



FREE MOVEMENT OF PERSONS

Freedom of movement and residence for persons in the EU is the cornerstone of Union citizenship, established by the Treaty of Maastricht in 1992. The gradual phasing-out of internal borders under the Schengen agreements was followed by the adoption of Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within the EU. Notwithstanding the importance of this right, substantial implementation obstacles persist, 10 years after the deadline for implementation of the Directive.

LEGAL BASIS

Article 3(2) of the Treaty on European Union (TEU); Article 21 of the Treaty on the Functioning of the European Union (TFEU); Titles IV and V TFEU; Article 45 of the Charter of Fundamental Rights of the European Union.

OBJECTIVES

The concept of the free movement of persons has changed in meaning since its inception. The first provisions on the subject, in the 1957 Treaty establishing the European Economic Community ([1.1.1](#), [2.1.5](#) and [2.1.4](#)), covered the free movement of workers and freedom of establishment, and thus individuals as employees or service providers. The Treaty of Maastricht introduced the notion of EU citizenship to be enjoyed automatically by every national of a Member State. It is this EU citizenship that underpins the right of persons to move and reside freely within the territory of the Member States. The Lisbon Treaty confirmed this right, which is also included in the general provisions on the Area of Freedom, Security and Justice.

ACHIEVEMENTS

A. The Schengen area

The key milestone in establishing an internal market with free movement of persons was the conclusion of the two Schengen agreements, i.e. the Agreement proper of 14 June 1985, and the Convention implementing the Schengen Agreement, which was signed on 19 June 1990 and entered into force on 26 March 1995. Initially, the Schengen implementing Convention (signed only by Belgium, France, Germany, Luxembourg and the Netherlands) was based on intergovernmental cooperation in the field of justice and home affairs. A protocol to the Amsterdam Treaty provided for the transfer of the 'Schengen acquis' ([4.2.4](#)) into the Treaties. Today, under the Lisbon Treaty, it is subject to parliamentary and judicial scrutiny. As most Schengen rules are



now part of the EU acquis, it has no longer been possible, since the EU enlargement of 1 May 2004, for accession countries to 'opt out' (Article 7 of the Schengen Protocol).

1. Participating countries

There are currently 26 full Schengen members: 22 EU Member States plus Norway, Iceland, Switzerland and Liechtenstein (which have associate status). Ireland and the United Kingdom are not parties to the Convention but can 'opt in' to selected parts of the Schengen body of law. Denmark, while part of Schengen, enjoys an opt-out for any new justice and home affairs measures, including on Schengen, although it is bound by certain measures under the common visa policy. Bulgaria, Romania and Cyprus are due to join, though there are delays for differing reasons. Croatia began the application process to accede to the Schengen area on 1 July 2015.

2. Scope

The Schengen area's achievements include:

- a. The abolition of internal border controls for all persons;
- b. Measures to strengthen and harmonise external border controls: all EU citizens need only show an identity card or passport to enter the Schengen area ([4.2.4](#));
- c. A common visa policy for short stays: nationals of third countries included in the common list of non-member countries whose nationals need an entry visa (see Annex II to Council Regulation (EC) No 539/2001) may obtain a single visa, valid for the entire Schengen area;
- d. Police and judicial cooperation: police forces assist each other in detecting and preventing crime and have the right to pursue fugitive criminals into the territory of a neighbouring Schengen state; there is also a faster extradition system and mutual recognition of criminal judgments ([4.2.6](#) and [4.2.7](#));
- e. The establishment and development of the Schengen Information System (SIS) ([4.2.4](#)).

3. Challenges

While the Schengen area is widely regarded as one of the primary achievements of the European Union, it has recently been placed under considerable strain by the unprecedented influx of refugees and migrants into the EU. From September 2015, the sheer number of new arrivals prompted several Member States to temporarily reintroduce checks at the internal Schengen borders. While all the temporary border checks have been in line with the rules in the Schengen Borders Code, this marks the first time in the history of Schengen that temporary border checks have been instituted on such a scale. A further challenge comes in the form of terrorist attacks, revealing the difficulty of detecting terrorists entering and travelling through the Schengen area. The ongoing challenges have served to underline the inextricable link between robust external border management and free movement inside those external borders and have led to a series of new measures, both to enhance security checks on persons entering the Schengen area and to improve external border management ([4.2.4](#) and [4.2.7](#)).



B. Free movement of EU citizens and their family members

1. First steps

In a bid to transform the Community into an area of genuine freedom and mobility for all its citizens, directives were adopted in 1990 in order to grant residence rights to persons other than workers: Council Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity; Council Directive 90/366/EEC on the right of residence for students; and Council Directive 90/364/EEC on the right of residence (for nationals of Member States who do not enjoy this right under other provisions of Community law and for members of their families).

2. Directive 2004/38/EC

In order to consolidate different pieces of legislation (including those mentioned above) and take account of the large body of case-law linked to the free movement of persons, a new comprehensive directive was adopted in 2004 — Directive [2004/38/EC](#) of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. The Directive is designed to encourage Union citizens to exercise their right to move and reside freely within the Member States, to cut back administrative formalities to the bare essentials, to provide a better definition of the status of family members, and to limit the scope for refusing entry or terminating the right of residence. Under Directive 2004/38/EC, family members include: the spouse (also of the same sex, as clarified by the Court of Justice of the European Union (CJEU) in its judgment *Coman*, C-673/16); the registered partner, if the legislation of the host Member State treats registered partnerships as equivalent to marriage; direct descendants who are under the age of 21 or are dependants and those of the spouse or registered partner; and dependent direct relatives in the ascending line and those of the spouse or registered partner^[1].

a. Rights and obligations:

- For stays of under three months: the only requirement for Union citizens is that they possess a valid identity document or passport. The host Member State may require the persons concerned to register their presence in the country.
- For stays of over three months: EU citizens and their family members — if not working — must have sufficient resources and sickness insurance to ensure that they do not become a burden on the social services of the host Member State during their stay. Union citizens do not need residence permits, although Member States may require them to register with the authorities. Family members of Union citizens who are not nationals of a Member State must apply for a residence permit, valid for the duration of their stay or a five-year period.
- Right of permanent residence: Union citizens acquire this right after a five-year period of uninterrupted legal residence, provided that an expulsion decision has not been enforced against them. This right is no longer subject to any conditions.

[1] Most Member States also apply the directive to guarantee free movement rights to same-sex registered partners and partners in a durable relationship.



The same rule applies to family members who are not nationals of a Member State and who have lived with a Union citizen for five years. The right of permanent residence is lost only in the event of more than two successive years' absence from the host Member State.

- Restrictions on the right of entry and the right of residence: Union citizens or members of their family may be expelled from the host Member State on grounds of public policy, public security or public health. Guarantees are provided to ensure that such decisions are not taken on economic grounds, comply with the proportionality principle and are based on personal conduct, among others.

Finally, the directive enables Member States to adopt the necessary measures to refuse, terminate or withdraw any right conferred in the event of abuse of rights or fraud, such as marriages of convenience.

b. The implementation of Directive 2004/38/EC

The directive has been beset by problems and controversy, with evidence emerging of serious shortcomings in implementation and continuing obstacles to free movement, as highlighted by Commission reports and Parliament studies on the application of the directive, infringement proceedings against Member States for incorrect or incomplete transposition, the large volume of petitions submitted to Parliament and the considerable caseload before the CJEU. The criticism raised by some Member States in 2013-2014 on the alleged abuse of free movement rules by EU citizens for the purposes of 'benefit tourism' led to discussions at EU level on possible reforms, in the meantime set aside after the decision of the UK to leave the EU.

c. Third-country nationals

For provisions applying to third-country nationals who are not family members of an EU citizen, see [4.2.3](#).

ROLE OF THE EUROPEAN PARLIAMENT

Parliament has long fought hard to uphold the right to free movement, which it regards as a core principle of the European Union. In its resolution of 16 January 2014 on respect for the fundamental right of free movement in the EU, Parliament rejected efforts to curtail free movement rights and called on the Member States to comply with the Treaty provisions on EU rules governing freedom of movement and to ensure that the principles of equality and the fundamental right of freedom of movement are upheld for all Member States.. In its resolutions of 15 March 2017 on obstacles to EU citizens' freedom to move and work in the internal market, and of 12 December 2017 on the EU Citizenship Report of the same year, Parliament called once more for the removal of obstacles to the right to free movement. The decision by the UK to leave the European Union has deprived free movement of one of its main critics, while an agreement between both parties is still under negotiation.

With regard to the Schengen area, in its resolution of 30 May 2018 on the annual report on the functioning of the Schengen area, Parliament condemned 'the continued reintroduction of internal border checks', as they are 'detrimental to the unity of the



Schengen area and harmful to the prosperity of European citizens and the principle of freedom of movement’.

Ottavio Marzocchi
02/2020

