



I. Introduction

The free movement of persons provisions, together with the free movement of goods and the free movement of capital provisions, are aimed at ensuring the internal market by allowing the free movement of labour and a more efficient allocation of resources in the EU. However, a strong social component sides the economic one, and there is secondary legislation aimed at guaranteeing the rights of economic actors as persons rather than as mere factors of production. Further, the direct effect of Union citizenship is weakening the link between economic activity and rights under EU law. The economic free movement of persons provisions are:

- Articles 45-48 TFEU (ex 39-42 EC) → Free movement of workers
- Articles 49-55 TFEU (ex 43-48 EC) → Freedom of establishment
- Articles 56-62 TFEU (ex 49-55 EC) → Freedom to provide services
- Articles 63-66 TFEU (ex 56-59 EC) → Free movement of capital

And after the Maastricht Treaty:

- Articles 20 slightly amended and 21 TFEU (ex 17 and 18 EC) → Free movement for Union citizens
- Articles 22 – 25 TFEU (ex 19-21 EC) → Citizenship rights

NB Article 18 TFEU prohibits discrimination on grounds of nationality in all matters falling within the scope of the Treaty.

The fragmented body of secondary legislation governing the right to move and reside of Union citizens (both economically active and inactive) has been subsumed in Directive 2004/38 on the right of Union citizens.

The free movement of persons became a major political battle ground during the EU referendum campaign in 2016.



Suggested reading:

You will find references to a number of academic articles in the handout. Generally, I recommend that you look at Barnard, *Substantive Law of the EU*, OUP, 2022, especially chapters 6 (as far as citizenship is concerned) and 9 on Union Citizenship

II. The winding road of Union citizenship

1. Before 1990 – market citizens

- E(EE)C Treaty granted rights only to those who were economically active, i.e. those who moved to another Member State to exercise an economic activity (either as employed or self-employed)
→ consider problem of exclusion as well as problems of reverse discrimination (see below)
- Rights granted by the Treaty and secondary legislation were extensive, including a right to equal treatment in respect of most matters, and in particular: (i) equal access to employment/market; (ii) equal treatment in respect to tax and social advantages (Art. 7(2) Reg. 492/2011 which has replaced Regulation 1612/68), including equal treatment in relation to welfare provisions (e.g. unemployment benefits, rail card discounts, housing benefits etc); (iii) all things connected to receiving an economic service (museum admission conditions, crime compensation schemes etc).
- **AND** the ECJ interpreted the economic free movement provisions generously, including in their scope work-seekers as well as part-time workers. **But** most people would still be excluded from the benefits of the Treaty since they (i) did not move (problem of reverse discrimination); or (ii) they did not (or could not) exercise an economic activity.

2. 1990 – The residency directives

The three residency directives have now been repealed and their content subsumed in Directive 2004/38.

- **Directive 90/364** ('playboy' Directive) established the right to reside in any of the Member States for *any* national of a Member State, but such right was **conditional upon** the person having **sufficient resources and comprehensive health insurance** so as not to become an unreasonable burden upon the host-State welfare resources;
- **Directive 90/365** (pensioners' Directive) established the right to reside for those in receipt of an old-age pension, **conditional upon sufficient resources and comprehensive health insurance** so as not to become an 'unreasonable burden'; and

- Directive 93/96 (students' Directive) provided the same right for students, which was still conditional upon comprehensive health insurance and sufficient resources, but the latter criterion was easier to satisfy (students only needed to assure the authorities they had resources)
- The effect of the residency Directives was therefore to introduce a further distinction:
 - (i) **financially independent**, i.e. those who have sufficient resources + comprehensive health insurance and were therefore protected by the Directives; and
 - (ii) **financially dependent**, i.e. those who do not have sufficient resources/health insurance and were therefore not covered by the Directives and enjoyed no right of residency under (then) Community law.
- NB: the same distinction is still present in Dir 2004/38!

3. 1992 – the Maastricht Treaty

- Article 17 EC (now 20 TFEU) → All nationals of the Member States are Union citizens and Union citizenship **complements** and **does not** replace national citizenship. This article has been slightly amended by the Lisbon Treaty and it now reads “Union citizenship shall be additional to and not replace national citizenship”.
- Article 18 EC (now 21 TFEU) → “**Every** citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.”
- Please note – there are other citizenship rights, such as voting for EP elections; voting and stand for local and EP elections in the country where you live etc; right to consular representation in non EU country where own country does not have representation; citizen's initiative etc.

4. The Road to Union Citizenship – from *Sala* to *Baumbast*

- C-85/96 *Martinez Sala* [1998] ECR I-2691
- *C-184/99 *Grzelczyk* [2001] ECR I-6193
- *Case C-413/99 *Baumbast* [and R] [2002] ECR I-7091 (see *Dougan and Spaventa “Educating Rudy and the (non-)English Patient: A Double-Bill on Residency Rights under Article 18 EC” (2003) *ELRev* 699.

Following the *Baumbast* case it became clear that Union citizenship had explosive potential and a rich body of case law was developed by the ECJ; most of this case law was then codified in Directive 2004/38 and therefore we will look at it in the context of the Directive.

Generally an **intra-Union link** (movement or intention to move) is necessary to trigger Articles 20 and 21 TFEU since Union citizenship does not replace national citizenship: for this reason, static citizens should be protected by their own Member State. However, this might lead to **reverse discrimination**, i.e. discrimination against the majority of Union citizens who do not move and cannot establish a cross-border link (see E Spaventa “Seeing the Wood despite the Trees? On the scope of Union citizenship and its constitutional effects” (2008) *CMLRev* 1). The Court has however pushed the boundaries of the Treaty, especially in:

- Case C-135/08 *Rottmann*, EU:C:2010:104
- *Case C-34/09 *Ruiz Zambrano*, EU:C:2011:124.

The Court accepted that Union citizens in what would be otherwise a purely internal situation might fall within the scope of protection of the Treaty if denying protection would affect the very ‘**essence**’ of their citizenship rights. The *Ruiz Zambrano* case though represents an exception and has never been applied by the CJ again, see Case C-256/11 *Dereci* EU:C:2011:734. See on the case law, **K Lenaerts, ‘EU citizenship and the European Court of Justice’s ‘stone-by-stone’ approach’, (2015) International Comparative Jurisprudence 1-10.

5. Changing moods on EU citizenship?

However, in recent years the mood has changed in Luxembourg and the Court appears to have taken a step back from interpreting citizenship rights extensively (E Spaventa ‘Earned Citizenship - Understanding Union Citizenship through its Scope’. In *EU Citizenship and Federalism: the Role of Rights*. Kochenov, D. Cambridge: Cambridge University Press, 2017. 204-225; E Spaventa, ‘Economic justifications and Union Citizenship: Reallocating welfare responsibilities to the State of origin’. In *Exceptions from EU Free Movement Law - Derogation, Justification and Proportionality*. Koutrakos, P., Nic Shuibhne, N. & Syrpis, P. Oxford: Hart Publishing, 2016; E Spaventa, ‘Once a foreigner, always a foreigner: Who Does Not Belong Here Anymore? Expulsion Measures’. In *Residence, employment and social rights of mobile persons. On how EU law defines where they belong*. Verschueren, H. Cambridge Intersentia, 2016, 89-110).

- Case C-140/12 **Brey** EU:C:2013:565
- Case C-333/13 **Dano** EU:C:2014:2358
- Case C-67/14 **Alimanovic** EU:C:2015:597 – this decision is similar to *Dano*, but we will deal with it when examining the free movement of workers
- Case C-709/20 **CG** EU:C:2021:602 – on the interpretation of Part II of the Withdrawal Agreement; shows that the Court is applying the *Dano* and *Alimanovic* case law to EU citizens who have received pre-settled status under the Withdrawal Agreement

III. Directive 2004/38/EC

1. General Scope

Conditions governing exercise of the right to move and reside of Union Citizens and their family members; right to permanent residence; public policy, security and health derogations. It repeals a number of pre-existing instruments.

The Directive details who is entitled to reside in another Member State and the rights that Union citizens have in host MSs, including the right to equal treatment in relation to social assistance.

2. Personal Scope (i.e. who is covered by the Directive)

- a. **Union Citizens (UC)** → Anyone having the nationality of one of the MSs. It is for national law to determine own nationals (C-200/02 *Chen v SofS for the Home Department* [2004] ECR I-9925).
- b. **Family Members (FM):**
- Spouse → And immigration status of spouse at the moment when marriage is entered into is irrelevant (*Case C-127/08 *Metock* [2008] ECR I-6241)
 - Registered partner **if the host MS** treats registered partnerships as equivalent to marriage (see Case 59/85 *Netherlands v Reed* [1986] ECR 1283).
 - Descendants under 21 or dependants even if only of the spouse.
 - Dependant relatives in the ascending line (and national law can provide more generous conditions, Case C-1/05 *Jia* [2007] ECR I-1).

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- c. **Other family members** → if dependant or member of the household or if they require the personal care of the Union Citizen on health grounds; and partners in a durable relationship duly attested. N.B. the non-protected family members do not have a right to reside as such; rather the Member State has **to facilitate entry and residence** and must take into consideration personal circumstances and justify denial.

NB Article 3 makes clear that the Directive applies only to Union Citizens and their family members who *move or reside* in a Member State other than that of which they are nationals. Hence the Directive **does not apply** to purely internal situations. However, the Directive applies by analogy to **circular situations** i.e. when a Union citizen is coming back after having exercised her free movement rights (see Case C-456/12 *O and B*, EU:C:2014:135, noted Spaventa (2015) CMLRev 753 – why did the Court rely on Art 21 TFEU here?).

What about an EU citizen who moves to another Member State and subsequently becomes a national of this latter Member State (double nationality)? Can she claim rights on the basis of her EU citizenship against the Member State of which she is now a national? Would this situation be covered by the Directive? Or by Art 21 TFEU? See C-165/16 *Lounes v Secretary of State for the Home Department* ECLI:EU:C:2017:862

The reasons why the Union citizen has moved are immaterial → C-200/02 *Chen* [2004] ECR I-9925

3. Union Citizens' (UC) and their Family Members' (FM) rights

a. Enter/exit and temporary residence

Right to exit / enter (Art 4 and Art 5) → right to exit and enter upon showing ID or passport; Third Country Nationals (TCNs) family members might need a visa. Lack of ID or visa does not justify turning back at the frontier (c.f. Case C-459/99 *MRAX v Belgium* [2002] ECR I-6591).

Right of residence for up to 3 months (Art 6) → unconditional for UC and FM, but no obligation upon MSs to grant right to ‘social assistance’ (Art 24(2)), and in any event if the UC / FM becomes an ‘unreasonable burden’ by relying on social assistance temporary residence can be terminated.

b. Medium term residence

Right of residence for more than 3 months (Art 7)

- **Economically active** (i.e. a worker or self-employed) → no conditions, economic activity enough (see next term). **Work-seekers** also have residence rights pursuant to Art 14(4)(b)
- **Economically independent** → sufficient resources and comprehensive health insurance for them and their family so as not to become an ‘unreasonable burden’. The Court has recently indicated that fulfilment of those two criteria (or at least of the sufficient resources criteria) is a **precondition** to enjoy the protection provided for by Directive 2004/38:
 - *Case C-333/13 *Dano* EU:C:2014:2358
- **Students** with comprehensive health insurance and sufficient resources (declaration sufficient). Must be enrolled in educational establishment.
- **Family members** (FM) → have a right to install themselves with UC regardless of whether they are UC or TCNs. They have a right to reside as well as a right to pursue an economic activity. Note that the categories of family members under Art 2(2) who benefit from a derived right of residence is more limited in case of students (see Art 7(4) -> spouse, the registered partner or dependent children).

The right of residence of FM is *derived* from the UC’s right, but in certain cases (Art 12) they retain an **independent** right to reside, i.e. in case of **death** of UC, provided if they are TCNs that they have resided in the host state for at least a year; when the UC **leaves** the MS, but they stay provided they are either UCs themselves or they have children in education of whom they have custody (c.f. *R and Baumbast* – the R part of the case).

Art 13 provides for retention of right of residence upon **divorce / termination of marriage**; if spouse is a TCN then such right is conditional (3 years of marriage of which 1 in the host state; or custody or access to children; or difficult circumstances such as domestic violence). FM who retains right to reside must satisfy the conditions imposed on UC (i.e. economic activity or independence). Family members are also protected when coming back to UC's home state → Case C-370/90 *Singh* [1992] ECR I-4265.

Administrative formalities for UC → MSs might impose a duty to register for stays longer than 3 months (Art 8); residence certificate shall be granted immediately to those who prove that they satisfy the conditions in Art 7. Failure to register might give rise to proportionate and non-discriminatory sanctions, but failure to comply with administrative formalities can never be grounds for expulsion (Case 48/75 *Belgium v Royer* [1976] ECR 497).

Administrative formalities for TCNs family members → Art 9. N.B. family members do not have independent rights so MSs must provide them with a residence card which allows right to travel around the EU without visa; absences for no more than 6 months a year or for important reasons do not affect the TCN's right to reside (Art 11). N.B. **no discretion** on granting leave to remain / reside; MS can deny such a right only for public policy / security reasons, or if marriage is not genuine.

c. Right to move (art 22)

Right to move within the territory of the host state (Art 22) → territorial restrictions can be imposed only if same restrictions can be imposed on own nationals (c.f. Case 36/75 *Rutili v Ministre de l'Intérieur* [1975] 1219, overruled by Case C-100/01 *Ministre de l'Intérieur v Olazabal* [2002] ECR I-10981).

d. Permanent Residence

Right of permanent residence (Art 16) After 5 years of lawful residence UC and FMs acquire right **to permanent residence** → once acquired, right to reside in host MS is **unconditional**. i.e. UC / FM no longer have to satisfy the economic activity / independence criteria. MSs can deport a permanent resident only on **serious grounds of public security / policy** (Art 28(2)). N.B. retired economically

active people benefit from more generous conditions (i.e. shorter length of time required, c.f. Art 17). The right is evidenced by a document which must be issued as soon as possible to UC (Art 19) and FM (Art 20). Once the UC / FM has become a permanent resident the **right to equal treatment applies in full**, including for social assistance and maintenance grants.

NB The Court has decided that ‘good’ behaviour relevant; for reasons of time we shall not deal with these cases but should you be interested you can look them up:

Case C-400/12, *M.G.*, EU:C:2014:9

Case C-378/12, *Onuekwere v. Secretary of State for the Home Department*, EU:C:2014:13.

Applications by EU citizens in the UK asking the Home Office to confirm their right of permanent residence rose dramatically following the outcome of the EU referendum. It was reported that over 92,000 applications had been received in 2016 (H Warrell, ‘UK tries to put EU nationals off applying for residency’ (Financial Times, 25 April 2017)

e. Rights to equal treatment (Art 24)

Right to equal treatment applies under Article 24(1). However Article 24(2) sets limitations on right to social assistance and maintenance aid. Member States are not obliged to provide social assistance during the first three months of residence (or for longer periods in case of job seekers: see FMW lectures). Note that this limitation does not apply to economically active citizens (see Case C-299/14 *Garcia Nieto*). After the initial period of three months, the principle of equal treatment with respect to social assistance applies, but note qualifications: a host M-S may consider that recourse to social assistance is an indication of Union citizen not having sufficient resources to avoid becoming an unreasonable burden on social assistance system in host M-S (Case 140/12 *Brey* ECLI:EU:C:2013:565) – recall in this context conditions under Article 7 for economically independent citizens and students. However, recourse to social assistance cannot automatically lead to termination of residence (Art 14(3)) => case by case assessment (*Brey*). See also Case C-333/13 *Dano* ECLI:EU:C:2014:2358, making lawful residence in host M-S a pre-condition to protection of Art 24(1) in the case of residence > 3 months but < 5 years. In relation to maintenance aid, Member

States are not, pursuant to Article 24(2), obliged to provide maintenance grants or loans to students until they have acquired the right of permanent residence (or unless they are workers/self-employed or are family members of workers/self-employed).

4. Derogations

Public policy, public security and public health → see Art 39(3) EC and Art 46 EC → never to serve economic ends (Art 27).

Public policy and security → must be based on **personal conduct** (c.f. Case 67/74 *Bonsignore* [1975] ECR 297) and considerations of **general prevention** do not justify deportation (Art 27(2)); previous criminal convictions in themselves are not enough for deportation (Case 30/77 *R v Bouchereau* [1978] ECR 1999) and individual **must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society**. Such is not the case when same conduct performed by own citizen is not sanctioned, joined Cases 115 & 116/81 *Adoui and Cornuaille v Belgium* [1982] ECR 1665. Deportation can never be the **automatic consequence of a custodial sentence** (Art 33). Expulsion **can never be permanent** (Art 32), see Case C-348/96 *Calfa* [1999] ECR I-11, and individual has a right to review after 3 years.

Personal circumstances must be taken into account (Art 28); permanent residents can only be deported on ‘serious grounds’; and those who have been in the country for the previous ten years or are minors can be deported only for **imperative reasons of public security**. The Court has interpreted this in surprisingly broad terms, see Case C-348/09, *PI*, EU:C:2012:300.

Public health → can be invoked only for listed infectious diseases and only for the first three months. After that time has elapsed the MS cannot invoke public health to justify deportation (Art 29).

Procedural requirements → notification, right to appeal or review, etc; see Art 30 and Art 31.

Abuse of rights → frauds and marriages of convenience might determine withdraw of rights → Art 35.

IV. Other Rights of Union Citizens

As mentioned above, Directive 2004/38 codified most of the case law existing at the time; however it only applies to Union Citizens in the territory of a Member State other than that of their nationality (Art 3). On the other hand Article 21 TFEU also protects citizens against their own Member State provided movement (even only potential) has been established.

- **Article 21 TFEU also protects Union citizens from discriminatory criteria imposed by their Member State of origin** → e.g. residence requirements in relation to benefits (C-224/02 *Pusa* [2004] ECR I-5763) even though it is open to Member States to justify such restrictions (Case C-406/04 *De Cuyper* [2006] ECR I-6947).
- **And Article 21 TFEU might be relevant even in cases in which the main object of the claim falls outside the scope of the EC Treaty** → Case C-148/02 *Avello* [2003] ECR I-11613; C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451.
- **Query: So Union citizens who have exercised the right to free movement fall within the scope of the Treaty for that sole reason?** Cf Case C-224/98 *D'Hoop* [2002] ECR I-6191 with more recent case law and especially *Dano*; and does the principle of proportionality and fundamental rights still play a role?

CHECK LIST

1. What are the rights granted by Articles 20 and 21 TFEU?
2. When does an economically inactive Union citizen gain a right to reside in another Member State?
3. What are the issues that need balancing when considering the rights that should be granted to economically inactive Union citizens? And do you think the Court has struck the right balance?
4. To what extent do economically inactive citizens have a right to equal treatment in the host Member States?
5. To what extent can Union citizens rely on Article 21(1) TFEU against their Member State of nationality?
6. Outline the different types of residence rights (short term, medium and permanent) and the conditions which need to be satisfied in order to gain such rights
7. Who are the protected family members? And what rights do they gain? Should the Union have been more or less generous in relation to family members?
8. When and how can a Member State terminate the right to reside of a Union citizen?
9. What is the relationship between Directive 2004/38 and Articles 20 and 21 TFEU?