is indeed characterised by claims which are often not backed up by statistical evidence. The lack of reliable statistics is sometimes politically motivated and sometimes the result of national legal constraints. The discussion, however, has long gone beyond proof by numbers, and some Member States feel they have lost control over one of the core competences of a sovereign state, namely their welfare system, not by agreeing to such a shift of competences, but through the 'back door' of EU citizenship. The extension of social solidarity among Union citizens on the basis of the equal treatment provisions has been said to have a negative impact on national welfare schemes by reducing overall standards and destroying the bonds of solidarity on which those schemes are based.[5] Solidarity thus remains mainly a concept inherent to national sovereignty and to limiting EU competences, rather than being seen in the context of an equitable redistribution of welfare in the EU.[6] Many put the blame for this alleged 'silent' loss of competences on the Court of Justice of the European Union (CJEU) for permitting the extension of access to social benefits to non-economically active EU citizens by overstretching the Treaty provisions on freedom of movement.

From a 'market citizen' to 'European social citizenship'

Freedom of movement of workers was established as a core instrument at the service of the single market, helping to redistribute labour from Member States with high rates of unemployment to those with a shortage of labour. However, besides this economic aspect the free movement of workers also has a social aspect, reflected in workers' desire to raise their standard of living. Freedom of movement shifted from being a mere instrument of economic integration to serving a broader objective of EU integration, based on EU citizenship and thus on individuals, to be placed at the heart of the EU.[7] The CJEU stated that "Union citizenship is destined to be the fundamental status of nationals of the Member States"[8] and started basing the equal treatment principle on EU citizenship status, so that worker status was no longer the sole criterion opening up access to social benefits to EU citizens in their host Member State. The case law of the CJEU, but also EU legislation on free movement, shaped not only in economic but also humanitarian terms,[9] have brought about a genuine paradigm shift, from a concept of economically active citizens as actors in the Single Market to a notion of Union citizenship ensuring a quasi-complete inclusion in the national social community.[10]

Against this background, a discussion has emerged across the EU, as well as within the EU institutions, on whether the EU legal framework not only facilitates access to the

[4] Joint Statement from the Foreign Ministers of the Visegrad countries of 04.12.2013.

[5] S. Giubboni, "Free movement of persons and European solidarity", in *European Law Journal* Vol. 13, No 3, May 2007, p. 360.

[6] V. Hatzopoulos, "Health law and policy: the impact of EU law", in *EU Law and the Welfare State. In Search of Solidarity*, G. De Burca (ed.), 2005, p. 167.

[7] CJEU judgment of 03.07.1986, C-66/77 *Lawrie-Blum*, para 12.

[8] CJEU judgment of 20.09.2001, C-184/99 *Grzelczyk*, para 31.

[9] S. O'Leary, "Free movement of persons and services", in *The evolution of EU Law*, P. Craig and G. De Búrca (ed.), 2011, p. 510.

[10] Giubboni, op. cit., p. 368.

Member States' labour markets but also to their national welfare systems. Furthermore, debate extends to the question of whether EU law needs to be amended so that 'benefit tourism' can be prevented and duly punished, or, if efficient legal and policy instruments are already, in fact, in place at EU and national levels and merely need to be implemented more effectively.

2. Legal framework

2.1. Treaty provisions

A transitional regime for free movement of workers was introduced for the Member States that joined in 2004 (up to 30 April 2011), for Romania and Bulgaria (up to 31 December 2013), and recently for Croatia.

The free movement of workers is established by Article 45 TFEU as one of the fundamental freedoms of the single market. Besides, according to Article 34(2) of the EU Charter of Fundamental Rights "everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices". Furthermore, the Treaties confer directly on EU citizens the right to freely move and reside in Member States different from their Member State of origin, irrespective of whether they are economically active or not (Article 21(1) TFEU and Article 45 of the EU Charter of Fundamental Rights). The rights conferred upon EU citizens by the Treaties need to be interpreted broadly. They are, however, also subject to limits, although those limits must be proportionate to the legitimate goal pursued.[11]

2.2. Secondary EU law

2.2.1. Directive 2004/38

Directive 2004/38 (the Free Movement Directive) codified important aspects of the CJEU's case law on free movement from the 1970s and 1980s. It distinguishes between cases of residence of up to three months, three months to five years, and over five years. The Directive has been integrated into the EEA Agreement, and thereby also applies to Iceland and Norway.[12]

2.2.2. Social coordination regulations

The EU regulations on the coordination of social security were adopted to ensure that citizens do not suffer disadvantages in their social security protection when exercising their right to free movement across the EU. EU law only coordinates the national social security systems without harmonising them, so that the Member States decide on the benefits to be granted, their amount, etc., provided equal treatment is ensured.[13]

Regulation 883/2004 replaced Regulation 1408/71 as of 1 May 2010.[14] It contains rules for the purpose of establishing the Member State (of work or of residence) responsible

[11] CJEU judgment of 17.09.2002, C-413/99 *Baumbast*, para 91; CJEU judgment of 07.10.2010, C-162/09 *Lassal*, para 29.

[12] The Directive does not apply to EEA country Liechtenstein as its application has been derogated. See Decision of the EEA Joint Committee No. 191/1999. The Directive does not apply to Switzerland. Free movement between the EU and Switzerland is regulated by the 1999 Free Movement Agreement and successive changes to it.

[13] CJEU judgment of 17.01.2012, C-347/10 *Salemink*, para. 38.

[14] Regulation 883/2004 of the European Parliament and Council of 29 April 2004 on the coordination of social security systems. The procedure for the implementation of the Regulation is laid down by Regulation 987/2009.

for the provision of social security benefits such as sickness benefits, maternity and equivalent paternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits, pre-retirement benefits and family allowances. In contrast, social security coordination between Member States does not extend to social and medical assistance. The boundaries between social security and social assistance are often blurred, and rendered hard to define by the existence of mixed-type benefits.

Social assistance, social security and SNCBs

In general, social assistance benefits are regarded as those that are means-tested, i.e. depending on the actual needs of the claimant and not on previous contributions to the social security system through insurance or completion of a given period of employment. While social assistance tends to be needs-related, social security seeks to cover certain types of social risks, such as those relating to sickness, invalidity, old age, unemployment, and maternity/paternity.

Special non-contributory benefits (SNCBs) are of a mixed type (between social assistance and social security). According to Regulation 883/2004, SNCBs are granted in the **Member State of residence**. Each Member State's SNCBs are listed in Annex X to that Regulation. Examples include the compensatory supplement in Austria, supplementary allowance in France, minimum income guarantee in Spain, the jobseeker's allowance in Ireland, basic subsistence income for the elderly or disabled in Germany, and income support in the UK.

The relationship between Regulation 883/2004 and Directive 2004/38 is controversial, particularly as regards whether recourse to SNCBs under Regulation 883/2004 leads to the loss of the residence right of economically inactive persons under the Directive.[15]

Regulation 492/2011[16] repealed and consolidated Regulation 1612/68. It establishes the equal treatment of EU and host-country workers as regards social and tax advantages, including the rights of workers' families.

3. Conditions for residence in a host Member State

3.1. Up to three months

All EU citizens and their family members have the right to reside for up to three months in another Member State without any conditions other than presentation of a passport or identity card.

3.2. From three months to five years

Pursuant to Article 7(1) of the Free Movement Directive, Union citizens have the right to reside in the territory of another Member State for a period longer than three months if:

- they are workers or self-employed persons in the host Member State; or
- they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence, and have comprehensive sickness insurance cover in the host Member State.[17]

[15] For this problematic issue, see chapter 5 below.

[16] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (codification).

[17] The residence of family members of Union citizens will not be dealt with in this analysis.

3.2.1. Worker

The concept of a 'worker' is an "autonomous EU concept" and not dependent on definition in national law. The CJEU regards as sufficient any effective and genuine employment activity for someone to be a worker, excluding only people undertaking an activity on such a small scale that it can be regarded as purely marginal and ancillary.[18]

- Minimum income and working time

The Court has rejected national definitions of 'worker' which refer to minimum wages or minimum working hours, in order to ensure the equal application of the provisions on freedom of movement across the EU and the effective enjoyment of that freedom.[19] The fact that someone is employed on a fixed-term contract, works part-time, is employed as part of an overall training programme, works a very limited numbers of hours per week (even under 5.5 hours)[20] or per month, or enjoys limited earnings does not prevent that person from qualifying as a worker. As long as their work is genuine and effective, even part-time workers or workers who are not able to support themselves exclusively from their earnings and who therefore claim financial assistance from the public funds of the host Member State in order to supplement their income cannot be excluded from the scope of the free movement provisions.[21]

- Purpose of employment

The criteria by which an EU citizen may qualify as a worker in a host Member State are not affected by the purpose for which the work is undertaken. This means that a citizen may legitimately move to another Member State and work there with a view to obtaining a residence permit. This is of particular importance with regard to some Member States' concern that EU citizens from Member States with less generous welfare systems could move to another Member State not with the aim of genuinely working there but rather to benefit from more generous welfare arrangements. Article 35 of the Free Movement Directive authorises Member States to withdraw any right conferred by that Directive in cases of abuse or fraud. The Commission has defined abuse as "an artificial conduct entered into solely with the purpose of obtaining the right to free movement and residence under EU law which, albeit formally observing the conditions laid down by EU rules, does not comply with the purpose of those rules".[22] However, EU citizens undertaking part-time or other types of work in a host Member State, even if such work is limited in terms of extent and income generated, and who therefore come to rely on the social security system of the host Member State, cannot be considered to be perpetrating an abuse, as the enjoyment of the rights conferred by the Treaties cannot constitute by itself an abuse of the situation.[23] Accordingly, reliance on the national social security system to supplement low incomes does not prevent EU citizens from being workers.

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[18] CJEU Judgment of 23.03.1982, C-53/81, *Levin*, para. 21.

[19] Ibid., para 11.

[20] CJEU Judgment of 04.02.2010, C-14/09 *Genc*, paras 25-26.

[21] *Levin* case, op. cit., para 16; CJEU Judgment of 03.06.1986, C-139/85, *Kempf*, para 14.

[22] Commission communication Free movement of EU citizens and their families: Five actions to make a difference, COM(2013)0837, 25.11.2013, p. 7.

[23] CJEU Judgment of 06.11.2003, C-413/01, *Ninni-Orasche*, para 31.

Similar concerns have been expressed regarding EU migrants abusively invoking self-employment in order to obtain residence and benefit rights in the host Member State. In this context the Court has held that the burden of proof lies with the national authorities – in other words, it is for them to prove that there is a case of sham self-employment.[24]

3.2.2. Economically non-active EU citizens: self-sufficiency

The right of EU citizens who are not economically active to reside in another Member State is subject to the condition that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State and also have comprehensive sickness insurance (Article 7(1)(b) of the Free Movement Directive).

- Sufficient resources

Member States may not lay down a fixed amount which they regard as 'sufficient resources', but need to take account of the circumstances in each individual case. In any case, the amount deemed to be necessary in order to accept that the EU citizen in question is self-sufficient may not exceed the threshold under which nationals become eligible for social assistance, or the threshold for the payment of a social security pension (Article 8(4), Directive 2004/38). Union citizens retain their residence right as long as they do not become an unreasonable burden on the social assistance system of the host Member State. National authorities can, when necessary, undertake checks as to the existence of the resources and their lawfulness, amount and availability. Self-sufficiency does not need to be acquired on the territory of the Member State of residence.[25] Resources available to the EU migrant concerned from a third person must also be accepted.

According to the Free Movement Directive, under certain conditions unemployed persons and jobseekers are not considered economically inactive persons.

- Sickness insurance

Sickness insurance does not necessarily have to derive from the host Member State: it may be contracted in another Member State if cover is granted in the host Member State too, even if emergency treatment given in the host Member State is not.[26]

Differences between Member States arise from the fact that whilst some Member States have a national health service (e.g. Denmark, Finland, Ireland, Italy, Sweden and the UK), others have a health insurance scheme (e.g. Belgium, Germany, Luxembourg, the Netherlands and Romania).[27] In Member States with health services, such as the NHS in the UK, the entitlement to healthcare is based solely on residence. Health insurance schemes, in contrast, are primarily directed towards the economically active population and their family members.[28] In this context, it should be noted that in the UK, in order to avoid the overburdening of the NHS with treatments for unemployed

[24] CJEU judgment of 09.03.1999, C-212/97, *Centros*.

[25] *Baumbast* case, op. cit., para 88.

[26] Ibid., paras 89 and 93.

[27] ICF GHK / Milieu, *A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence*, for the European Commission, DG Employment, Social Affairs and Inclusion, 14.10.2013.

[28] F. Van Overmeiren / E. Eichenhofer / H. Verschueren, *Analytical Study 2011. Social security coverage of non-active persons moving to another member state*, Training and Reporting on European Social Security (trESS), 2011, p. 26.

and economically inactive non-UK citizens, access to the NHS is not considered to be sufficient to meet the requirement of comprehensive sickness insurance for EU migrants, and instead private health insurance is required. However, in 2012 the Commission addressed a reasoned opinion (second step of the infringement procedure) to the UK, requesting it to consider NHS cover as sufficient sickness insurance when assessing whether or not a non-active EU citizen has a right to reside in the country.[29]

3.2.3. Residence rights of jobseekers and the involuntarily unemployed

Under certain conditions established by the Free Movement Directive, the unemployed and jobseekers are not considered to be economically inactive, so that the sufficient resources and sickness insurance requirements are not applied to them. Pursuant to Article 7(2) of Directive 2004/38, EU citizens maintain their status of worker, *inter alia* when an individual is in duly recorded involuntary unemployment after having been employed for over a year, and has registered as a jobseeker with the employment office. Those losing their job involuntarily before having completed a period of employment of one year nonetheless retain their worker status for a minimum period of six months (Article 7(3)). The same applies to a person who was employed on a fixed-term contract of less than one year. Accordingly, the self-sufficiency and sickness insurance requirements do not apply either to unemployed EU citizens who were employed in the host Member State for at least one year before losing their job, or (for six months) to those who were employed for under one year.

It is, in contrast, a problematic issue whether jobseekers who have never worked in the territory of the host Member State and who have entered it in order to seek employment (first-time jobseekers) need to be self-sufficient and have comprehensive sickness insurance in order to be entitled to reside in that Member State. These citizens have no worker status to retain. Furthermore, persons who are not workers or self-employed need to have sufficient resources and sickness insurance to be entitled to reside in the host Member State (Article 7(1) of the Free Movement Directive), so that jobseekers would fall into this group. However, Article 14(4)(b) of the Directive prohibits the expulsion of Union citizens who have entered the territory of the host Member State to seek employment and have a genuine chance of being recruited. This notion of non-expulsion is widely interpreted as giving jobseekers entering the territory of a Member State a right to reside there without the need to prove self-sufficiency.[30]

This has been confirmed by the CJEU in the *Antonissen*, *Collins* and *Ioannidis* cases, in which the Court concluded that jobseekers have a right of residence during the periods in which they seek work.[31] It considered that if citizens could move to another Member State only if they already had a job offer, the number of people who could move would be very small and freedom of movement would be rendered practically irrelevant.[32] The Court has thus acknowledged that in order to make full use of the EU's labour potential it is necessary not only to enable persons to take up employment in another

[29] European Commission, Free movement: Commission asks the UK to uphold EU citizens' rights, press release, 26.04.2012.

[30] F. Van Overmeiren, E. Eichenhofer and H. Verschueren (trESS), Analytical Study 2011, op. cit.

[31] CJEU judgment of 23.03.2004, C-138/02 *Collins*, para 18; CJEU judgment of 15.09.2005, C-258/04 *Ioannidis*, para 38.

[32] CJEU judgment of 26.02.1991, C-292/89 *Antonissen*.

Member State but also to facilitate their jobseeking there.[33] It confirmed that a jobseeker does not enjoy the same status as a worker and that the host Member State can expel a jobseeker if there prove to be no prospects of that person finding employment after a reasonable period of time. This classification of jobseekers as economically active persons has proved controversial: a frequent criticism is that the abstract possibility of someone finding a job is treated as an established fact whereas it is possible that the jobseeker will never find a job.[34]

The Court went on to conclude that a period of six months (the case of the UK legislation) is reasonable to allow the jobseeker to take the necessary steps in order to find a job. However, the Court did not limit jobseekers' right of residence to six months: rather, it stated that a jobseeker who after the expiry of that period provides evidence of continuing to seek employment and who has a genuine chance of finding a job cannot be required to leave the territory of the host Member State.[35] In this way, jobseekers entering a host Member State to seek employment seem to have a right of residence as long as they can prove that they are seeking employment, even if the period spent seeking work is in excess of six months from their entry into the host Member State. During this period they do not need to be self-sufficient in order to be entitled to reside in the host Member State.

3.3. More than five years

The Member States assumed a much greater social responsibility with the establishment of a permanent right of residence for EU citizens who have resided continuously in the host Member State for at least five years without having to meet other conditions such as self-sufficiency and sickness insurance (Articles 16 to 18 of the Directive 2004/38).

The introduction of this permanent and unconditional right of residence was a consequence of the emergence of a new model of membership in the host society, deriving from Union citizenship status and based on integration rather than on contribution to national finances.[36] According to the CJEU, such integration is based not only on territorial and temporal factors but also on qualitative elements, relating to the level of integration in the host Member State. Therefore, periods spent in prison cannot be taken into account for the completion of the five-year period.[37] It is also argued that periods of residence in which the EU citizen placed an unreasonable burden on the national social assistance system should be discounted from the five-year residence period.[38]

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[33] F. Wollenschläger and J. Ricketts, "Jobseekers' residence rights and access to social benefits: EU law and its implementation in the Member States", in *Online Journal for Freedom of Movement of Workers within the European Union*, No. 7, January 2014, European Commission, p. 8.

[34] M. Dougan, "The spatial restructuring of national welfare states within the European Union: the contribution of Union citizenship and the relevance of the Treaty of Lisbon", in *Integrating Welfare Functions into EU Law. From Rome to Lisbon*, U. Neergard (ed.), 2009, p. 147.

[35] *Antonissen* case, op. cit., para. 21.

[36] O. Golynker, *EU citizenship and the role of the European Court of Justice in reconfiguration of social solidarity in European Union*, European University Institute Research Papers, p. 4.

[37] CJEU judgment of 16.01.2014, C-378/12 and C-400/12, *Onuekwere and G*.

[38] D. Thym, "Sozialleistungen für und Aufenthalt von nichterwerbstätigen Unionsbürgern", in *Neue Zeitschrift für Sozialrecht* 2014, p. 87, based on CJEU judgment of 21.07.2011, C-325/09, *Dias*, para 55.

3.4. Expulsion and re-entry ban

Article 19(1) of the EU Charter of Fundamental Rights prohibits collective expulsions.

The Free Movement Directive establishes the expulsion of Union citizens as an *ultima ratio*. Member States can revoke the residence rights of unreasonably burdensome migrant claimants. However, an expulsion measure should not be the automatic consequence of recourse to the social assistance system.[39] Rather, the CJEU understands that if the threshold is that of an 'unreasonable burden', then there must be a burden which is still reasonable and which Member States need to support. The Court has stated that in instituting citizenship of the Union and linking it with the right to move across the EU, the Member States have accepted a certain degree of solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary.[40] Host Member State are obliged to examine whether there is a case of temporary difficulties, for how long the benefit is being granted and if it is likely that the EU citizen concerned will stop relying on the social system soon.

Furthermore, the duration of residence, the connection of the EU citizen to the host society, the citizen's family situation, age and state of health, any history of relying heavily on social assistance and any contribution to the financing of the social assistance system of the host Member State are all factors that should be taken into account[41] to determine whether the beneficiary has become an unreasonable burden on the social assistance system and whether to proceed to the beneficiary's expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or jobseekers, save on grounds of public policy or public security.[42]

Even if a Union citizen is expelled on the grounds of lack of self-sufficiency, the host Member State cannot easily impose a re-entry ban. In other words, the person in question can return there at any time.[43] This is due to Article 15(3) of the Free Movement Directive, according to which exclusion orders (entry bans) can be issued only on grounds of public policy, public security, or public health.[44] This was deplored by the four Ministers from Austria, Germany, the Netherlands and the United Kingdom in their letter to the Irish Presidency of the Council who proposed making it possible to ban EU migrants for a certain period from entering the host Member State after having been expelled for abusing free-movement provisions. Indeed, pursuant to Article 35 of Directive 2004/38, Member States may adopt the "necessary measures" to refuse, terminate or withdraw any right conferred by the Directive in the case of abuse of rights or fraud.

The European Commission points in this context to the possibility, after assessing all relevant circumstances and depending on the gravity of the offence (serious offences could, for example, be forgery of a document, a marriage of convenience with

[39] Article 24(3) and Recital 16 of Directive 2004/38. For the relationship between the right of residence and access to benefits, see below (Chapter 7).

[40] *Grzelczyk* case, op. cit., para 44.

[41] Commission communication Guidance for better transposition and application of Directive 2004/38/EC, 02.07.2009, p. 9.

[42] Recital 16 of Directive 2004/38.

[43] Article 15 (3) Directive 2004/38. See also European Commission, Guide on how to get the best out of Directive 2004/38/EC, p. 12.

[44] See E. Guild, S. Peers, J. Tomkin, *The EU Citizenship Directive. A commentary*, 2014, p. 289.

involvement of organised crime), of concluding that the person represents a genuine, continuous and sufficiently serious threat to public order and, on this basis, issue an exclusion order in addition to expelling the offender – thus prohibiting re-entry into the territory for a certain period of time.[45] This threshold is, however, fairly high so that it would be difficult to establish that behaviour aimed at abusively enjoying the advantages conveyed by freedom of movement could be qualified as a serious threat to public order, and then that a re-entry ban would represent a proportional punishment.

4. Access to contributory and non-contributory benefits

The Free Movement Directive does not provide for equal treatment from day one for Union citizens who wish to enter the territory of another Member State for up to three months. Rather, EU rules establish a proportional relationship between residence and equal treatment of EU citizens and nationals. Known as 'incremental approach',[46] this means that the longer migrants reside in a Member State, the greater the number of benefits they can receive on equal terms with nationals, thus ensuring integration into and solidarity from the host society. Workers, however, are deemed to have an immediate connection with the host society due to their contribution (or potential contribution in the case of jobseekers) to the economy of the host Member State.

4.1. Access to benefits for workers

Workers and their family members have access to the host Member State's social security system under the same conditions as nationals, since they contribute to public funds, for example, through their taxes. Typical social security benefits include old-age pensions, survivor's pensions, disability benefits, sickness benefits, birth grants, unemployment benefits, family allowances and healthcare (Article 3 of Regulation 883/2004).

In addition, EU citizens working in another Member State enjoy equal treatment with national workers as regards social advantages (Article 7(2) of Regulation 492/2001/EU), and this from their first day of employment. Social advantages include, *inter alia,* those linked to improving professional qualifications, e.g. a maintenance grant for study at an educational institution. In this context, Member States are concerned that a brief work relationship could be entered into, merely in order to gain access to educational benefits. However, the Court considers, as stated above, that for the purposes of EU law there is no such thing as abusively creating the situation of becoming a worker, provided the work involved is not marginal or ancillary.[47]

4.2. Benefits for economically inactive EU citizens

Economically inactive EU citizens in terms of secondary EU law include students, pensioners, unemployed persons who are not jobseekers, and jobseekers who have no genuine chance of finding a job in the host Member State. In contrast to workers and other economically active migrants, their access to benefits is based on their integration into the host society in a social rather than an economic context.

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[45] European Commission, European Commission upholds free movement of people, Press release, 15.01.2014.

[46] C. Bernard, "EU citizenship and the principle of solidarity", in *Social Welfare and EU Law*, Dougan and Spaventa (ed.), 2005, p. 166.

[47] Ninni-Orasche case, op. cit., para 31.

The Court has therefore made it more difficult for economically inactive persons to be eligible for social benefits, accepting Member States' requirements regarding a high degree of social integration of such persons if they are to receive, for instance, a student-maintenance grant. This 'real link' test for economically inactive people to obtain social security benefits includes an overall assessment of the claimant's individual situation in accordance with criteria such as duration of stay, motivation, family situation and intentions.[48] However, the CJEU has held that a blank (i.e. not linked to personal circumstances) residence requirement of five years in order to be granted a student maintenance allowance is acceptable as regards establishing the existence of a real link of the claimant with the host society.[49]

Member States are, in contrast, not obliged to treat economically inactive Union citizens as nationals for purposes of social assistance (Article 24(2) of Directive 2004/38) during the first three months following their arrival. After that, the equal treatment principle applies, including in regard to social assistance. However, at the same time (after the first three months) the self-sufficiency requirement would also apply, so that having recourse to social assistance could be regarded as proof of lack of self-sufficiency and thus lead to losing the right to reside in the host Member State and in turn also the right to social benefits.[50]

4.3. Access to benefits for jobseekers

4.3.1. First-time jobseekers' access to benefits

Jobseekers have, according to the Free Movement Directive, a mixed status: they are on the one hand currently not contributing to the productivity of the host society, but on the other hand, they are potential members of the labour force.

The Directive distinguishes further between those jobseekers who used to be employed in the host Member State before involuntary losing their employment and 'first-time jobseekers' who move to the host Member State to seek employment there. Under certain conditions, those who have worked in the host Member State retain their status as a worker or self-employed after their employment has ended. Pursuant to Article 7(2) of Directive 2004/38, EU citizens maintain their status as workers *inter alia* if they are in duly recorded involuntary unemployment after having been employed for more than one year and have registered as a jobseeker with the employment office. Someone losing their job involuntarily before having completed a period of employment of one year will retain their worker status for at least six months (Article 7(3)). The same applies to a person who was employed with a fixed-term contract of less than a year. First-time jobseekers, in contrast, have no worker status to 'retain' as they have never worked in the host Member State.

The Union legislator has been reluctant to grant equal treatment to migrating job-seekers, given concerns over 'benefit tourism' and reflecting doubts regarding the value of merely potential economic activity.[51] Article 24(2) of Directive 2004/38 establishes an exemption from equal treatment with nationals regarding social assistance for the first three months of residence, extending longer for jobseekers. Accordingly, Member States are not obliged to grant jobseekers benefits that fall under social assistance.

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[48] CJEU judgment of 25.02.1999, C-90/97, *Swaddling*.

[49] CJEU Judgment of 18.11.2008, C-158/07, *Förster*.

[50] For the relationship between the right to reside and the right to claim benefits, see chapter 5 below.

[51] C. O'Brien, "Real links, abstract rights and false alarms: the relationship between the ECJ's “real link” case law and national solidarity", in *European Law Review* 2008, pp. 652-653.

In its previous case-law the CJEU also distinguished between migrant workers who became jobseekers and first-time jobseekers in a host Member State, whereby the latter were not entitled to equal treatment with nationals as regards unemployment benefits.[52] However, the Court held in the landmark *Collins* and *Vatsouras* cases that in view of the establishment of citizenship of the Union, jobseekers enjoy the right to equal treatment for the purpose of claiming a benefit of a financial nature intended to facilitate access to the labour market.[53] The *Vatsouras* case concerned the German basic benefit for jobseekers[54] which the German authorities considered to be 'social assistance' in the sense of Article 24(2) of Directive 2004/38. The CJEU argued, however, that benefits such as the one in question which are aimed at ensuring that jobseekers are capable of earning a living are likely to be aimed at facilitating access to employment and thus cannot constitute 'social assistance', regardless of their formal status under national law.

Moreover, jobseekers can claim jobseeker's allowances in those Member States (e.g. Ireland) where those benefits fall not under 'social security benefits' but under SNCBs pursuant to Annex X of Regulation 883/2004. As SNCBs are granted in the Member State of residence, jobseekers may qualify for them if they are habitually resident there.[55] Jobseekers' access to certain benefits such as SNCBs is a consequence of the residence-based approach laid down for SNCBs in Regulation 883/2004. However, through the *Brey* case, the CJEU clarified that the Free Movement Directive allows Member States to impose proportional restrictions on access to social benefits for Union citizens so that they do not become an unreasonable burden on the social assistance system of host Member States.[56]

4.3.2. Duration of access to benefits

The CJEU held in the *Antonissen* case that jobseekers have a right to reside in the host Member State for as long as they have a genuine chance of finding a job there. According to the Court, this can go beyond six months from entry into the host Member State, if jobseekers can prove that they are still seeking a job and have a genuine chance of finding one. During this period of work-seeking, the first-time jobseeker has a right to equal treatment with national jobseekers as regards benefits intended to facilitate access to employment, as well as any applicable SNCB.[57]

4.3.3. Real link to the employment market

A Member State may, however, legitimately grant a benefit aimed at facilitating access to employment only to jobseekers who have a real link with the labour market of that Member State. This seems problematic as first-time jobseekers have never worked in the host Member State. However, according to the Court, the existence of such a link can be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question.[58] To confirm someone's status as a jobseeker, national authorities usually demand evidence

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[52] CJEU judgment of 18.06.1987, C-316/85, *Lebon*.

[53] CJEU judgment of 04.06.2009, C-22/08 and C-23/08 *Vatsouras*, para. 37; F. Wollenschläger and J. Ricketts, op. cit., p. 12.

[54] *Grundsicherung für Arbeitsuchende*, Article 7(1)(2) of the German Social Code II (SGB II).

[55] F. Wollenschläger and J. Ricketts, op. cit., p. 13.

[56] CJEU judgment of 19.09.2013, C-140/12, *Brey*, paras 39-57. For more details, see below.

[57] See E. Guild, *Cameron's proposal to limit EU citizens' access to the UK: lawful or not, under EU rules?*, CEPS Commentary, 2013, p. 2.

[58] *Collins* case, op. cit., para 63; CJEU judgment of 25.10.2012, C-367/11, *Déborah Prete*, paras 33 and 47.

such as invitations to job interviews or participation in activities organised by employment agencies. Reports show that several Member States consider a lasting period of unemployment as an indication that the person has no chance of finding a job, the result being loss of access to jobseekers' benefits.[59] Further possible factors are registration as a jobseeker, period of residence and family ties.[60] In recognition of the economic potential of jobseekers, the Court has made clear that the hurdles to establishing a sufficient real link regarding a migrant's eligibility for unemployment benefits should be low, such as a period of genuine work-seeking.

4.3.4. Criticism

Some see the 'real link' test for economically inactive EU migrants as a guarantee against 'benefit tourism' and as balancing social solidarity and integration of the claimant in the host Member State.[61] That test has, on the other hand, led many commentators to conclude that the Court has opened up national welfare systems to EU citizens.[62]

The CJEU has been seen as taking a stance contradictory to the wording and spirit of the Free Movement Directive. Golynker argues that the special treatment of jobseekers in comparison to economically inactive Union citizens such as students has no justification in the Directive.[63] According to Recital 21 of the Directive, it is up to the Member States to decide whether they will grant social assistance to Union citizens during the first three months of residence, or for longer periods in the case of jobseekers, as well as maintenance assistance for students.[64] It is therefore argued that the Directive makes no distinction between the three categories of EU migrants – short-term visitors, students and newly-arrived jobseekers – as regards access to social solidarity within the host society. The Directive is thus seen as excluding such migrant EU citizens from national welfare systems, as they are neither contributors nor integrated into the host society through long residence.[65] The 'real link' test is generally seen as too broad to be a test at all,[66] with the CJEU examining merely whether it is 'inconceivable' that the jobseeker can establish a real link with the host employment market.[67] Here, some criticise the fact that benefits are granted at all to people whose affiliation to the host society is only potential, i.e. dependent on whether they start contributing economically.[68]

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[59] F. Wollenschläger and J. Ricketts, op. cit., p. 11.

[60] *Déborah Prete* case, op. cit., paras 40, 44, 47.

[61] See in general on the 'real link' test P. J. Neuvonen, "In search of (even) more substance for the "real link" test: comment on *Prinz and Seeberger*", in *European Law Review* 2014, Vol. 39 (1), pp. 125-136.

[62] C. O'Brien, op. cit., p. 648.

[63] O. Golynker, *EU citizenship and the role of the European Court of Justice* ..., op. cit., p. 9.

[64] Recital 21 of Directive 2004/38 states: that "it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of jobseekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons".

[65] O. Golynker, *EU citizenship and the role of the European Court of Justice* ..., op. cit., p. 9.

[66] Ibid.

[67] Ioannidis case, op. cit. See F. Wollenschläger, "The Judiciary, the Legislature and the Evolution of Union Citizenship", in *The Judiciary, the Legislature and the EU Internal Market*, P. Syrpis (ed.), 2012, pp. 325.

[68] See, e.g., O. Golynker, "Jobseekers' rights in the European Union: challenges of changing the paradigm of social solidarity", in *European Law Review*, 2005, Vol. 30 (1), pp. 111 and 122.

5. The relationship between right of residence and access to benefits for economically inactive EU immigrants

The relationship between residence and benefits rights is highly controversial, in particular with regard to temporary and long-term economically inactive persons (e.g. pensioners, and also jobseekers without a genuine chance of finding a job). As shown above, on the one hand economically inactive citizens need to have sufficient resources in order to be entitled to reside in the host Member State. On the other hand, their right of residence cannot be terminated in such a way that that they are expelled if they claim social assistance in the host Member State. This ambiguity has led to divergent practices in the Member States and to the CJEU, here too, being seen as shaping the EU social system.

5.1. 'Right of residence' test for social benefits

Some Member States hosting EU immigrants have established a link between access to benefits and, going beyond factual residence, a legal right of residence. The legal residence test establishes that those without means through work or otherwise (self-sufficiency) have no right to reside in the host Member State and thus are not entitled to claim social security or SNCBs. This is in order to avoid economically inactive EU citizens and jobseekers being eligible to receive benefits without contributing financially to the national welfare system.

Habitual residence test for SNCBs

Special non-contributory benefits (SNCBs) under Regulation 883/2004, unlike classical social security benefits, are granted only on the territory of the host Member State. 'Residence' means the place where a person habitually resides. In order to clarify the concept of 'habitual residence' in Regulation 883/2004, the Commission published a practical guide[69] in January 2014 which stresses that all residence criteria are purely factual.

This is the case, for instance, in Austria and the UK. In 2004, after the accession of the ten 'new Member States', and in addition to the habitual residence test, the UK introduced a further 'right to reside test' for persons who are not workers or self-sufficient. The 'right to reside test' applies to social security benefits within the scope of Regulation 883/2004 such as income support, state pension credit, income-related employment and support allowance, child benefit, and income-based jobseeker's allowance, as well as to social advantages under Regulation 492/2011 such as housing benefit and housing assistance, social fund crisis loans and council tax benefit. As a consequence, an EU citizen who has not sufficient means or is unemployed, and has no permanent residence in the UK (i.e. longer than five years), will fail the 'right to reside' test and will not be eligible for those benefits. Several UK courts have been called on to decide on the lawfulness of the right to reside test. In the *Abdirahman*[70] and *Patmalniece*[71] rulings, the Court of Appeal and the Supreme Court respectively ruled

[69] European Commission, Practical guide on the applicable legislation in the European Union, the European Economic Area and Switzerland, December 2013.

[70] Joined cases [2007] EWCA Civ 657, *Nadifa Dalmar Abdirahman* v *Secretary of State for Work and Pensions* (2006/1639) and *Ali Addow Ullusov* v *Secretary of State for Work and Pensions* (2006/1668), 05.07.2007.

[71] UK Supreme Court judgment in the case *Petmalniece* v *Secretary of State for Work and Pensions* (2011).

that there is no indirect discrimination against EU citizens and that such measures would in any case be justified in order to combat 'benefit tourism'.

As a consequence, in May 2013 the Commission referred the UK to the CJEU over the 'right to reside' test for social security benefits,[72] highlighting in particular the refusal of the UK authorities to grant, for instance, income-based jobseeker's allowances even to Union citizens who retained the status of workers after having worked in the UK and then became unemployed. The Commission recalled that EU rules on coordination of social security do not allow for restrictions on social security benefits in the case of EU nationals who are workers, direct family members of workers or habitually resident in the Member State in question. Hence, according to the Commission, the UK may solely apply to social security benefits the habitual residence test as provided for in EU law. The Commission stresses that the criteria for determining the centre of interest, and therefore also the habitual residence, of a person are strict enough to ensure that these social security benefits are only granted to those genuinely residing habitually within a Member State's territory.

5.2. Does claiming benefits prove lack of self-sufficiency?

According to Article 7(1) of the Free Movement Directive, economically inactive persons have the right to reside in the host Member States for more than three months only if they have sufficient resources for themselves and their family members so as not to become a burden on the social assistance system of the host Member State. Furthermore, during the first three months the right of residence is subject to the condition that the EU citizen does not become an unreasonable burden on the social assistance system. Those Member States favouring a 'right to reside test' argue that the fact that an EU citizen claims SNCBs is proof of lack of self-sufficiency. Thus, the question has arisen of whether migrant EU citizens claiming social benefits in their host Member State, in particular SNCBs under Regulation 883/2004, put at stake their right to reside there under the Free Movement Directive, their claim being proof of their lack of self-sufficiency.

The Free Movement Directive contains an exception to the equal treatment principle for EU citizens and nationals as regards 'social assistance': Article 24(2) stipulates that Member States are not obliged to grant social assistance during the first three months of residence. Regulation 883/2004 does not provide for coordination of national social assistance systems, only of social security (contributory benefits) and SNCBs. Many argue therefore that this exception from the equal treatment principle as regards social assistance would be circumvented should EU citizens be entitled to claim SNCBs without the right to reside in the host Member State. In this context it is argued, however, that SNCBs do not constitute social assistance within the meaning of Articles 7 and 24 of the Free Movement Directive. Thus, the question arises whether 'social assistance' within the meaning of Directive 2004/38 also includes SNCBs within the meaning of Regulation 883/2004, so that Member States would not be obliged to grant SNCB to migrant EU citizens who have no residence right as they are not self-sufficient. These questions were partially clarified by the CJEU in the *Brey* case of 2013.

[72] European Commission, Social security benefits: Commission refers UK to Court for incorrect application of EU social security safeguards, press release, 30.05.2013.

The Court stressed in the first place that Regulation 2004/38 does not constitute a right to SNCBs, but merely contains a conflict rule stipulating that SNCBs shall be provided in the Member State of residence and not, for example, in the Member State of origin. Member States are therefore free to set the conditions under which SNCBs are granted, and can establish that they will be granted only if the EU citizen in question is **lawfully resident** in the host Member State.[73]

The *Brey* case

Mr Brey is a German national receiving a modest German pension. He moved to Austria and applied there for a compensatory supplement to his pension (an SNCB). In order to prevent pensioners from other Member States who have never contributed in Austria from benefiting from this supplement, Austrian legislation provides that only persons legally residing in Austria are entitled to it, and that in order to reside legally non-active persons must have sufficient resources.

The Court pointed out in this context that one of the objectives of the Free Movement Directive, in contrast to the Social Coordination Regulation (883/2004), is to ensure that EU citizens moving to another Member State do not become an unreasonable burden on the social assistance system there, thus weighing the right to reside against the legitimate interest of the Member States in protecting their public finances. In the Court's view, social assistance in terms of Directive 2004/38 covers:

> "all assistance [...] that can be claimed by a person 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."[74]

The Court acknowledged that **if an economically inactive EU citizen claimed an SNCB in the host Member State, this could mean that the person in question is not self-sufficient** and that this claim could become a burden on the Member State's social assistance system. However, the Court upheld its earlier case-law stating that whether a benefits claim would suggest a burden may not be established in an abstract way, but, rather, the particular circumstances of each case need to be examined.[75]

5.3. Unreasonable burden on social assistance through access to benefits

According to the CJEU, this need for an individualised approach to the issue of the burden placed by each claim for benefits on the national social assistance system follows from the fact that such claims cannot automatically lead to the EU citizen's expulsion (Article 14(3) of Directive 2004/38). Moreover, according to Article 8(4) of the Free Movement Directive, Member States may not lay down a fixed amount to be regarded as 'sufficient resources', but must take into account the personal situation of the person concerned. Accordingly, an overall assessment is needed of the specific burden which granting that benefit would place on the social assistance system as a whole, taking account of the individual situation of the person concerned.[76] The Court clarified in the *Brey* case that such aspects of the individual situation could be the amount and regularity of the claimant's income, the factors that have led the national authorities to issue the claimant with a certificate of residence, and the period for which the benefit is likely to be granted.

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[73] *Brey* case, op. cit., paras 42-44.

[74] Ibid., para. 61.

[75] Ibid., para 64.

[76] Ibid., para. 77.

This assessment of the impact of individual benefits for EU citizens on the social assistance system of the host Member State as a whole has been sharply criticised as inadequate, since it seems impossible that a single individual can become an unreasonable burden on the finances of a Member State.[77] Many argue that, in contrast, the total number of benefit claims made by Union citizens in a host Member State could become 'unreasonable' for the host Member State's welfare system, and argue that national authorities should be allowed to conduct such a global assessment of unreasonableness.[78]

The CJEU responded to these demands for a more global assessment for the first time in the *Brey* judgment. There the Court concluded, following the Commission's argument in this sense in the proceedings, that in order to ascertain more precisely the extent of the burden which granting a benefit would place on the national social assistance system, it may be relevant to determine the **proportion of beneficiaries of that benefit in the host Member State who are Union citizens**. In this way, a rising trend in numbers of benefits claims in a host Member State can be duly taken into account. This does not mean, however, that a global assessment of the impact on the host Member State's social assistance system of granting a certain type of benefit to Union citizens would be allowed in future to replace case-by-case analysis. The remaining factors, such as personal circumstances, duration of residence and duration of benefit claims, will still need to be taken into account by the national authorities when assessing the unreasonableness or otherwise of the burden placed on the national social assistance system as a whole.

It is estimated that in 2012, 0.3% of beneficiaries of the pension supplement in Austria were EU migrants. The number of EU migrants receiving the benefit increased by 27% between 2011 and 2013. The beneficiaries came from Germany (214), Romania (200), Bulgaria (92), Poland (62), Hungary (33), Slovakia (19) and the UK (15) (see ICF GHK / Milieu, 2013 study, op. cit., p. 78).

Figure 2 - Summary of benefits rights for EU citizens in a host Member State

EU citizens	Benefits entitlement
Workers / Unemployed after one year / Unemployed after less than one year – worker status for six months	Same social security benefits as national workers. Same healthcare entitlements as national workers. Right to child benefit without need for children to be resident in host Member State.
First-time jobseekers	No social assistance during first three months or while seeking a job. However, equal treatment with nationals as regards 'benefits of financial nature intended to facilitate access to labour market', if they have a real link to employment market of host Member State, e.g. by having genuinely sought work there. Access to SNCBs where habitually resident; in some Member States jobseeker's allowance is not social assistance but falls instead under SNCB.
Economically non-active citizens: • Pensioners • Students	Complementary pension supplements, if no unreasonable burden placed on national social assistance system. Student allowance, if real link with host society (e.g. five years' residence), and if no unreasonable burden.

[77] M. Fuchs, "Die Rechtsprechung des Gerichtshofs der Europäischen Union zum Sozialrecht im Jahr 2013", in *Neue Zeitschrift für Sozialrecht*, 2014, p. 122.

[78] S. O'Leary, "Free movement of persons and services", op. cit., p. 518.

5.4. Judicial designing of the 'European social system' under criticism

This individualised approach to the relationship between residence right and access to benefits has been welcomed by some as necessary in order to guarantee freedom of movement as a fundamental right of Union citizens. However, others – experts and Member States – criticise it for placing a heavy administrative burden on national authorities. It is also argued that this case-by-case approach has led to a situation where, in place of coherent legislation, the EU social system is shaped by individual cases taken to the CJEU. Davies bemoans the fact that "it is not legislation that is harmonising welfare states, but principles developed reactively, inductively, and out of individual situations, by the Court of Justice", concluding that "welfare reform is not being led by welfare policy at all."[79]

Experts point out, however, in the Court's defence, the existence of diverse inconsistencies in the Free Movement Directive. As shown above, economically inactive EU migrants are expected to be self-sufficient, yet there are no fixed thresholds for this self-sufficiency, and recourse to social assistance may lead to expulsion not automatically but only when there is an unreasonable burden on the national welfare system. It is widely argued that Member States deliberately accepted these inconsistencies and left the CJEU to close the gaps in the legislation. The results are consequently not always those desired or envisaged by the different actors.[80]

6. Intra-EU migration and access to social benefits in figures

The legal rules governing the free movement and residence of EU citizens across the EU and their transnational access to social benefits present, as seen in the previous chapters, a picture of far-reaching integration of EU citizens benefitting from the solidarity of the host society. This integration nonetheless reaches its limits where an unreasonable burden is placed on the national social assistance system. The legal framework thus needs to be set in a practical context offering statistical evidence of the scale of the issues at stake.

6.1. Data on EU migrants in host Member States

There are statistical data available on the use of freedom of movement and residence by EU citizens. Moreover, in some host Member States there are data on the reliance of migrant EU citizens on the welfare system, although other Member States do not provide data broken down by nationality. However, reliable and systematic data on the abuse of residence and benefits rights are very rare, and are often not presented separately from data on non-EU nationals.

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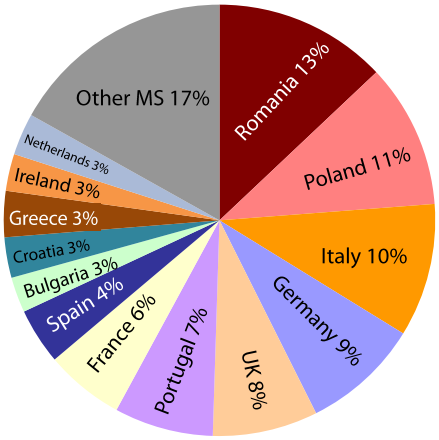
[79] G. Davies, *The process and side-effects of harmonisation of European welfare states*, Jean Monnet Working Paper No 02/2006, p. 5.

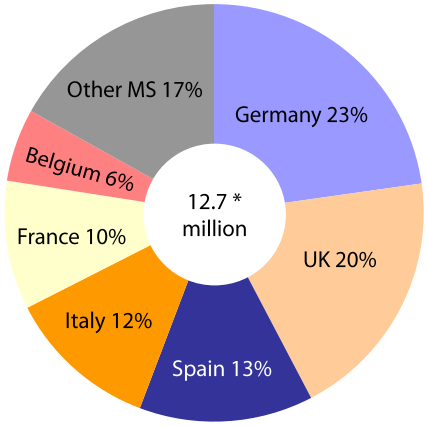
[80] K. Heilbronner, "Unionsbürgerschaft und Zugang zu Sozialsystemen", in *Juristenzeitung* 2005, pp. 1138 and 1141 et seq.; D. Thym, "Sozialleistungen für und Aufenthalt von nichterwerbstätigen Unionsbürgern", op. cit., p. 85.

Figure 3 - EU nationals living in another Member State (departure countries, 2010)



Data source: World Bank

Figure 4 - EU nationals living in another Member State (host countries, 2013)

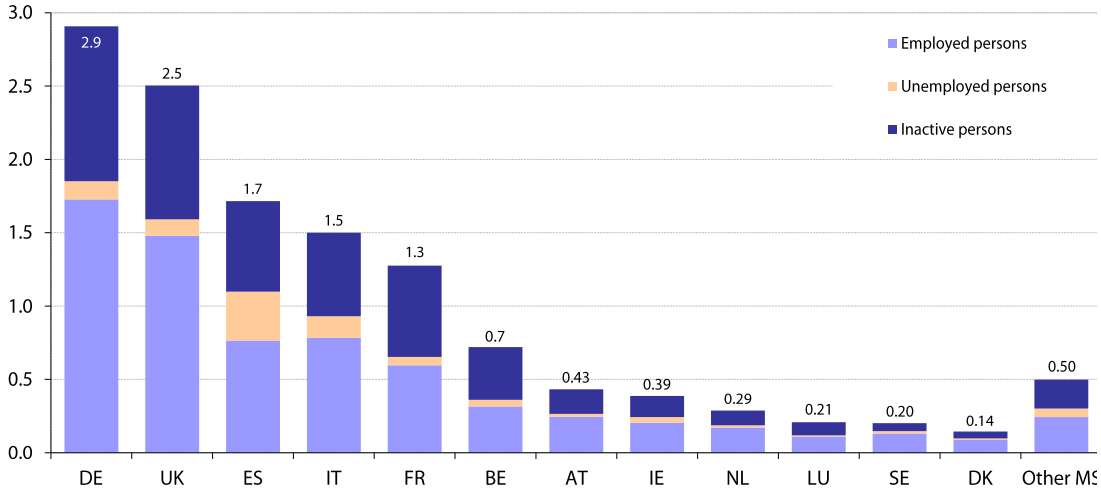


Data source: Eurostat LFS, (*). Data on total migrant population vary considerably in different sources.

The number of intra-EU migrants of working age (15-64) has increased in recent years, taken as a percentage of the total EU population (EU-27), from 1.3 % in 2003 to 2.6 % in 2012. It remains, however, relatively low compared with the figures for mobility within the US. The Member States from which the largest numbers of intra-EU migrants come are Romania, Poland, Italy and Germany. It should be noted that the numbers of newly arrived Romanian and Polish economically active citizens fell dramatically between 2008 and 2011, although their overall numbers remain high.[81]

The percentage of economically inactive EU immigrants living in another Member State has also risen, from 0.7% of the overall EU population in 2003 to 1.0% in 2012, but this group represents a very small share of the total population in each Member State.

Figure 5 - Employed, unemployed and inactive EU citizens in host Member States (in millions, 2013)



Data source: Eurostat

[81] ICF GHK / Milieu, *A fact-finding analysis on the Impact on the Member States' social security systems,* op. cit., p. 40.

A 2013 study[82] commissioned by the European Commission and analysing data for the 27 Member States (before Croatia's accession) found that, in 2012, 71% of the non-active EU migrant population were pensioners, students or jobseekers and that 79% of non-active EU migrants live in economically active households. According to the study, 64% of economically inactive EU migrants have worked previously in their host Member State and the vast majority became unemployed there and are therefore not first-time jobseekers. The study also found that some 77% of non-active EU migrants are long-term residents in the host Member State (more than five years): the Member States with the highest rates of such inactive long-term residents are Spain, Italy and France, all traditional countries of destination for EU pensioners.

Abuse of welfare systems has traditionally been measured statistically by comparing welfare use of immigrants and nationals, and assessing whether the former use the welfare system to excess in ways not justifiable by objective criteria.[83] In this sense, the 2013 study stresses that in most Member States, immigrants are not more intensive users of welfare than nationals. In the case of cash benefits such as social pensions, disability allowances or non-contributory jobseeker's allowances (falling under SNCBs), the study shows that economically non-active and mobile EU citizens account for a very small proportion of beneficiaries and that the budgetary impact of the claims of this group on national welfare budgets is very low. This group accounts for between 1% and 5% of all SNCB beneficiaries of EU citizenship in only five Member States (Germany, Finland, France, the Netherlands and Sweden), and above 5% only in Belgium and Ireland (figures for Ireland are estimates based on claims). There has been, however, a trend to higher numbers of EU immigrants receiving SNCBs in their host Member State, although total numbers remain small.

Figure 6 - EU migrants receiving SNCBs in selected EU Member States, 2012

Member State	SNCB	% of total SNCB beneficiaries
Austria	Compensatory pension supplement	653 (0.3%)
Belgium	Subsistence benefit for persons 65+	5 354 (6.1%)
Germany	Benefits for jobseekers	254 011 (4.2%)
France	Disabled adult allowance	14 419 (1.5%)
Ireland	Jobseeker allowance	45 153 (15.2%) (estimate of claimants)
Netherlands	New Wajong benefit (for disabled)	900 (0.4%)
Sweden	Housing supplements and elderly support	4 113 (1.5%)

Source: 2013 ICH GHK Milieu study

In this context it should be noted that several studies reveal that immigrants move to other Member States mainly to work there and not in order to 'abuse' the welfare system in the host Member State. In fact, on average mobile EU citizens are more likely to be in employment than nationals of the host country, *inter alia* because they are generally of working age when they move to another Member State. Moreover, many of them are highly educated, and this combination of factors is liable to make them net

[82] Ibid. The study understands non-active persons include all migrants not in employment, including jobseekers.

[83] C. Giuletti and M. Kahanec, "Does generous welfare attract immigrants? Towards evidence-based Policy-Making", in *Social Benefits and Migration: A Contested Relationship and Policy Challenge in the EU*, E. Guild and S. Carrera (ed.), CEPS 2013, p. 121.

contributors to public finances.[84] According to the 2013 study, the overall rate of inactivity among EU migrants has fallen from 47% in 2005 to 33% in 2012. Although on average EU migrants are more likely to be employed than nationals in the same Member State,[85] the unemployment rate among EU migrants is higher than among nationals. That rate increased from 8.5% to 12.5% between 2008 and 2012, while the increase among nationals was from 6.6% to 9.8%.[86]

The 2013 study estimates that on average, expenditure associated with healthcare provided to non-active EU migrants is very low relative to total health spending (0.2% on average) or to the size of the economy in the host countries (0.01% of GDP on average).

6.2. Figures in selected Member States

201 000 EU citizens immigrated to the **United Kingdom** in 2013, compared to 158 000 in 2012. Of these, 125 000 immigrated for work. Whilst in 2012, 9 000 Romanian and Bulgarian (EU-2) citizens immigrated to the UK, the number increased in 2013, when 23 000 EU-2 citizens moved to the UK. The UK Office of National Statistics estimates that some 122 000 EU-2 citizens were employed in the UK in the period January to March 2014, compared with 103 000 in the same period in 2013.[87]

The number of EU migrants of working age has increased by 70% since 2006. The number of jobseeking EU migrants rose by 73% between 2008 and 2011. Of the approximately 1.44 million people claiming means-tested jobseeker's allowance in the UK in 2011, some 2.6% were non-national EU citizens while some 0.9% were A8 nationals (from the eight Central and Eastern European countries which joined the EU in 2004).[88] At the beginning of 2014, the UK government introduced measures "to tighten up our EEA migration rules to ensure our welfare system is not taken advantage of", including a three-month waiting period for entitlement to an income-based jobseeker's allowance (JSA) and no access to housing benefits for jobseekers receiving JSA.[89] Whilst the UK Department for Work and Pensions has not produced an estimate of the savings expected from the new three-month rule for JSA, "due to the lack of detailed data",[90] it estimates that the housing benefit restrictions could save some £10 million per year.[91]

Some 2.8 million non-national EU citizens reside in **Germany**. New arrivals from the EU-10 (the Member States which joined in 2004) increased by 61.5% between 2004 (173 424) and 2012 (280 156). The number of new arrivals of EU citizens from Romania and Bulgaria increased by 414.5%, from 35 131 (2007) to 180 733 in 2012. At the same time in 2012, 359 720 EU citizens left Germany, resulting in a positive migration balance for 2012 of 263 687 EU citizens. In 2013 there were 146 000 unemployed EU

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[84] C. Dustmann, T. Frattini and C. Halls, "Assessing the fiscal Costs and benefits of A8 Migration to the UK", in *Fiscal Studies* 2010 (Vol. 31), No. 1, pp. 1-41.

[85] ICH GHK / Milieu 2013 study, op. cit., p. 36.

[86] Eurostat, LFSA_urgan – unemployment rates.

[87] UK Office for National Statistics, Migration Statistics Quarterly report, May 2014.

[88] ICH GHK / Milieu 2013 study, op. cit., p. 64.

[89] House of Commons Library, Measures to limit migrants' access to benefits, 15.05.2014.

[90] UK Department for Work and Pensions, The Jobseeker's Allowance (Habitual Residence) Amendment Regulations 2013, Impact Assessment, 16.12.2013.

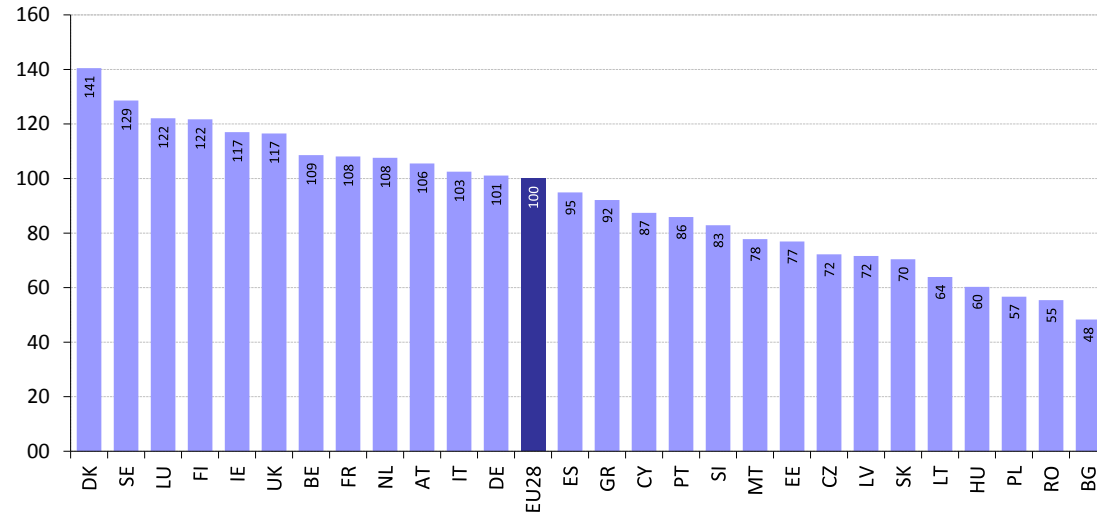
[91] UK Department for Work and Pensions, The removal of Housing Benefit from EEA jobseekers, Impact Assessment, 27.02.2014.

citizens, accounting for approximately 5% of all unemployed persons in Germany. Most unemployed EU citizens are from Italy, Poland and Greece. The number of beneficiaries of basic subsistence income for jobseekers who are Romanian and Bulgarian citizens increased by 50% from October 2012 to October 2013, but their total number remained low in absolute terms at 14 000. During the same period, 7.5% of the total population and 16.2% of all foreigners in Germany received the basic subsistence income, as against 10% of resident EU-2 citizens and 10.7% of EU-8 (EU-10 excluding Cyprus and Malta) citizens.[92]

6.3. Social benefits as a pull factor for intra-EU immigration

Those alleging 'abuse' of the freedom of movement often link it to the higher levels of social benefits received in some Member States as compared to others. Jobseekers and economically inactive persons from Member States with less generous welfare systems are said to move to other Member States with the sole aim of benefitting from higher jobseeker's allowances, family and other benefits. It should be noted however that economically inactive persons and jobseekers need effectively to reside in the host Member State in order to be entitled to minimum subsistence benefits. This means that they will have higher expenditure than in their home Member States. This is because such Member States' social benefits are higher in direct relation with the higher cost of living there.[93]

Figure 7 - Price level index for household final consumption expenditure (EU28=100, 2012)



Data source: Eurostat

Giuletti and Kahanec analysed several statistical studies and found that the hypothesis that welfare is a strong magnet for immigrants cannot be sustained.[94] These studies found that the most important criteria for migrants when they move to another country are the bilateral differences between countries' per capita income and unemployment rates. Conversely, the factor of social expenditure as a proportion of

[92] German Federal Ministry for Labour and Social Affairs, Rechtsfragen und Herausforderungen bei der Inanspruchnahme der sozialen Sicherungssysteme durch Angehörige der EU-Mitgliedstaaten, Zwischenbericht des Staatssekretärsausschusses, March 2014.

[93] H. Verschueren, "European (internal) migration law as an instrument for defining the boundaries of national solidarity systems", in *European Journal of Migration and Law* 2007 (9) 3, p 342.

[94] C. Giuletti and M. Kahanec, op. cit., pp. 111 et seq.

gross domestic product (GDP), as a measurement of welfare, has been found to influence immigration only weakly and in any case to a far lesser extent than other factors, such as existing family ties and diaspora.[95] It should be stressed, however, that there might also be a combination of factors, since countries with more generous welfare systems also tend to offer better employment prospects and wage levels.[96]

7. Economic impact of intra-EU mobility

7.1. Macroeconomic effects

Economic analyses generally see immigration as having a positive impact on the public finances of the destination country, by boosting the labour force and, as a result, GDP. Also, the majority of EU citizens believe that free movement of people within the EU is beneficial for their national economies (67%).[97] According to a 2011 study, EU-8 immigration to the EU-15 has led to a long-term increase in EU-15 GDP of 0.33%, with GDP per capita remaining the same or slightly decreasing (by 0.01%). Immigration from Romania and Bulgaria to the EU-15 has entailed a long-term increase in GDP for the EU-15 of 0.34% and a fall in GDP per capita of 0.12%.[98]

The net fiscal impact of an individual migrant depends on the person's age, education, and duration of stay.[99] Studies argue that, in general, EU workers from other Member States usually pay more into host country budgets in taxes and social security than they receive in benefits, as they tend to be younger and often return to their home country before becoming entitled to specific benefits.[100] A 2009 study by the Centre for Research and Analysis of Migration showed that in each fiscal year since enlargement in 2004, A8 immigrants made a positive contribution to public finances in the United Kingdom. The reasons are that they had a higher labour force participation rate, paid proportionately more in indirect taxes, and made much lower use of benefits and public services.[101]

A study on the fiscal impact of Romanian and Bulgarian immigrants to Sweden between 2007 and 2010 found that their net contribution was positive – around SEK 30 000 on average, meaning a revenue/cost ratio for those migrants of around 1.30. According to the author, this positive result is due to migrants receiving less social benefits and being subject to less government spending compared with average spending for Swedish

[95] P.J. Pedersen, M. Pytlikova and N. Smith, "Selection and Network Effects: Migration Flows into OECD Countries 1990-2000", in *European Economic Review* 2008 (Vol. 52), pp. 1160 et seq.; G. De Giorgy and M. Pelizzari, "Welfare Migration in Europe", in *Labour Economics*, 2009 (Vol. 16), pp. 353 et seq.

[96] ICF GHK / Milieu 2013 study, op. cit., p. 45.

[97] Flash Eurobarometer 365, 2013, op. cit., p. 43.

[98] D. Holland, T. Fic, A. Rincón-Aznar, L. Stokes and P. Paluchowski, *Labour mobility within the EU - The impact of enlargement and the functioning of the transitional arrangements*, for the European Commission, DG Employment, Social Affairs and Inclusion, July 2011, pp. 63-67.

[99] European Commission, DG Employment, Social Affairs and Inclusion Directorate A, *Employment and Social Developments in Europe 2011*, November 2011, p. 276.

[100] M. Benton and M. Petrovic, *How free is Free Movement. Dynamics and drivers of mobility within the European Union*, Migration Policy Institute Europe, March 2013, pp. 18-19.

[101] C. Dustmann, T. Frattini and C. Halls, "Assessing the fiscal costs and benefits of A8 Migration to the UK", op.cit., pp. 9 et seq.

nationals: this is found to positively balance the fact that migrants tend to earn lower incomes and hence pay less in taxes than the population on average.[102]

Conversely, it is argued that while immigration might have a positive impact at national level, it might affect some groups negatively ('distributional effects') when immigrants compete for jobs with local workers and bring the level of earnings down by accepting to work for lower wages, this being more likely in a situation of economic crisis.[103]

7.2. Effect on business

Immigration is also said to have a positive effect on business by ensuring a better match of workers' skills and job vacancies. A study on migrant entrepreneurs in the UK shows that 14 % of all UK companies were created by migrants. The top ten entrepreneur nationalities include four EU Member States: Germany, Poland, France and Italy. The average age of migrant entrepreneurs in the UK is 44.3, while entrepreneurs from EU Member States tend to be younger (Romania: 33.3, Estonia: 34.7, Bulgaria: 36.1, Poland: 36.7). There are 8 798 Bulgarian entrepreneurs in the UK, responsible for 8 398 companies, and 10 931 Romanian entrepreneurs with 10 693 companies.[104]

7.3. Challenges for infrastructure at local level

Migration flows to certain local communities can lead to the overburdening of their capacities in terms of budgetary provisions and infrastructure. The discussion focuses in this context particularly on EU citizens from the Roma minority moving to another EU Member State and allegedly overburdening local facilities.[105]

The German Association of Cities has published a position paper[106] stressing that local authorities face considerable expense due to poverty-related immigration, e.g. providing emergency accommodation, basic health services and counselling. The situation is further aggravated by the fact that EU immigrants in this category often move to neighbourhoods characterised by poor social standards and relatively high unemployment and social transfer rates. They often live in poor conditions, and a higher burden is thus placed on the local budget in order to ensure them dignified living standards.

Moreover, local authorities report the existence of a vicious circle, with improved integration policies leading to increased poverty-related immigration, as the existence of integration courses, child allowances, etc. attracts more immigration on the part of needy migrants. It is also reported that, in particular, Romanian and Bulgarian citizens belonging to the Roma minority often fall victim to traffickers who are paid high sums to prepare applications for child allowances or register sham companies. The effect is often increased pressure on migrants to find illegal sources of income, resulting in wage dumping, prostitution and begging. As a consequence, social peace is often at risk in the communities affected, with xenophobic and racist movements on the rise.

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[102] J. Ruist, *The fiscal consequences of unrestricted immigration from Romania and Bulgaria*, Working Papers in Economics, No 584, University of Gothenburg, January 2014, p. 3.

[103] M. Benton and M. Petrovic, *op. cit.,* p. 16.

[104] Centre for Entrepreneurs / DueDil, *Migrant Entrepreneurs: Building our Businesses, Creating our Jobs*, 2014, pp. 5-6, 27-28.

[105] See e.g. From Slovakia to Belgium: the story of failed Roma policy, EUobserver, 09.04.2014.

[106] German Association of Cities, Questions concerning Immigration from Romania and Bulgaria, 2013.

Intra-EU human trafficking and benefit fraud

Europol has reported increasing trafficking of children in the EU. Traffickers use children to support and justify claims linked to family and housing benefits.[107] Adult victims of trafficking are often forced to claim benefits in the host Member State to which they are legally entitled, but the money is withheld by the traffickers. 209 such cases of benefit fraud were reported in the UK in 2012, the majority involving Polish or Slovak citizens.[108] Another UK study refers to a Romanian Roma criminal ring trafficking mainly Roma children in the EU, *inter alia* for purposes of benefit fraud. Several members of this ring were convicted in 2008 and 2009. The study draws attention to the falsification of the identity of children by EU immigrants in order to claim child benefit, recalling that under Article 67 of Regulation 884/2004 the children concerned do not need to be resident in the host Member State of the beneficiary.[109]

Criticism has been voiced in this context regarding the failure of the Member States of origin to successfully implement Roma integration policies, despite the EU funding available from the European Structural and Investment Funds for the Member States of origin and destination. At least 20% of funding under the new European Social Fund (ESF) (2014-2020)[110] is dedicated to social inclusion to ensure that people in difficulties and those from disadvantaged groups receive greater support, enabling them to have the same opportunities as others to integrate into society. The European Regional Development Fund (ERDF)[111] allows funding of projects for the development of disadvantaged regions and local communities. Moreover, the newly adopted Fund for European Aid to the Most Deprived (FEAD) supports Member States' actions to provide material assistance, including food and clothing, to the most deprived. The actions need to be accompanied by social inclusion measures, such as guidance and support to help people out of poverty. A total of more than €3.8 billion is earmarked for the FEAD for the period 2014-2020.[112]

8. Proposals to modify EU legislation

The figures presented in the previous chapters do not by themselves suggest a need for legislative change. Policy recommendations in the field of free movement limit themselves therefore to calling for more (and more reliable) statistical evidence before any decisions are taken to amend the current EU rules on free movement and residence.[113] However, changes in legislation are in order wherever there is legal injustice, which would be the case where there is abuse of the right of free movement, regardless of absolute numbers. While the Commission takes the view that EU law does not involve any consequences not agreed upon by the EU legislator, and hence also by

[107] Europol, Trafficking in Human Beings in the European Union, September 2011, p. 8.

[108] UK Serious Organised Crime Agency (SOCA), UKHTC: A Strategic Assessment on the Nature and Scale of Human Trafficking in 2012, August 2013, pp. 16-17.

[109] Child Exploitation and Online Protection (CEOP) Centre, The trafficking of children into and within the UK for benefit fraud purposes, October 2010.

[110] Regulation (EU) No 1304/2013 of the European Parliament and of the Council of 17 December 2013 on the European Social Fund and repealing Council Regulation (EC) No 1081/2006.

[111] Regulation (EU) No 1301/2013 of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No 1080/2006.

[112] Regulation (EU) No 223/2014 of the European Parliament and of the Council of 11 March 2014 on the Fund for European Aid to the Most Deprived.

[113] E. Guild, S. Carrera and K. Eisele, "Social Benefits and Migration...", op. cit., p. 141.

the Member States, and that it offers sufficiently effective instruments for preventing and combating any abusive behaviour, Member States and some stakeholders are increasingly calling for changes to the EU rules, and particularly to Article 35 of the Free Movement Directive, which would allow national authorities to withdraw the residence right of EU immigrants abusing the national welfare system and to impose a re-entry ban for a certain period of time.

However, the demands of national governments and other stakeholders now go beyond simply calling for changes to the EU rules to make it possible to combat abusive behaviour more effectively. A tendency can be observed among political actors and in national societies to perceive the legally allowed exercise of residence and social benefits rights by economically inactive EU migrants to be 'abusive'. Behind the 'rights abuse' discourse there is now a more far-reaching call for a change of paradigm in the EU legal framework on free movement, demanding a re-conception of the original essentials of free movement, i.e. based on the contribution of EU citizens to the economies of the host Member States rather than on their broader inclusion into the solidarity arrangements and welfare community of the latter.

There are very few concrete proposals for changes to the existing EU rules on free movement and social coordination. In 2011, the consultancy trESS carried out a study[114] for the European Commission, which looked into several options for changes in EU legislation, aimed mainly at resolving the tensions in the relationship between residence rights and access to benefits in the host Member State. The study proposes introducing a waiting period for entitlement (e.g. to SNCBs) in the Member State of residence, so that the first three months of residence would not count as such for the purposes of Regulation 883/2004. Some experts suggest in this context that Member States should be authorised to require a certain degree of integration in the host society as a condition for treating economically inactive citizens as nationals as regards social assistance as from three months after their arrival.[115]

As an alternative it is proposed to retain the responsibility for economically inactive persons and first-time jobseekers in the Member State of origin by establishing a cost compensation mechanism for the reimbursement of costs incurred by the host Member State. Another proposal is to establish a 'European Mobility Fund' to assist Member States with high pressure on their social security system as a result of immigration, as well as Member States of origin to avoid 'brain drain'.[116] Moreover, it has been proposed, in order to effectively combat fraud and abuse, to systematically investigate and sanction, under Article 35 of the Free Movement Directive, practices such as 'addresses of convenience', in cases where EU citizens have not really transferred their centre of interest to the host Member State and still have persisting links with their Member State of origin.[117]

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[114] F. Van Overmeiren, E. Eichenhofer and H. Verschueren (trESS), Analytical Study 2011, op. cit., pp. 50 et seq. See also the impact assessment carried out by trESS on the proposed changes to Regulation 883/2004: F. Van Overmeiren (ed.), C. García de Cortázar, K. Koldinska and J.P. Lhernould, *Impact assessment of the revision of selected provisions of Regulations 883/2004 and 987/2009*, Analytical Study 2013, Training and Reporting on European Social Security (trESS), Project DG EMPL/B/4 - VC/2012/1110.

[115] D. Thym, op. cit., pp. 87, 88. The author argues that the integration requirement under Article 4 of Regulation 883/2004 and Article 7 of Regulation 492/2011 could be applied to all social assistance (therefore also with reference to Article 24 of Directive 2004/38).

[116] K. Sorensen, Some solutions for the EU social benefits debate, EUobserver, 10.06.2014.

[117] F. Van Overmeiren, E. Eichenhofer and H. Verschueren (trESS), Analytical Study 2011, op. cit., pp. 50.

9. Outlook

The concerns on intra-EU immigration expressed by some Member State governments may very well not always be justified by the statistical data available. Behind the statistical evidence and the average numbers there are, however, cases, which, even if they are legally valid, give rise to misgivings in public opinion. The central issue in this regard seems to be the fact that economically inactive citizens, *inter alia* also first-time jobseekers, may claim social benefits and healthcare in the host Member State without ever having contributed to its public finances, as long as their claims do not represent an unreasonable burden on the national social assistance system – which in practice seems impossible or very difficult for the national authorities to prove. Voices call for caution as regards over-prioritising individual welfare rights over the collective interests and priorities inherent in the traditional concept of social solidarity.[118] It therefore seems necessary to further clarify the relationship between the European system of social coordination and the freedom of movement and residence of Union citizens.

Thus, the challenges to be met derive not least from the constructive potential of this relationship, which has, for instance, been described by Giubboni as "federalisation through solidarity" on the lines of the US model.[119] Academics seem to agree that redistributive policies, if politically desirable at all, should be conceived of as 'citizen to citizen' and not 'State to State'.[120] Some therefore propose European redistributive solidarity as a supranational form of welfare to remove tensions between free movement of EU citizens and access to benefits. This would be done by partial centralisation at EU level of non-contributory forms of social protection to prevent 'welfare tourism'.

Several experts and stakeholders have proposed, in this context, creating a European unemployment benefits scheme in order to tackle 'asymmetric shocks' in the euro area or in the EU as a whole.[121] The need for automatic stabilisers at euro-area level was also identified at a public hearing held in July 2013 by the European Parliament's Committee on Employment and Social Affairs on "The social dimension of the EMU – European unemployment benefit scheme".[122] Following the hearing, Parliament's EU Added Value Unit commissioned a study to explore "the cost of non-Europe of the absence of an unemployment insurance scheme for the euro area".[123]

Many warn, however, that the formation of a new instrument for solidarity in the EU through a top-down approach, i.e. before any self-identification of Member States' nationals with such a supranational community, could be too advanced for the current stage of European integration.[124] In this sense, the post-national approach to the formation of an identity of solidarity seems to be at a crossroads, and should be viewed as part of a broader decision on the path to closer European integration.

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[118] M. Dougan, "The Spatial Restructuring of National Welfare States ...", op. cit., pp. 172- 173.

[119] S. Giubboni, "Free movement of persons and European solidarity", op. cit., p. 374.

[120] M. Maduro, *Europe's social self: the sickness unto death*, 2002.

[121] See, e.g., Bertelsmann Stiftung, Automatic stabilizers for the Eurozone: pros and cons of a European Unemployment Benefit Scheme, October 2013.

[122] The presentations at the hearing are available on the Employment Committee website.

[123] M. Beblavý, I. Maselli, M. Busse and E. Martellucci (CEPS), Cost of non-Europe of the absence of an Unemployment Insurance Scheme for the Euro Area, January 2014, IP/G/EAVA/IC/2013-138.

[124] O. Golynker, "EU citizenship and the role of the ECJ...", op. cit., p. 24. Habermas, in contrast, argues that such 'national state' concepts may not be applicable to the EU. J. Habermas, *The inclusion of the Other: Studies in Political Theory*, Cambridge Polity Press 2002, p. 152.

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Access to social benefits for EU migrants has lately turned into a pivotal point for questioning the very essence of freedom of movement and residence within the EU. Criticism is increasingly being voiced concerning economically inactive and also low-income workers from other EU Member States relying on the provision of national welfare, such as jobseeker's allowance, housing and child benefits, and pension supplements.

The principal condition for economically inactive citizens to be able to move to another Member State – their economic self-sufficiency – has proven to be unsuitable to prevent 'poverty immigration' as demanded by several national governments. The reason is that EU law and the case law of the Court of Justice of the EU consider individual claims not to place an 'unreasonable burden' on Member States' social welfare.

Some Member States and experts propose therefore to change the current EU free movement and social coordination rules to impose e.g. a waiting time before being entitled to benefits in the host Member State. Conversely, the European Commission and many academics point to the lack of reliable statistical evidence for the alleged 'benefit tourism' and 'abuses', and highlight the positive impact of intra-EU immigration on national economies and business. Whilst studies do show little reliance of EU migrants on the social systems of the host Member States in absolute numbers, challenges are reported at local level where the concentration of EU migrants lacking financial means represents a burden on local infrastructure.

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