Complete EU Law: Text, Cases, and Materials (5th edn)
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11. Free movement of persons

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https://doi.org/10.1093/he/9780192846419.003.0011
Published in print: 04 August 2022
Published online: September 2022

Abstract

Titles in the Complete series combine extracts from a wide range of primary materials with clear explanatory text to provide readers with a complete introductory resource. This chapter discusses the scope of the right of the free movement of persons in the EU; the relevant Treaty provisions and secondary legislation provisions regarding the free movement of persons in the EU; the specific rights granted to workers and EU citizens under their general right of free movement, limitations on the rights of free movement as provided for in primary and secondary legislation; and the impact of Brexit on free movement rights.

Keywords: free movement, EU citizenship, workers, Article 18 TFEU, Article 20 TFEU, Article 21 TFEU, Article 45 TFEU, Directive 2004/38, Regulation 492/2011, limitations

Key Points

By the end of this chapter, you should be able to:

- define the scope of the right of free movement of persons in the European Union (EU);
- identify the relevant Treaty provisions and secondary legislation provisions regarding the free movement of persons in the EU;
- explain and apply the relevant legislation in order to determine and describe the specific rights granted to EU citizens and those holding the status of worker under their general right of free movement;
- explain and apply the relevant legislation concerning measures restricting the free movement of persons in the EU; and
- understand the impact of Brexit on movement rights of British citizens in the EU and EU citizens in the UK.

Introduction

The free movement of persons is one of the four fundamental freedoms in EU law. The right for people to move freely between Member States is a distinguishing characteristic of an internal market. In particular, Article 26 TFEU provides that 'the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'.

Initially, the free movement of persons did not entail a right of free movement for all persons; the emphasis was on the right of free movement for economically active persons, such as workers. Those people enjoyed, and continue to enjoy, a right to equal treatment compared to nationals of the host Member State in which they resided. Historically, the purpose or policy underlying the right of free movement for the economically active was primarily of an economic nature. It was thought that it would lead to an optimal allocation of resources, with workers viewed as factors of production.

However, there was also a social dimension to the free movement of the economically active: to form an ever-closer union of the peoples of Europe, it should be regarded as attractive and natural for people within the European Union (EU) to work in a Member State other than their own.

The free movement of persons is governed by Treaty provisions, as well as secondary legislation. Over the years, secondary legislation has demonstrated that the link between economic activity and free movement has become weaker, and that workers are no longer viewed as mere production factors; rather, they are now viewed as individual human beings who have certain rights in the host Member State, based on EU law.

Furthermore, the category of non-economically active persons with free movement rights has expanded greatly over the years, culminating in a right of free movement for all EU citizens, a concept formally introduced by the Treaty on European Union (TEU).

Cross-Reference

See 1.13 on the TEU.

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11.1 EU citizenship

Whilst the rights of free movement of persons within the internal market began with the economically active, the Maastricht Treaty (TEU 1992) introduced the status of citizenship of the European Union. The significance of this status may not have been realized by some at this time, but, in a series of important cases, the Court of Justice interpreted the provisions on citizenship status as a basis for rights, declaring in Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, at para 31, that 'Union

citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.'

As such, it seems fitting to begin by discussing the relevant provisions that apply to EU citizens before considering in detail the rights provided to workers.

Article 20 TFEU

> 1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
> 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
>
> (a) the right to move and reside freely within the territory of the Member States;
>
> (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
>
> (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
>
> (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.
>
> These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

Article 21 TFEU

> 1. 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 the Treaties and by the measures adopted to give them effect.

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11.1.1 EU citizens

It follows from Article 20(1) TFEU that an EU citizen is anyone who has the nationality of one of the Member States of the EU.

Review Question

> Does the EU decide who is an EU citizen or do the Member States set out the criteria?
>
> *Answer*: It is under the Member States' exclusive competence to decide who can obtain that State's nationality and under what conditions. Therefore the Member States decide who is an EU citizen, and the EU has no power to grant or remove nationality and, consequently, citizenship of the EU. Similarly, other Member States cannot interfere with a Member State's decision to grant nationality or the conditions for acquiring that nationality.

Thinking Point

> Why do you think this approach is taken?

In Case C-369/90 *Micheletti* [1992] ECR I-4239, a person with both Argentine and Italian nationalities wanted to set up as a dentist in Spain. The Spanish authorities denied him the right of permanent residence in Spain based on the Spanish Civil Code, according to which, in cases of dual nationality in which neither nationality is Spanish, the nationality corresponding to the habitual residence of the person concerned before his arrival in Spain is to take precedence. In the case of Mr Micheletti, that was Argentine nationality and therefore, under Spanish law, he was viewed as a third-country national. The Court of Justice ruled that, under international law, it was for each Member State, having due regard to EU law, to lay down the conditions for the acquisition and loss of nationality. It was not permissible for the legislation of a Member State to restrict the effects of the grant of nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to restricting the exercise of the fundamental freedoms provided for in the Treaty.

The Member States also have the power to grant different rights to different categories of nationals. In Case C-192/99 *Kaur* [2001] ECR I-1237, a British citizen born in Kenya was denied the right to reside in the UK. Upon its accession to the EU, the UK had made a declaration in which it specified which UK nationals would benefit from the provisions regarding free movement of persons. Ms Kaur was not one of them. The Court of Justice held that this declaration did not deprive her of rights under EU law because such rights never arose for her in the first place. The UK had the competence to decide which nationals gain the right to reside in its territory and which nationals were considered EU citizens.

However, the Court of Justice has emphasized that the Member States, when laying down the conditions for the acquisition and loss of nationality, must have due regard to EU law. A case in which this was at issue was Case C-135/08 *Rottmann* [2010] ECR I-1449. Mr Rottmann was Austrian by birth and moved to Germany, where
p. 477 he successfully applied for German ↵ nationality. Austrian law provided that, as a result, he lost his Austrian nationality. During the application procedure, however, he failed to mention that he was under investigation for fraud in Austria, where a warrant for his arrest had been issued. His German naturalization was withdrawn for deception, rendering him stateless. The Court of Justice held that although a decision to withdraw naturalization fell within the competence of the Member States, the situation of an EU citizen who lost his status and the rights attached to it because of a Member State decision fell within the scope of EU law. A decision withdrawing naturalization because of deception was in itself compatible with EU law even if it meant that the person lost not only nationality of the Member State, but also citizenship of the EU. In such a case, however, the national court must ascertain whether the withdrawal decision was proportionate, given the consequences. In particular, the national court must establish whether the loss of the rights the person had as an EU citizen was justified in relation to the gravity of the offence committed, to the lapse of time between the naturalization decision and the withdrawal decision, and to whether it was possible for that person to recover their original nationality.

11.1.2 Dual citizens

In Case C-165/16 *Toufik Lounes v Secretary of State for the Home Department* EU:C:2017:862, taking place before Brexit and therefore not impacted by Brexit, the Court of Justice considered the circumstances of a Spanish national who exercised free movement rights as an EU citizen, and subsequently acquired permanent residency rights and was naturalized as British. She later married an Algerian national, who applied for residence on the basis of being a family member of an EU citizen. The question arose as to whether the third-country national acquired residency rights on the basis of being a family member of an EU citizen.

Case C-165/16 *Toufik Lounes v Secretary of State for the Home Department* EU:C:2017:862

58. … [I]t would be contrary to the underlying logic of gradual integration that informs Article 21(1) TFEU to hold that such citizens, who have acquired rights under that provision as a result of having exercised their freedom of movement, must forego those rights—in particular the right to family life in the host Member State—because they have sought, by becoming naturalised in that Member State, to become more deeply integrated in the society of that State.

59. It would also follow that Union citizens who have exercised their freedom of movement and acquired the nationality of the host Member State in addition to their nationality of origin would, so far as their family life is concerned, be treated less favourably than Union citizens who have also exercised that freedom but who hold only their nationality of origin. The rights conferred on Union citizens in the host Member State, particularly the right to a family life with a third-country national, would thus be reduced in line with their increasing degree of integration in the society of that Member State and according to the number of nationalities that they hold.

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60. It follows from the foregoing that, if the rights conferred on Union citizens by Article 21(1) TFEU are to be effective, citizens in a situation such as Ms Ormazabal's must be able to continue to enjoy, in the host Member State, the rights arising under that provision, after they have acquired the nationality of that Member State in addition to their nationality of origin and, in particular, must be able to build a family life with their third-country-national spouse, by means of the grant of a derived right of residence to that spouse.

61. The conditions for granting that derived right of residence must not be stricter than those provided for by Directive 2004/38 for the grant of a derived right of residence to a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement by settling in a Member State other than that of which he is a national. Even though Directive 2004/38 does not cover a situation such as that mentioned in the preceding paragraph of this judgment, it must be applied, by analogy, to that situation (see, by analogy, judgments of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraphs 50 and 61, and of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraphs 54 and 55).

62. In view of all the foregoing, the answer to the question is that Directive 2004/38 must be interpreted as meaning that, in a situation in which a Union citizen (i) has exercised his freedom of movement by moving to and residing in a Member State other than that of which he is a national, under Article 7(1) or Article 16(1) of that directive, (ii) has then acquired the nationality of that Member State, while also retaining his nationality of origin, and (iii) several years later, has married a third-

> country national with whom he continues to reside in that Member State, that third-country national does not have a derived right of residence in the Member State in question on the basis of Directive 2004/38. The third-country national is however eligible for a derived right of residence under Article 21(1) TFEU, on conditions which must not be stricter than those provided for by Directive 2004/38 for the grant of such a right to a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement by settling in a Member State other than the Member State of which he is a national.

The Court therefore decided that such a right derived from the EU citizen's Article 21(1) TFEU rights.

11.1.3 Article 21(1) TFEU: direct effect

Like the other free movement provisions, the Court of Justice has affirmed that Article 21(1) TFEU has direct effect.

Cross-Reference

See 4.1 on direct effect.

The question first arose in Case C-413/99 *Baumbast* [2002] ECR I-7091, a case in which Mr Baumbast was a German national married to a Colombian, with two children. He lived in the UK with his family for three years while working there, after which he was employed by German companies in China and Lesotho. Mrs
p. 479 Baumbast applied for indefinite leave to ↵ remain in the UK for herself, her husband, and their children. When this was refused, the case was sent to the Court of Justice for a preliminary ruling. The question arose whether Mr Baumbast had an independent right of residence in the UK as an EU citizen since he was no longer a worker and therefore no longer had that right as a worker.

The Court held that, although before the TEU entered into force the right of residence was subject to the condition that the person concerned was carrying out an economic activity, since then EU citizenship had been introduced into what is now the TFEU.

Cross-Reference

See 1.13 on the TEU.

Article 21(1) TFEU confers a right for every citizen to move and reside freely within the territory of the Member States and EU citizenship is destined to be the fundamental status of nationals of the Member States. The Treaty did not require that EU citizens pursued a professional or trade activity in order to enjoy the rights

provided for them. Furthermore, there was nothing in the text of the Treaty that suggested that citizens who had established themselves in another Member State in order to carry out an activity as an employed person there were deprived, when that activity came to an end, of the rights that they had by virtue of their citizenship. As regards, in particular, the right to reside within the territory of the Member States under Article 21(1) TFEU, that right was conferred directly on every citizen of the EU by a clear and precise provision of the Treaty. Purely as a national of a Member State and consequently a citizen of the EU, Mr Baumbast therefore had the right to rely on Article 21(1) TFEU.

The direct effect of Article 21(1) TFEU was confirmed in Case C-200/02 *Chen* [2004] ECR I-9925, which concerned a child with parents who were third-country nationals. Mrs Chen and her husband both held Chinese nationality. Mrs Chen went to the UK when she was about six months pregnant. When about eight months pregnant, Mrs Chen went to Ireland and gave birth to her daughter, Catherine, who obtained Irish nationality, since Irish law allowed any person born on the island of Ireland to acquire its nationality. Afterwards, mother and daughter went to live in the UK. It was clear that Mrs Chen had gone to give birth in Ireland for the purpose of her child obtaining Irish nationality and to enable her, as a consequence, to acquire the right to reside with her child in the UK. Both mother and child were refused a long-term residence permit in the UK on the grounds that the child was not exercising any EU law rights and her mother was not entitled to reside in the UK under EU law.

The Court reiterated that the right to reside in the territory of the Member States provided for in Article 21(1) TFEU was granted directly to every citizen of the EU by a clear and precise provision of the Treaty. Purely as a national of a Member State and therefore as a citizen of the EU, the child was entitled to rely on Article 21(1) TFEU. Her age meant that she was dependent on her mother, both emotionally and financially, and the Court therefore had to address whether her mother had a right to reside as the child's primary carer. It decided that a refusal to allow the parent-carer of a child with a citizen's right of residence to reside with the child in the host Member State, regardless of whether the parent-carer was a national of a Member State, would deprive the child's right of residence of any useful effect. Enjoyment by a young child of a right of residence necessarily implied that the child was entitled to be accompanied by the person who was their primary carer and, accordingly, that carer must be in a position to reside with the child in the host Member State for the duration of such residence.

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11.1.4 The rights of EU citizens and their families

Articles 20–24 TFEU are the primary legislation regarding EU citizenship. The secondary legislation is now consolidated in the Citizenship Directive (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 ..., OJ 2004 L158/77), which replaced a range of legislation with one instrument. An overview of the key provisions is provided in Figure 11.1.

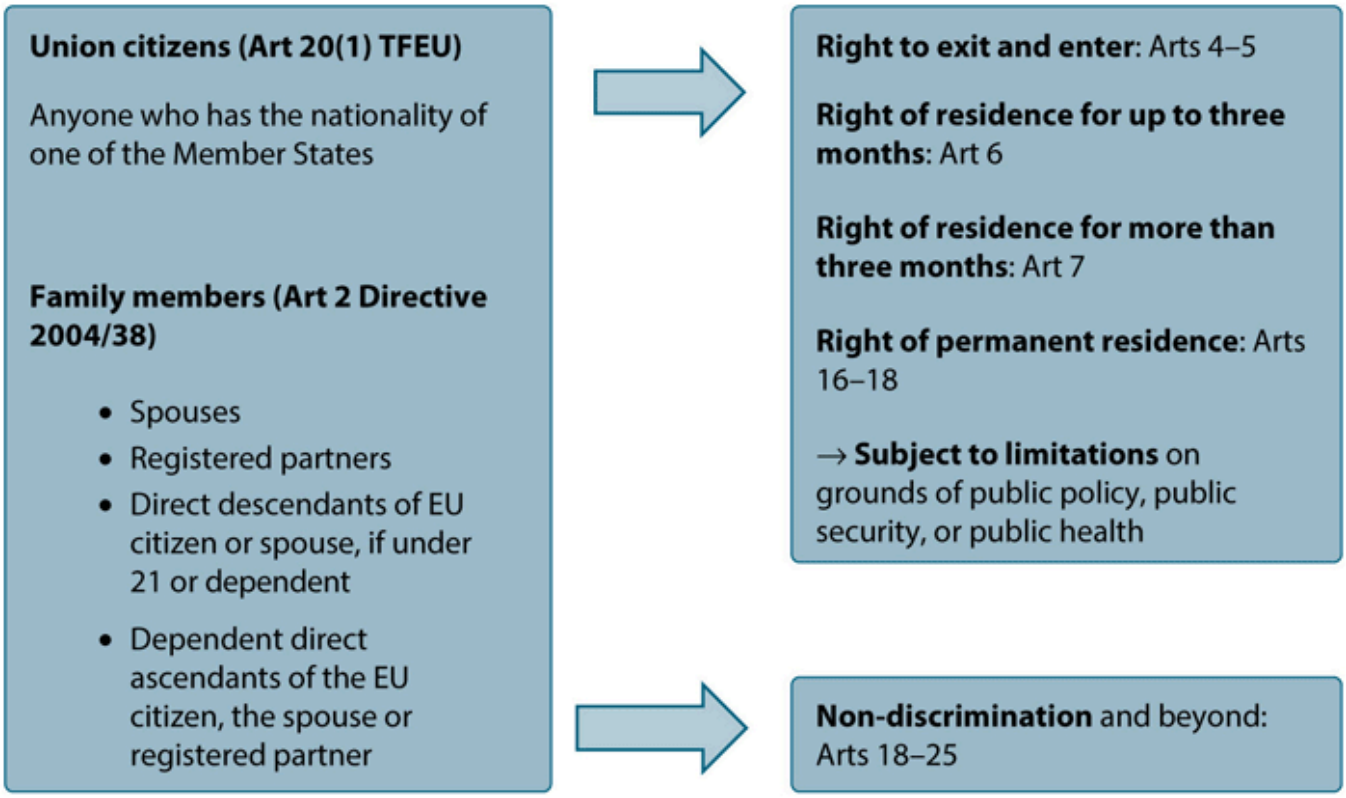

Figure 11.1 Overview of the rights of EU citizens and their families

11.1.4.1 The right to exit and enter

Chapter II of the Citizenship Directive is entitled ‘Right of exit and entry’ and contains two Articles.

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 ..., OJ 2004 L158/77

Article 4

Right of exit

1. Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State.
2. No exit visa or equivalent formality may be imposed on the persons to whom paragraph 1 applies.

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3. Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality.
4. The passport shall be valid at least for all Member States and for countries through which the holder must pass when travelling between Member States. Where the law of a Member State does not provide for identity cards to be issued, the period of validity of any passport on being issued or renewed shall be not less than five years.

Article 5

Right of entry

1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport. No entry visa or equivalent formality may be imposed on Union citizens.
2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement. Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.
3. The host Member State shall not place an entry or exit stamp in the passport of family members who are not nationals of a Member State provided that they present the residence card provided for in Article 10.
4. Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence.
5. The Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.

Article 4 of the Directive provides that EU citizens have the right to depart their home state by producing a valid identity card or passport, which must be issued and renewed by their Member State. Their non-EU citizen family members must produce a valid passport. There are no additional formalities. Similarly, Article 5 of the Directive provides that EU citizens are allowed to enter the host State with a valid identity card or passport. Family members who are not EU citizens may be required to obtain an entry visa, in accordance with EU or national law, although a visa is not required if the family member has a valid residence card, which is a document giving them the right to establish themselves in a Member State with an EU citizen as their
p. 482 family member or partner. If an EU citizen or their family member lacks the necessary ↵ travel documents or visas, the host Member State has to give them ample opportunity to obtain the documents or to prove their right of free movement and residence before turning them back. EU citizens and their family

members may be required to report their presence in the territory of the host Member State within a reasonable and non-discriminatory period. Failure to comply may result in a sanction, which must be proportionate and non-discriminatory.

11.1.4.2 The right of residence for up to three months

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 ..., OJ 2004 L158/77

Article 6

> 1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.
> 2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.

Based on this provision, all EU citizens, whether economically active or not, whether jobseeking or not, and whether having sufficient resources or health insurance or not, have a right of residence for up to three months in another Member State. Their non-EU citizen family members have the same right derived from that of the citizen. It must be noted, however, that Article 24(2) of the Directive provides that the host Member State is not obliged to confer entitlement to social assistance during the first three months of residence. Furthermore, following Article 14(1), EU citizens and their family members no longer have the right of residence in another Member State for up to three months (provided for in Article 6) if they become an unreasonable burden on the social assistance system of the host Member State.

11.1.4.3 The right of residence for more than three months

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 ..., OJ 2004 L158/77

Article 7

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
   (a) are workers or self-employed persons in the host Member State; or
   (b) 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; or
   (c)
   - are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
   - have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, 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 during their period of residence; or

   (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).
2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

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Article 7 gives persons the right to reside in another Member State for more than three months and up to five years if they are workers or self-employed, if they have sufficient resources and comprehensive medical insurance, or if they are students with sufficient resources and comprehensive medical insurance. Family members accompanying such persons have the same right of residence, regardless of whether they are Member State nationals. Article 14(2) of the Directive provides that Member States may verify whether the

conditions in Article 7 are fulfilled in specific cases in which there is a reasonable doubt as to whether an EU citizen or their family members satisfy the conditions. Such verification may not, however, be carried out systematically.

Cross-Reference

See 11.2.3 on the rights of workers.

These four categories of persons having the right to reside for more than three months in the territory of another Member State will now be looked at more closely.

Economically active citizens

Economically active citizens are workers and self-employed persons. Workers have extensive rights under EU law in terms of equal treatment and these are discussed more fully at 11.2.

They also have a right to reside in another Member State for a period longer than three months. Regarding their right to reside, EU citizens who are no longer a worker or self-employed retain their status under certain circumstances. These are set out in Article 7(3) of the Citizenship Directive.

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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 ..., OJ 2004 L158/77

Article 7(3)

> For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:
>
> (a) he/she is temporarily unable to work as the result of an illness or accident;
>
> (b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;
>
> (c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;
>
> (d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

This provision is important because it means that a person no longer working or self-employed, under the conditions set out in the previous extract, retains the right to reside in the host Member State without any additional requirements such as sufficient resources or health insurance. Furthermore, Article 14(4) of the Directive provides that an expulsion measure may in no case be adopted against EU citizens or their family members if they are workers or self-employed persons or if they entered the territory of the host Member State in order to seek employment. In the latter case, the EU citizens and their family members may not be expelled for as long as the EU citizens can prove that they are continuing to seek employment and that they have a genuine chance of being employed.

The case of Case C-442/16 *Florea Gusa v Minister for Social Protection, Ireland and Attorney General* EU:C:2017:1004 involved a Romanian national working in Ireland as a self-employed plasterer. When work dried up due to an economic downturn, Mr Gusa applied for a jobseekers' allowance, but it was refused on the grounds that he no longer satisfied the requirements for a right of residence. Mr Gusa argued that he retained self-employed status within Article 7. In drawing an analogy with a worker who has involuntarily lost their job, the Court decided that such status was retained.

Case C-442/16 *Florea Gusa v Minister for Social Protection, Ireland and Attorney General* EU:C:2017:1004

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> 45. It follows from all of the foregoing that a person who has ceased to work in a self-employed capacity, because of an absence of work owing to reasons beyond his control, after having carried on that activity for more than one year, is, like a person who has involuntarily lost his job after being employed for that period, eligible for the protection afforded by Article 7(3)(b) of Directive 2004/38. As set out in that provision, that cessation of activity must be duly recorded.
>
> 46. Accordingly, the answer to the first question is that Article 7(3)(b) of Directive 2004/38 must be interpreted as meaning that a national of a Member State retains the status of self-employed person for the purposes of Article 7(1)(a) of that directive where, after having lawfully resided in and worked as a self-employed person in another Member State for approximately four years, that national has ceased that activity, because of a duly recorded absence of work owing to reasons beyond his control, and has registered as a jobseeker with the relevant employment office of the latter Member State.

It is important to note here that, according to Article 24(2) of the Citizenship Directive, the Member States are not obliged to confer entitlement to a jobseekers' allowance. Case C-138/02 *Collins* [2004] ECR I-2703, however, made it clear that Member States cannot always deny a jobseeker's claim for social assistance. While it is legitimate to require a genuine link between the jobseeker and the employment market of the State in question, and while the existence of such a link may be established by a residence requirement, the period of residence required must not exceed that necessary in order to assess whether the jobseeker is genuinely seeking work in the employment market of the host Member State. Furthermore, Joined Cases C-22 & 23/08 *Vatsouras and another v Arbeitsgemeinschaft (ARGE) Nurnberg 900* [2009] ECR I-4585, which was decided after the entry into force of the Citizenship Directive, established that a jobseekers' allowance is not 'social assistance' within the meaning of Article 24(2) of the Directive.

Cross-Reference

For a more in-depth discussion of *Collins*, see 11.2.2.5. On *Vatsouras*, see 11.2.3.2.

Economically independent citizens

The second category of EU citizens having a right of residence in the territory of another Member State for a period longer than three months are persons who 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 who have comprehensive sickness insurance cover in the host Member State.

Article 8(4) of the Citizenship Directive provides that Member States may not lay down a fixed amount that they regard as 'sufficient resources', but they must take into account the personal situation of the person concerned. In all cases, the amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.

In Case C-200/02 *Chen* [2004] ECR I-9925, which concerned a newborn EU citizen, the Court of Justice made it clear that the resources required need not be the citizen's own; they may be provided by a family member—in this case, the baby's mother.

Cross-Reference

On *Chen*, see 11.1.3.

In Case C-408/03 *Commission v Belgium* [2006] ECR I-2647, it was pointed out that it is sufficient for the
p. 486 nationals of Member States to 'have' the necessary resources and that there ↵ are no requirements whatsoever as to the origin of the resources. There does not have to be a legal link between the provider and the recipient of the resources.

Regarding required medical insurance, Case C-413/99 *Baumbast* [2002] ECR I-7091 established that the fact that an EU citizen is covered only partially by insurance does not justify a Member State's refusal to renew his residence permit. Again, regard must be had to the individual circumstances and the principle of proportionality.

Cross-Reference

Baumbast is discussed at 11.1.3.

Finally, Article 14(3) of the Citizenship Directive provides that an expulsion measure shall not be the automatic consequence of an EU citizen's or their family member's recourse to the social assistance system of the host Member State. Prior to the acquisition of the right of permanent residence, though, the host Member State is not obliged to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status, and members of their family (Article 24(2) of the Directive). Moreover, if an economically inactive citizen becomes a burden on the social assistance system of the host Member State, they may lose their right of residence (Article 7 (1) (b) of the Directive).

In regards to the entitlement of non-active EU citizens to social advantages, the decision in C-333/13 *Dano v Jobcentre Leipzig* EU:C:2014:2358 clarified the position under EU law. Ms Dano and her son Florin, both Romanian nationals, resided in Germany with Ms Dano's sister. Ms Dano never worked in Germany and there was nothing to indicate that she had looked for a job. She received a child benefit for her son, but when she

applied for social benefits by way of basic provision, this was refused. Ms Dano objected to this refusal, relying on EU law—specifically, the prohibition of discrimination based on nationality in Article 18 TFEU and Article 24 of the Citizenship Directive.

The Court of Justice pointed out that, pursuant to Article 24(1) of the Directive, EU citizens can indeed claim equal treatment with nationals of the host Member State, but only if their residence has complied with the conditions of the Directive. For residence between three months and five years, such as that of Ms Dano and her son, the relevant provision is Article 7(1) of the Directive. According to this provision, persons who are economically inactive must meet the condition that they have sufficient resources of their own in order to have a right of residence. When assessing whether such persons have sufficient resources, the social assistance applied for cannot be taken into account, as the person does not have sufficient resources without such social assistance. Since Ms Dano and her son did not have sufficient resources, they could not claim a right of residence in Germany and therefore they could not invoke the principle of non-discrimination applicable to EU citizens residing in another Member State.

Cross-Reference

Article 16(2) of the Citizenship Directive on family members is discussed later at 11.1.4.4.

Students

Persons enrolled at a private or public establishment accredited or financed by the host Member State have a right to reside in another Member State for more than three months if they have sufficient resources and comprehensive health insurance. The fact that they have sufficient funds for themselves and their family members not to become a burden on the social assistance system of the host Member State may be proven by means of a simple declaration. Like the category of economically independent citizens, this means they may
p. 487 lose their residence ↵ right if they become an unreasonable burden on the host Member State's social system (Article 7 (1) (c) of the Directive).

Since students are economically inactive, according to Article 24(2) of the Citizenship Directive the host Member State has no obligation to provide them with maintenance grants or student loans before the right of permanent residence has been acquired. The Court of Justice decided in Case C-209/03 *R v London Borough of Ealing and Secretary of State for Education, ex p Bidar* [2005] ECR I-2119, however, that encouragement and support for cooperation in education matters had been incorporated into EU law. Therefore, there must be equality between EU students in relation to loans and grants. A condition requiring a certain degree of integration into the host Member State's society, however, is justified.

The existence of a certain degree of integration may be evaluated through a residence requirement. This was established in Case C-158/07 *Forster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-8507, in which a requirement of at least five years' uninterrupted lawful residence before claiming a maintenance grant was held to be compatible with EU law.

Family members

Family members of EU citizens have a right of residence dependent on the citizen's right of residence. Article 2(2) of the Citizenship Directive defines 'family member'.

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 …, OJ 2004 L158/77

Article 2

> For the purposes of this Directive:
>
> […]
>
> 2. 'Family member' means:
>
> (a) the spouse;
>
> (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
>
> (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
>
> (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);
>
> […]

p. 488 ↵ The Directive further specifies in Article 3 that host Member States have to facilitate entry and residence for any other family members who, in the country of origin, are dependants or household members of the EU citizen having the primary right of residence, or whose serious health grounds strictly require the personal care of the family member by the EU citizen. Finally, the same provision requires host Member States to facilitate entry and residence of the partner with whom the EU citizen has a durable relationship, duly attested.

11.1.4.4 The right of permanent residence

General rule for all EU citizens

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 …, OJ 2004 L158/77

Article 16

> 1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.
>
> [...]
>
> 3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.
> 4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.

Thinking Point

> Why do you think an EU citizen acquires the right of permanent residence after five years in the host Member State? How is a right of permanent residence different from a right of residence for up to five years?

After an EU citizen has legally resided in the host Member State for a continuous period of five years, it is deemed that there is a very strong link between that person and the host Member State that makes the person comparable to a national of that Member State. The right of permanent residence is seen as a vehicle for integration into the society of the host Member State. Therefore this right, once acquired, is not subject to the conditions set out for a right of residence for up to five years. In particular, after five years of continuous
p. 489 legal residence, the ↵ citizen does not have to be economically active or economically independent with comprehensive health insurance.

Cross-Reference

On the right of residence for more than three months and the conditions that have to be met to acquire this right, see 11.1.4.3.

Article 16 of the Citizenship Directive specifies that the acquisition of five years' continuity of residence in the host Member State is not affected by temporary absences. Furthermore, after those five years, when the right of permanent residence is acquired, it can be lost only through absence from the host Member State for more than two consecutive years.

More favourable rule for the formerly economically active

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 ..., OJ 2004 L158/77

Article 17

1. By way of derogation from Article 16, the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by:

   (a) workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension or workers who cease paid employment to take early retirement, provided that they have been working in that Member State for at least the preceding twelve months and have resided there continuously for more than three years.

   If the law of the host Member State does not grant the right to an old age pension to certain categories of self-employed persons, the age condition shall be deemed to have been met once the person concerned has reached the age of 60;

   (b) workers or self-employed persons who have resided continuously in the host Member State for more than two years and stop working there as a result of permanent incapacity to work.

   If such incapacity is the result of an accident at work or an occupational disease entitling the person concerned to a benefit payable in full or in part by an institution in the host Member State, no condition shall be imposed as to length of residence;

   (c) workers or self-employed persons who, after three years of continuous employment and residence in the host Member State, work in an employed or self-employed capacity in another Member State, while retaining their place of residence in the host Member State, to which they return, as a rule, each day or at least once a week.

   For the purposes of entitlement to the rights referred to in points (a) and (b), periods of employment spent in the Member State in which the person concerned is working shall be regarded as having been spent in the host Member State.

> Periods of involuntary unemployment duly recorded by the relevant employment office, periods not worked for reasons not of the person's own making and absences from work or cessation of work due to illness or accident shall be regarded as periods of employment.
>
> p. 490
>
> 2. The conditions as to length of residence and employment laid down in point (a) of paragraph 1 and the condition as to length of residence laid down in point (b) of paragraph 1 shall not apply if the worker's or the self-employed person's spouse or partner as referred to in point 2(b) of Article 2 is a national of the host Member State or has lost the nationality of that Member State by marriage to that worker or self-employed person.
>
> [...]

Citizens who were economically active in the host Member State acquire the right of permanent residence more easily than citizens who were not economically active. This means that, in order to have a right of permanent residence, a shorter period of residence in the host Member State is required for people who have reached pensionable age, for people who can no longer work because of permanent incapacity, and for so-called frontier workers.

People who are no longer working because they have reached pensionable age have the right of permanent residence if they worked in the host Member State for at least one year preceding that birthday and provided that they resided there continuously for more than three years.

People who are no longer working because they are permanently incapacitated have the right of permanent residence if they have continuously resided in the host Member State for more than two years. Furthermore, if the incapacity is a result of an accident at work or an occupational illness, they have the right of permanent residence without any condition as to length of residence.

Frontier workers—that is, those who reside in one Member State and work in another—have the right of permanent residence even if they worked in the host Member State for less than five years, as long as they worked there for at least three years before starting to work in another Member State and still reside in the host Member State and return there at least once a week.

A worker or self-employed person who is married to someone who has the nationality of the host Member State, or to someone who has lost this nationality as a consequence of marriage, does not have to satisfy any condition as to length of residence or employment in order to have a right of permanent residence. This rule brings us to the rights of permanent residence for family members of EU citizens, which is discussed in the next section.

Family members

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 ..., OJ 2004 L158/77

Article 16

> [...]
>
> 2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

p. 491

Article 17

> [...]
>
> 3. Irrespective of nationality, the family members of a worker or a self-employed person who are residing with him in the territory of the host Member State shall have the right of permanent residence in that Member State, if the worker or self-employed person has acquired himself the right of permanent residence in that Member State on the basis of paragraph 1.
> 4. If, however, the worker or self-employed person dies while still working but before acquiring permanent residence status in the host Member State on the basis of paragraph 1, his family members who are residing with him in the host Member State shall acquire the right of permanent residence there, on condition that:
>   (a) the worker or self-employed person had, at the time of death, resided continuously on the territory of that Member State for two years; or
>   (b) the death resulted from an accident at work or an occupational disease; or
>   (c) the surviving spouse lost the nationality of that Member State following marriage to the worker or self-employed person.

Article 18

> Without prejudice to Article 17, the family members of a Union citizen to whom Articles 12(2) and 13(2) apply, who satisfy the conditions laid down therein, shall acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State.

Family members of an EU citizen will also have a right of permanent residence, derived from that of the citizen, regardless of whether they are citizens or third-country nationals.

Cross-Reference

For the definition of 'family member', see Article 2(2) of the Citizenship Directive, set out at 11.1.4.3.

If the worker or self-employed person acquires a right of permanent residence after two or three years of residence or even without satisfying any residence requirement at all, as set out earlier in this section, their family members also acquire this right and they acquire it at the same time as does the worker or self-employed person. Equally, if the citizen acquires their right of permanent residence after five years of residence in the host Member State based on Article 16(1) of the Citizenship Directive, their family members will also acquire this right after five years.

Furthermore, if the worker or self-employed person dies while still working, but before they acquired the right of permanent residence, their family members will still acquire the right of permanent residence in the host Member State provided that one of three conditions are met:

(1) at the time of death, the worker or self-employed person had resided continuously for more than two years in the host Member State; or

(2) the worker or self-employed person died as a result of an accident at work or an occupational illness; or

(3) the surviving spouse lost the nationality of the host Member State as a consequence of marriage to the worker or self-employed person.

p. 492 ↵ From case law, it appears that these conditions are interpreted in a strict manner. In Case C-257/00 *Givane* [2003] ECR I-345, an Indian widow and three children were denied the right of permanent residence in the UK. The deceased husband was a Portuguese national who had worked in the UK for three years as a chef, after which he went to India for ten months. He died less than two years after returning to the UK. Because he had resided for less than two years in the UK immediately preceding his death, the Court of Justice upheld the UK's refusal to grant his family members a permanent right of residence.

Finally, in the case of divorce or annulment of marriage, or in the case of death or departure of the EU citizen, family members who legally remain in the host Member State for a period of five consecutive years will acquire a right of permanent residence.

11.1.4.5 The right to equal treatment and beyond

Part Two of the TFEU (Articles 18–25) is entitled 'Non-discrimination and citizenship of the Union'. Non-discrimination and the corresponding right to equal treatment is one of the cornerstones of the EU and entails non-discrimination on a variety of grounds. In the context of the free movement of persons, however, equal treatment and the prohibition of discrimination based on nationality are of particular importance. The right to equal treatment regarding social assistance has already been discussed under the different relevant headings in this chapter. It will therefore not be expanded upon here.

Article 18 TFEU

> Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.
>
> The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

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 …, OJ 2004 L158/77

Article 24

> 1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

p. 493 ↵ EU citizens have a right to equal treatment in all matters having a connection with free movement rights, even if this connection is only very remote. This became clear after Case C-148/02 *Garcia Avello* [2003] ECR I-11613—a case that did not concern different treatment of similar situations, but rather similar treatment of different situations. Mr Garcia Avello, a Spanish national, was married to Ms Weber, a Belgian national. They were resident in Belgium, where their two children were born. The children had dual Spanish and Belgian nationality. In accordance with Belgian law, the children received their father's surname upon registration—that is, Garcia Avello. Their parents requested the children's surname to be changed to Garcia Weber in accordance with Spanish custom, which was that the surname of children of a married couple consisted of the first surname of the father followed by that of the mother. They had already registered the children under that name at the Spanish embassy. Their request was denied and the authorities merely changed the children's name to Garcia. A case was brought against the Belgian authorities and the Belgian court made a preliminary reference to the Court of Justice, asking whether EU law prevented the Belgian authorities from rejecting the requested change of surname.

Cross-Reference

On preliminary references, see Chapter 6.

Case C-148/02 *Garcia Avello* [2003] ECR I-11613

> 26. Citizenship of the Union, established by Article 17 EC [now Article 20 TFEU], is not … intended to extend the scope *ratione materiae* of the Treaty … to internal situations which have no link with Community law [now EU law].
>
> 27. Such a link with Community law does, however, exist in regard to persons in a situation such as that of the children of Mr Garcia Avello, who are nationals of one Member State lawfully resident in the territory of another Member State.
>
> […]
>
> 29. That being so, the children of the applicant in the main proceedings may rely on the right set out in Article 12 EC [now Article 18 TFEU] not to suffer discrimination on grounds of nationality in regard to the rules governing their surname.
>
> […]
>
> 35. In contrast to persons having only Belgian nationality, Belgian nationals who also hold Spanish nationality have different surnames under the two legal systems concerned. More specifically, in a situation such as that in issue in the main proceedings, the children concerned are refused the right to bear the surname which results from application of the legislation of the Member State which determined the surname of their father.
>
> 36. As the Advocate General has pointed out in paragraph 56 of his Opinion, it is common ground that such a discrepancy in surnames is liable to cause serious inconvenience for those concerned at both professional and private levels resulting from, *inter alia*, difficulties in benefiting, in one Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in the surname recognised in another Member State of which they are also nationals. As has been established in paragraph 33 of the present judgment, the solution proposed by the administrative authorities of allowing children to take only the first surname of their father does not resolve the situation of divergent surnames which those here involved are seeking to avoid.
>
> 37. In those circumstances, Belgian nationals who have divergent surnames by reason of the different laws to which they are attached by nationality may plead difficulties specific to their situation which distinguish them from persons holding only Belgian nationality, who are identified by one surname alone.

p. 494

In this case, the sole fact of dual nationality was enough to trigger the operation of the Treaty provisions on equal treatment, regardless of the fact that there was no actual movement. The Court looked at the fact that the children might want to exercise their free movement rights in the future, in which case the discrepancy

between their surnames (Garcia on Belgian documents and Garcia Weber on Spanish documents) could cause them serious inconvenience.

11.1.4.6 Other EU citizens' rights

Following Article 22 TFEU, every citizen of the EU has a right to vote and to stand as a candidate at municipal elections and in elections to the European Parliament in the Member State in which they reside and of which they are not a national under the same conditions as nationals of that State. The Article, however, allows for derogations, provided that they are warranted by problems specific to a Member State.

Article 23 TFEU provides that every EU citizen is entitled to protection by the diplomatic or consular authorities of another Member State on the same conditions as the nationals of that State in the territory of third countries.

Thinking Point

> What do you think such diplomatic or consular protection includes?

Decision 95/553EC of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations, OJ 1995 L314/73, specifies what protection the Member States will offer EU citizens. The protection concerns assistance in cases of death, serious accident or serious illness, and arrest or detention. Assistance is also available for victims of violent crime, and relief and repatriation will be provided for distressed citizens. The Member States' diplomatic representations or consular agents in third countries may also come to the assistance of any EU citizen who requests it in any other circumstance insofar as it is within their powers to do so.

Article 24 TFEU grants EU citizens the right of initiative and the right to petition the European Parliament, in accordance with Article 227 TFEU. The right of initiative, according to Article 11(4) TEU, is the right to invite
p. 495 the Commission to submit a proposal on ↵ matters where EU citizens consider a legal act of the EU to be required for the purpose of implementing the Treaties. Such an initiative must be supported by at least 1 million EU citizens who are nationals of a significant number of Member States. Furthermore, every citizen has a right to apply to the European Ombudsman, in accordance with Article 228 TFEU. Lastly, Article 24 TFEU provides that every citizen has the right to write to the EU institutions or the Ombudsman in any of the EU's languages and to receive an answer in the same language.

11.2 Free movement of workers: substantive rights

11.2.1 Article 45 TFEU

Article 45 TFEU sets out the principles regarding the free movement of workers.

Article 45 TFEU

> 1. Freedom of movement for workers shall be secured within the Union.
> 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
> 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
>   (a) to accept offers of employment actually made;
>   (b) to move freely within the territory of Member States for this purpose;
>   (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
>   (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
> 4. The provisions of this Article shall not apply to employment in public service.

It was established in Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337 that Article 45 TFEU has vertical direct effect, which means that it can be relied upon by an individual against public authorities.

Cross-Reference

See 4.1.4 for an explanation of vertical and horizontal direct effect.

In Case 36/74 *Walrave and Koch* [1974] ECR 1405, at 1406, it was held that Article 45 TFEU 'applies to all legal
p. 496 relationships which can be located within the territory of the Community ↵ [now Union] by reason either of the place where they are entered into or of the place where they take effect'. This means that the rule on non-discrimination can be relied upon when the legal relationship is entered into in the EU even if the work is performed outside the EU.

Furthermore, it was ruled in *Walrave and Koch* and in Case C-415/93 *Bosman* [1995] ECR I-1921 that Article 45 TFEU had not only vertical direct effect, but also horizontal direct effect.

> *Cross-Reference*
>
> For a full explanation and discussion of direct effect, see 4.1.

Both cases concerned rules made by sporting associations: cycling, in *Walrave and Koch*, and football, in *Bosman*. These associations were not public authorities, but the Court of Justice decided that the prohibition of discrimination also applied to rules aimed at regulating gainful employment in a collective manner, but not emanating from a public authority. The reason for this decision is that, in several Member States, working conditions and relations are regulated not only by law, but also by collective agreements, which are agreements concluded between an employer or an employers' association, on the one hand, and one or more trade unions, on the other hand. Thus limiting the prohibitions in Article 45 TFEU to acts of public authorities would greatly reduce their effect and could create inequality in their application.

In Case C-281/98 *Angonese* [2000] ECR I-4139, the Court of Justice went even further. A private bank in Italy required a certificate of bilingualism from anyone wishing to apply for a job with it. The certificate was to be issued by the local authority after an examination held only in the province of Bolzano. Since this certificate used to be required for a career in the local public service, it was very usual for residents of the province to obtain it. Since the majority of residents in the province of Bolzano were Italian nationals, in effect the required certificate put nationals of other Member States at a disadvantage because it could only be obtained in that province and not in another Member State for example. It was therefore held by the Court that the prohibition of discrimination based on nationality also applied to private employers.

> *Cross-Reference*
>
> For more on *Angonese*, see 11.2.3.

Finally, it must be noted that Article 45 TFEU can be relied upon not only by the worker, but also by the employer. Case C-350/96 *Clean Car Autoservice* [1998] ECR I-2521 concerned Austrian legislation that prohibited businesses in Austria from employing as managers persons not resident in the country. The Court of Justice decided that 'while [the rights in Article 45 TFEU] are undoubtedly enjoyed by those directly referred to—namely, workers—there is nothing in the wording of [Article 45 TFEU] to indicate that they may not be relied upon by others, in particular employers' (*Clean Car Autoservice*, at para 19).

11.2.2 The definition of ‘worker’

11.2.2.1 An autonomous EU concept

The concept of ‘worker’ is not defined in the TFEU or any secondary legislation, but has been developed through the Court of Justice’s case law. An overview of the relevant case law is provided in Figure 11.2. It is an autonomous EU concept, which means that its meaning is determined solely by EU law, without reference to the national laws of the Member States. In Case 75/63 *Hoekstra* [1964] ECR 177, the Court held that the relevant Treaty Articles would be deprived of all effect if the meaning of the concept of ‘worker’ could be fixed or modified by national law.

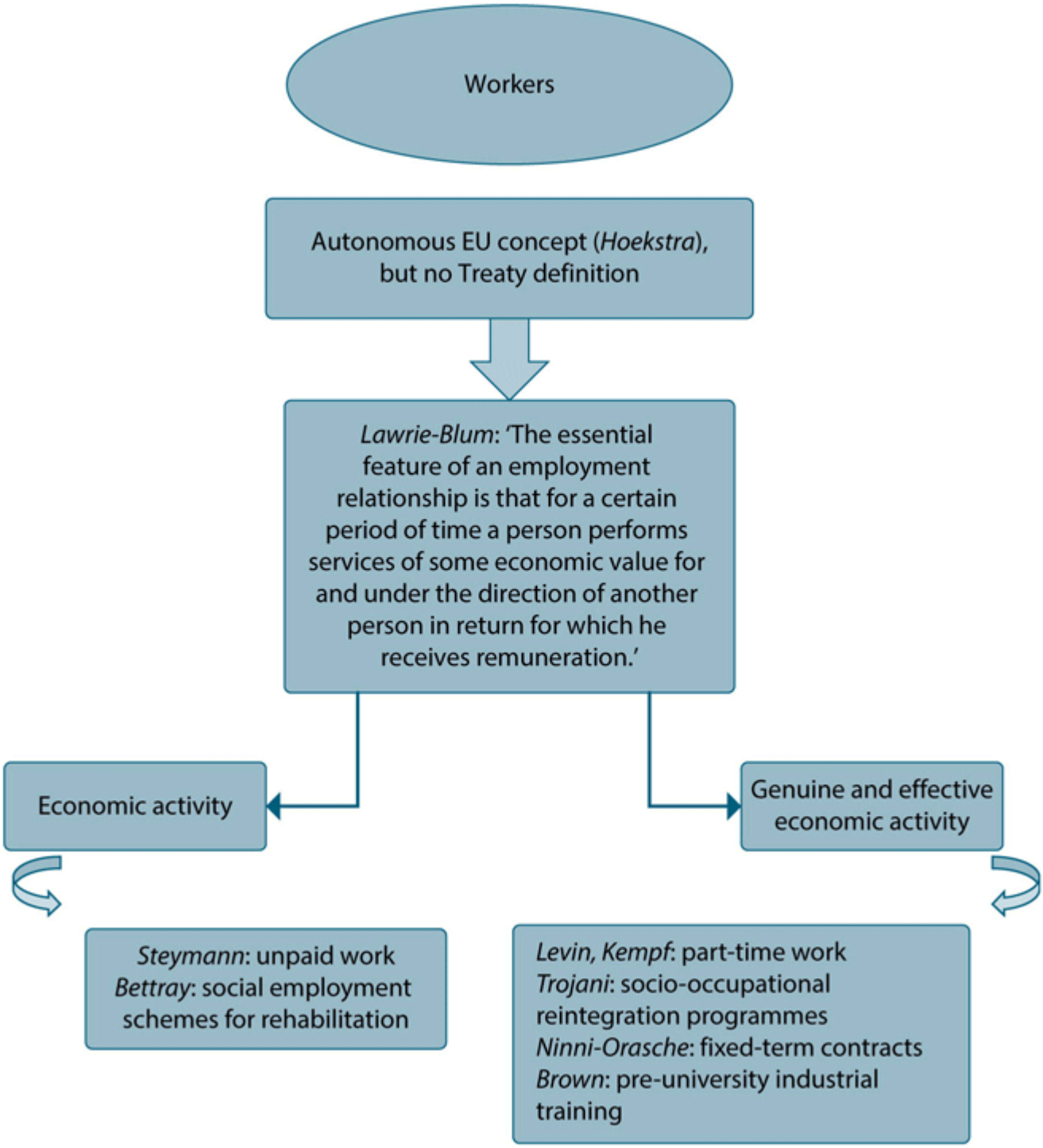

Figure 11.2 Overview: The concept of 'worker'

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Thinking Point

> Why do you think the Court of Justice decided this? What would be the consequences if the Member States could determine or modify the meaning of the concept of 'worker'?

After all, if the definition of the concept of worker were a matter of national law, each Member State could decide or modify, through its national law, which persons or categories of persons would be protected under the Treaty. This could severely undermine the effect and the objectives of the Treaty, since national laws would be able to exclude certain categories of persons from the benefit of the Treaty without any control by the EU institutions.

11.2.2.2 The essential feature of an employment relationship

The Court of Justice has pointed out the essential feature of an employment relationship in Case 66/85 *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121.

p. 498

Case 66/85 *Lawrie-Bl1um v Land Baden-Württemberg* [1986] ECR 2121

Summary

> 1. … The essential feature of an employment relationship is that for a certain period of time a person performs services of some economic value for and under the direction of another person in return for which he receives remuneration. The sphere in which they are provided and the nature of the legal relationship between employee and employer are immaterial as regards the application of [Article 45 TFEU].

Thinking Point

> Do you think that a trainee teacher, who gives lessons under supervision and is paid for this, is a 'worker' according to EU law?

The question of whether a trainee teacher, who gives lessons under supervision and is paid for this, is a 'worker' arose in *Lawrie-Blum*.

Deborah Lawrie-Blum was a British national living and working in Germany. After passing the examination for the profession of teacher at a secondary school, she was refused admission to a practical training course leading to a state examination, which qualified successful candidates for appointment as teachers in gymnasia. The ground for refusing her admission was her nationality, because German law classed trainee teachers as temporary civil servants, who had to possess German nationality.

The German court asked for a preliminary ruling on the question of whether trainee teachers were 'workers' under EU law.

Case 66/85 *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121

> 18. In the present case, it is clear that during the entire period of preparatory service the trainee teacher is under the direction and supervision of the school to which he is assigned. It is the school that determines the services to be performed by him and his working hours and it is the school's instructions that he must carry out and its rules that he must observe. During a substantial part of the preparatory service he is required to give lessons to the school's pupils and thus provides a service of some economic value to the school. The amounts which he receives may be regarded as remuneration for the services provided and for the duties involved in completing the period of preparatory service. Consequently, the three criteria for the existence of an employment relationship are fulfilled in this case.
>
> 19. The fact that teachers' preparatory service, like apprenticeships in other occupations, may be regarded as practical preparation directly related to the actual pursuit of the
>
> p. 499
>
> occupation in point is not a bar to the application of [Article 45 TFEU] if the service is performed under the conditions of an activity as an employed person.
>
> 20. Nor may it be objected that services performed in education do not fall within the scope of the ... Treaty because they are not of an economic nature. All that is required for the application of [Article 45 TFEU] is that the activity should be in the nature of work performed for remuneration, irrespective of the sphere in which it is carried out ... Nor may the economic nature of those activities be denied on the ground that they are performed by persons whose status is governed by public law since ... the nature of the legal relationship between employee and employer, whether involving public law status or a private law contract, is immaterial as regards the application of [Article 45 TFEU].

The work performed must be an economic activity. In Case 196/87 *Steymann v Staatssecretaris van Justitie* [1988] ECR 6159, Mr Steymann carried out plumbing for a religious community and also took part in their commercial activities. He did not receive a salary, but the community took care of his material needs. According to the Court of Justice, he performed economic activities because the services the community provided to its members could be regarded as the indirect quid pro quo for the work they carried out.

A person taking part in a social employment scheme for the rehabilitation of drug addiction, however, is not a worker. The purpose of such a scheme is social and the activities carried out are not economic, but merely a means of rehabilitation or reintegration (Case 344/87 *Bettray v Staatssecretaris van Justitie* [1989] ECR 1621).

11.2.2.3 Part-time workers

The question can be asked whether someone working part-time or for a salary less than the minimum wage in the country concerned could be classed as a 'worker', since they would not earn sufficient money to support themselves and certainly not enough to support a family. This question was answered in Case 53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR 1035.

Mrs Levin was a British citizen and married to a non-EU national husband. She worked part-time as a chambermaid and, because she worked only part-time, she earned less than what was considered the minimum for subsistence in the Netherlands. She applied for a permit to reside in the Netherlands, but this was refused. The reason for the refusal was that, according to Dutch legislation, Mrs Levin was not engaged in gainful employment in the Netherlands and therefore could not benefit from the EU legislation favourable to workers.

The Court of Justice emphasized that the terms 'worker' and 'activity as an employed person' are not to be defined by reference to the national laws of the Member States, but have an EU meaning. As these concepts define the field of application of one of the fundamental freedoms guaranteed by the Treaty, they must not be interpreted restrictively.

According to the Court of Justice, one of the objectives of the Treaty is the abolition, as between Member States, of obstacles to freedom of movement of persons, with the purpose of promoting throughout the EU the harmonious development of economic activities and raising the standard of living. Although part-time
p. 500 employment may provide an income lower ↵ than that considered to be the minimum required for subsistence, it constitutes, for a large number of persons, an effective means of improving their living conditions. The effectiveness of EU law would be impaired and the achievement of the Treaty objectives would be jeopardized if the enjoyment of the rights for workers were to be reserved solely to persons engaged in full-time employment and earning, as a result, a salary at least equivalent to the guaranteed minimum wage.

11.2.2.4 Genuine and effective economic activity

Although *Levin* established that part-time employment is not excluded from the field of application of the rules on freedom of movement for workers, the work performed must be effective and genuine, and not purely marginal and ancillary. The question as to which activities are considered effective and genuine was raised in Case 139/85 *Kempf v Staatssecretaris van Justitie* [1986] ECR 1741.

Mr Kempf was a German citizen who worked in the Netherlands as a part-time music teacher. Since he worked only 12 hours per week, he applied for and received supplementary benefits, which came out of public funds and were payable to persons having the status of workers. When he applied for a residence permit in the Netherlands in order to pursue an activity as an employed person, he was refused a permit. It was decided by the Dutch authorities that he was not a worker because he had received public funds and was therefore clearly unable to support himself out of the income received from his employment.

The Dutch government argued that work providing an income below the minimum means of subsistence cannot be regarded as effective and genuine work if the person who carries out the work claims social assistance from public funds.

The Court of Justice disagreed. It held that a person in effective and genuine employment who sought to supplement their income, which was below the level of minimum means of subsistence, was still a worker under EU law. It was irrelevant whether those supplementary means were derived from property or from the employment of a family member—as was the case in *Levin*—or whether they were obtained through financial assistance drawn from public funds of the Member State in which the worker resides.

However, work cannot be regarded as an effective and genuine economic activity if it constitutes merely a means of rehabilitation or reintegration for the persons concerned and if the purpose of the paid employment, which is adapted to the specific possibilities of each person, is to enable those persons to recover their capacity to take up ordinary employment or to lead a normal life (Case 344/87 *Bettray v Staatssecretaris van Justitie* [1989] ECR 1621).

In an apparently similar case, the Court of Justice left it to the national court to decide whether there was a real and genuine economic activity. In Case C-456/02 *Trojani* [2004] ECR I-7573, a French national, Mr Trojani, worked for approximately 30 hours per week as part of a personal socio-occupational reintegration programme in a Salvation Army hostel in return for board and lodging and some pocket money. The Court of Justice ruled that, in deciding whether Mr Trojani was a worker, the national court had to establish, by assessing the facts, whether the paid activity was real and genuine. In particular, the national court had to
p. 501 ascertain whether the services performed were capable of being regarded as forming part of the ↵ normal labour market. For that purpose, account could be taken of the status and practices of the hostel, the content of the social reintegration programme, and the nature and details of performance of the services.

Another scenario in which the question as to effective and genuine activities has arisen is that of employment of short duration. In Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187, an Italian national worked as a waitress in Austria for a fixed term of two-and-a-half months. After unsuccessful attempts to find new employment, she decided to study romance languages in Austria. The question raised in this case was whether the short-term employment taken up by Mrs Ninni-Orasche could be regarded as an effective and genuine activity, therefore classing her as a worker. The Court held that the fact that a person has worked for a temporary period of two-and-a-half months can confer on them the status of worker within the meaning of the Treaty, provided that the activity performed as an employed person is not purely marginal and ancillary. The national court must assess the facts in order to determine whether this is the case. The Court of Justice emphasized that the national court, in examining whether a person is a worker, must look at objective criteria relating to the nature of the activities concerned and the employment relationship. Subjective factors, such as motive or the fact that the person abusively created a situation enabling them to claim the status of worker within the meaning of the Treaty, are irrelevant.

In Case 197/86 *Brown* [1988] ECR 3205, the claimant similarly worked before moving on to further education, although the Court reached a different conclusion from that in *Ninni-Orasche*. Mr Brown had both British and French nationalities. He worked for nine months for a company in Scotland in employment that was described as 'pre-university industrial training'. After this employment, he commenced studies leading to a degree in electrical engineering at Cambridge University. He applied for a maintenance grant to which he was

not entitled under national regulations. He relied on his French nationality, however, claiming that he was a worker and therefore entitled to the grant under EU law. The Court of Justice decided that Mr Brown was a worker, but that this did not mean he was entitled to the maintenance grant. He had acquired his status of worker exclusively as a result of being accepted at university to undertake studies and, in such circumstances, the employment relationship was merely ancillary to the studies.

11.2.2.5 Jobseekers

The Court of Justice has decided in its case law that Article 45 TFEU applies not only to workers, but also to those seeking work.

It could be difficult to find work in one Member State while living in another. Therefore, if only persons already employed were allowed to move to another Member State, Article 45 TFEU would lose a considerable amount of its effect, since this would cover only a small group of people. For this reason, the Court of Justice has ruled that jobseekers are also covered by Article 45 TFEU, which means that they have the right to move to another Member State to seek employment. This does not mean, however, that jobseekers have exactly the same status and rights as workers, which is evidenced by the relevant case law.

Thinking Point

> Why do you think persons seeking work can also benefit from Article 45 TFEU, even though they have no employment of any kind in the Member State in which they want to live?

In Case C-292/89 *Antonissen* [1991] ECR I-745, a Belgian national had unsuccessfully sought work in the UK when he was sentenced to imprisonment for unlawful possession of cocaine with intent to supply. After his release from prison, the Secretary of State ordered his deportation. The question to be answered was whether Mr Antonissen was a worker within the meaning of the Treaty because, if he was, this would make him virtually immune from deportation. The Court of Justice acknowledged that, according to the strict wording of Article 45 TFEU, EU nationals are given the right to move freely within the territory of the Member States only to accept offers of employment actually made and the right to stay in the territory of a Member State is stated to be for the purpose of employment. However, such a strict interpretation would exclude the right of a national of a Member State to move freely and to stay in another Member State to seek employment. The Court decided that such an interpretation could not be upheld because it would jeopardize the actual chances of a jobseeker finding employment in another Member State and would therefore render Article 45 TFEU ineffective. As a consequence, the Court decided as follows.

Case C-292/89 *Antonissen* [1991] ECR I-745

> 13. It follows that Article 45 TFEU must be interpreted as enumerating, in a non-exhaustive way, certain rights benefiting nationals of Member States in the context of the free movement of workers and that that freedom also entails their right to move freely within the territory of the other Member States and to stay there for the purposes of seeking employment.

As mentioned at the beginning of this section, the status of a person seeking employment is not entirely the same as that of a worker. In that respect, it must be noted that the right to stay in a Member State to seek employment may be subject to a reasonable time limitation, unless the jobseeker can prove that they are continuing to seek employment and that they have genuine chances of being employed. This is provided for in Article 14(4)(b) of the Citizenship Directive.

Cross-Reference

See 11.1.4 and also the section therein on economically active citizens' right of residence for more than three months.

Another difference between workers and jobseekers lies in their rights to certain social advantages, which was at issue in Case C-278/94 *Commission v Belgium* [1996] ECR I-4307. In this case, the Court of Justice said that national rules concerning unemployment insurance do not infringe EU law if they require a person to have participated in the employment market by exercising an effective and genuine occupational activity before they can use such insurance.

The right of jobseekers to social advantages was further discussed in Case C-138/02 *Collins* [2004] ECR I-2703, which concerned Mr Collins, an Irish national, who moved to the UK. A little over a week after arriving in the UK, he applied for a jobseekers' allowance whilst seeking work. He was refused unemployment benefits because he was not habitually resident in the UK. The Court of Justice pointed out that Member State
p. 503 nationals who move to seek ↵ work benefit from the principle of equal treatment only as regards access to employment. This means that those who have already entered the employment market may claim the same social and tax advantages as national workers, but those who have not yet entered the employment market may not. It is legitimate for a Member State to grant a jobseekers' allowance only after it has become possible to establish that a genuine link exists between the person seeking work and the employment market of that State. The existence of such a link may be determined by establishing that the jobseeker has, for a reasonable period, genuinely sought work in the Member State. A residence requirement is, in principle, appropriate to ensure such a connection, but is has to be proportionate. That means it cannot go beyond what is necessary in order to achieve the objective. Therefore the period of residence required must not exceed that necessary to be able to assess whether the jobseeker is genuinely seeking work in the employment market of the host Member State.

Cross-Reference

For a further discussion of a jobseeker's right to social advantages, see 11.2.3.2.

11.2.3 The rights of workers under EU law

Article 45 TFEU is the primary legislation conferring rights on workers. In addition, there is secondary legislation governing workers' rights under EU law. For many years, this included one Directive and two Regulations:

- Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, OJ 1968 L257/13;
- Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ 1968 L257/2; and
- Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State, OJ 1970 L142/24.

More recently, the Citizenship Directive replaced Directive 68/360 and Regulation 1251/70, as well as Articles 10 and 11 of Regulation 1612/68. 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, OJ 2011 L141/1, replaced the remainder of Regulation 1612/68. Since Regulation 492/2011 is a consolidation Regulation, it does not change the rights formerly contained in Regulation 1612/68. It must also be remembered that if there is a conflict between the Treaty provisions and any secondary legislation, the Treaty provisions prevail. An overview of the current relevant legislation is provided in Figure 11.3.

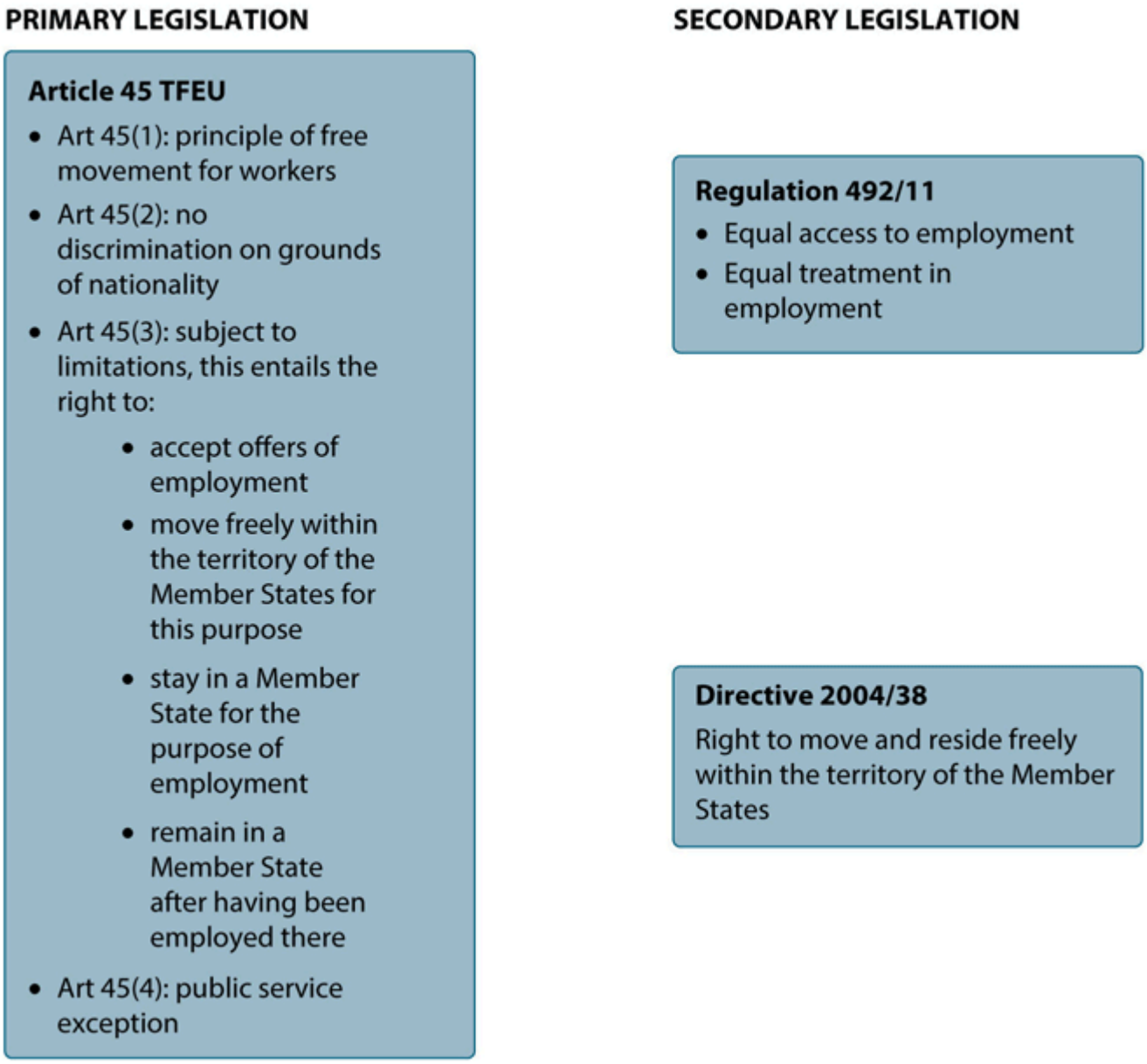

Figure 11.3 Overview: Legislation on workers' rights

Cross-Reference

On the sources of EU law, see 3.4.

11.2.3.1 The right to move and reside freely

Article 45 TFEU gives workers the right to move freely within the territory of the Member States and to reside there. These rights can be restricted only on grounds of public policy, public security, or public health. Workers are not the only persons having these rights in the EU: the Citizenship Directive gives all EU citizens the right to move and reside freely within the territory of the EU. This is therefore discussed in detail in this chapter under EU citizenship rights.

Cross-Reference

See 11.1.4 on the rights of EU citizens and their families.

p. 504 ↵ There are differences, however, between rights applicable to all EU citizens and those applicable only to workers specifically. Workers' specific rights will be the subject of the next sections.

11.2.3.2 The right to equal treatment for workers

Article 45 TFEU states that the freedom of movement of workers shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration, and other conditions of work and employment. 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, OJ 2011 L141/1, implements this provision regarding the prohibition of discrimination and the corresponding right to equal treatment. It provides for equal treatment in terms of eligibility for employment—that is, equal access to employment—as well equal treatment in employment—that is, equal treatment while working. Article 24 of the Citizenship Directive also formulates a general right to equal treatment for all EU citizens, but this chapter concerns equal treatment in the specific context of workers.

Key case law on the right to equal treatment for workers is summarized in Figure 11.4.

Figure 11.4 The right to equal treatment for workers

Eligibility for employment

The prohibition of discrimination based on nationality regarding access to employment is detailed in Article 1 of Regulation 492/2011.

p. 505

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, OJ 2011 L141/1

Article 1

p. 506

1. Any national of a Member State shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.
2. He shall, in particular, have the right to take up available employment in the territory of another Member State with the same priority as nationals of that State.

Article 45 TFEU and Regulation 492/2011 envisage the prohibition of not only direct discrimination, but also indirect discrimination and even certain non-discriminatory measures, as can be seen from the Court of Justice's case law, which will be discussed in the following sections.

Thinking Point

Do you think it is allowed, under EU law, to restrict the employment of foreign nationals in a business?

Direct discrimination

Direct discrimination entails that a national of a Member State is treated differently (usually more favourably) than a non-national of that Member State. In the context of the free movement of workers, it means that the non-national worker is treated less favourably than the national worker. As a rule, this is prohibited under EU law.

EU law does not prohibit the restriction of employment of foreign nationals provided that they are non-EU nationals. Article 45 TFEU provides that the freedom of movement of workers entails the abolition of any discrimination based on nationality between workers of the Member States. Furthermore, Article 4 of

Regulation 492/2011, which implements Article 45 TFEU, provides that provisions that restrict by number or percentage the employment of foreign nationals shall not apply to nationals of the other Member States.

These provisions have been applied on a few occasions by the Court of Justice. In Case C-415/93 *Bosman* [1995] ECR I-1921, a preliminary ruling was requested on whether a rule made by UEFA infringed EU law. The rule concerned was the so-called 3 + 2 rule, which permitted each national football association to limit to three the number of foreign players that a club may field in any first division match in their national championships *plus* two players who have played in the country of the relevant national association for five years, including three years as a junior. The same limitation applied to UEFA matches in competitions for club teams. The Court of Justice held that such limitations on the employment of foreign nationals could not apply to Member State nationals because they would directly discriminate against them based on their nationality. The fact that the rule did not concern the employment of foreign Member State players, but only the extent to which they could be fielded by their clubs, was held to be irrelevant, since participation in matches was the essential purpose of a football player's activity. A rule that restricted that participation therefore also restricted the chances of employment of the player concerned.

In Case 167/73 *Commission v France* [1974] ECR 359, the rule in question was one of French law, which provided
p. 507 that certain crew members on merchant ships had to be of French ↵ nationality and employment on merchant ships generally had to be in the ratio of three French crew members to one non-French crew member. The Court of Justice decided that this rule infringed Article 45 TFEU and Article 4 of Regulation 492/2011.

Finally, Case C-283/99 *Commission v Italy* [2001] ECR I-4363 provides another example of a rule directly discriminating based on nationality. In particular, Italian law required that private security activities could be carried out only by private security firms holding Italian nationality and hiring only Italian nationals. The Court held that such a rule was prohibited under Article 45 TFEU because it prevented workers from other Member States from working in Italy as private security guards.

Indirect discrimination

It is not only direct discrimination based on nationality that is prohibited under the Treaty and the implementing Regulation. Indirect discrimination also constitutes an infringement of EU law.

Thinking Point

> Can you define 'indirect discrimination'? What do you think it means?

Indirect discrimination exists when a rule, although neutral in terms of nationality, affects non-nationals of a Member State more severely than nationals of the Member State. In the context of eligibility for employment or access to work, this means that a rule will set a condition that is more easily satisfied by nationals than by non-nationals. Article 3(1) of Regulation 493/2011 provides that 'provisions laid down by law, regulation or

administrative practices of a Member State shall not apply … where, though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered'.

Several examples of case law involving indirect discrimination will be discussed here to illustrate the types of rule that are prohibited. In Case C-419/92 *Scholz* [1994] ECR I-505, the claimant was of German origin, but had acquired Italian nationality by marriage. She applied for a post as a member of the canteen staff at the University of Cagliari in Italy. Candidates entered an open competition based on tests and qualifications. The rules of the competition took account of previous employment in public service when drawing up the list of successful candidates. Mrs Scholz, the claimant, challenged her place on the list, saying it was unlawful for the selection board to refuse to take into account her previous employment with the German post office. The Court of Justice agreed and said that the board's refusal to take into consideration the claimant's employment in the public service of another Member State constituted unjustified indirect discrimination.

It was clear that there was no direct discrimination in this case since there were no nationality requirements for entering the open competition or restrictions on the employment of foreign Member State nationals and, in any event, Mrs Scholz had acquired Italian nationality by marriage. However, this did not mean that the
p. 508 principle of non-discrimination did not ↵ apply, since Mrs Scholz had exercised her right to freedom of movement for workers and could therefore rely on the relevant provisions irrespective of her place of residence or her nationality. The fact that the board would take account of experience in the public service of only its own State constituted indirect discrimination because it would be far easier for their own nationals to gain that experience than it would be for a foreign national, such as Mrs Scholz, who was a German national at the time she gained her experience with the German post office.

As well as requirements for a certain period of experience gained in the host Member State, residence requirements could also constitute indirect discrimination, since these requirements will similarly be met more easily by nationals of the Member State in question than by non-nationals. Case C-138/02 *Collins* [2004] ECR I-2703 is an illustration of this. English law required a person to be habitually resident in the UK in order to be able to claim a jobseekers' allowance. The Court of Justice held that this requirement was more easily met by the State's own nationals and could therefore be indirectly discriminatory as it placed at a disadvantage Member State nationals who had exercised their right of free movement in order to seek employment in another Member State. In *Collins*, however, the English rule could be justified.

> *Cross-Reference*
>
> See 11.2.2.5 for a full discussion of *Collins*.

Other examples of measures that could be indirectly discriminatory to non-nationals of a Member State in terms of eligibility for employment are language requirements. Non-nationals of a Member State will obviously be affected by such requirements more onerously since they are less likely to speak the languages required for employment in that Member State. Article 3(1) of Regulation 492/2011, however, expressly

provides that such requirements are allowed for eligibility for employment. In particular, it provides that the principle of non-discrimination does not apply to 'conditions relating to the linguistic knowledge required by reason of the nature of the post to be filled'.

This provision was applied in Case 379/87 *Groener* [1989] ECR 3967. Mrs Groener, a Dutch national, was engaged on a temporary basis as a part-time art teacher at the College of Marketing and Design in Dublin. She applied for a permanent full-time position as a lecturer in art in that college, a position for which she was required to obtain a certificate of proficiency in the Irish language. After her unsuccessful application for an exemption, she completed a four-week beginner's course, following which she took an examination to assess her knowledge of the Irish language, which she failed. Since this prohibited her from taking up the full-time employment as an art lecturer, she started proceedings alleging that the language requirements for the job infringed the principle of non-discrimination in Article 45 TFEU and Regulation 492/2011.

The Court of Justice observed that the teaching of art at the College was conducted essentially or almost exclusively in English. Knowledge of the Irish language was therefore not required for the performance of those teaching duties. The imposition of the language requirement could, however, be justified under Article 45 TFEU and Article 3(1) of Regulation 492/2011 in the context of the policy followed by the Irish government for many years of aiming to maintain and promote the use of Irish as a means of expressing national identity and culture. Since education was crucial for the implementation of such a policy, it was not unreasonable to require teachers to have knowledge of the Irish language, provided that the level of knowledge required was not disproportionate in relation to the objective pursued. The Court emphasized, however, that the principle of non-discrimination prevented the imposition of any requirement that the linguistic knowledge must have been acquired within the national territory.

p. 509 ↵ This last point was also addressed in Case C-281/98 *Angonese* [2000] ECR I-4139, a case that concerned a requirement for a certificate of bilingualism that could be obtained only in the province of Bolzano, Italy. The Court held that, even though the requirement to have a certain level of linguistic ability could be legitimate and the possession of a certificate could constitute a criterion to assess such ability, the fact that it was impossible to prove the required linguistic knowledge by any other means—in particular, by equivalent qualifications obtained in other Member States—was disproportionate in relation to the aim pursued.

Cross-Reference

The case of *Angonese* is discussed in more detail at section 11.2.1.

Obstacles to access the employment market

Some national measures impede the freedom of movement of workers without being either directly or indirectly discriminatory based on nationality. It is apparent from the Court of Justice's case law that such measures can also breach Article 45 TFEU and Regulation 492/2011. In particular, they will be prohibited when they substantially obstruct access to the market. The issue first arose in Case C-415/93 *Bosman* [1995] ECR I-1921, in which the transfer system applied in professional football was in question.

Mr Bosman was a professional footballer of Belgian nationality who was employed by a Belgian first-division club. A few months before his contract was due to expire, his club offered him a new contract for one season, which drastically reduced his salary. Mr Bosman refused to sign and was put on the transfer list. Since no club showed any interest in a transfer, Mr Bosman contacted a French club in the second division, which led to him being hired. A contract was also made between the Belgian club and the French club for the temporary transfer of Mr Bosman for one year, against payment by the French club of a compensation fee. Both the contract between Mr Bosman and the French club and the contract between the Belgian club and the French club were subject to the condition that a transfer certificate must be sent in time for the first match of the season. The compensation fee was also payable at the time that the transfer certificate was received by the proper authorities. The Belgian club had doubts as to the French club's solvency and never requested the transfer certificate to be sent. Consequently, neither contract took effect. The Belgian club also suspended Mr Bosman and hence prevented him from playing for the entire season.

Cross-Reference

The *Bosman* case has been discussed already in relation to the direct effect of Article 45 TFEU (see 11.2.1) and direct discrimination regarding eligibility for employment earlier in this section.

The real question here was whether the transfer system developed by football associations breached Article 45 TFEU, since it required football clubs wanting to hire players to pay substantial amounts of money, in the form of compensation fees, to the clubs with which these players' contracts were about to expire. The Court of Justice therefore considered whether these transfer rules formed an obstacle to the freedom of movement for workers prohibited by Article 45 TFEU.

Case C-415/93 *Bosman* [1995] ECR I-1921

96. Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned.

p. 510

↵ [...]

98. It is true that the transfer rules in issue in the main proceedings apply also to transfers of players between clubs belonging to different national associations within the same Member State and that similar rules govern transfers between clubs belonging to the same national association.

99. However, as has been pointed out by Mr Bosman, by the Danish Government and by the Advocate General in points 209 and 210 of his Opinion, those rules are likely to restrict the freedom of movement of players who wish to pursue their activity in another Member State by preventing or deterring them from leaving the clubs to which they belong even after the expiry of their contracts of employment with those clubs.

100. Since they provide that a professional footballer may not pursue his activity with a new club established in another Member State unless it has paid his former club a transfer fee agreed upon between the two clubs or determined in accordance with the regulations of the sporting associations, the said rules constitute an obstacle to freedom of movement for workers.

101. As the national court has rightly pointed out, that finding is not affected by the fact that the transfer rules adopted by UEFA in 1990 stipulate that the business relationship between the two clubs is to exert no influence on the activity of the player, who is to be free to play for his new club. The new club must still pay the fee in issue, under pain of penalties which may include its being struck off for debt, which prevents it just as effectively from signing up a player from a club in another Member State without paying that fee.

[...]

103. It is sufficient to note that, although the rules in issue in the main proceedings apply also to transfers between clubs belonging to different national associations within the same Member State and are similar to those governing transfers between clubs belonging to the same national association, they still directly affect players' access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers.

104. Consequently, the transfer rules constitute an obstacle to freedom of movement for workers prohibited in principle by Article 48 of the [EC] Treaty [now Article 45 TFEU]. It could only be otherwise if those rules pursued a legitimate aim compatible

> with the Treaty and were justified by pressing reasons of public interest. But even if that were so, application of those rules would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose.

The ***Bosman* principle** has been applied in several subsequent cases. In Case C-18/95 *Terhoeve* [1999] ECR I-345, a Dutch national lived and worked in the UK for a time after being sent there by his Dutch employer. Because of this, he was required by Dutch law to pay more social contributions than if he had not worked in the UK. Dutch law could not be said to discriminate either directly or indirectly based on nationality since Mr Terhoeve was Dutch. The Court held, however, that provisions that precluded or deterred a national of a
p. 511 Member State from ↵ leaving their country of origin in order to exercise their right to freedom of movement constituted an obstacle to that freedom even if they applied without regard to the nationality of the worker concerned.

Bosman principle

Provisions that impede access to the employment market for workers are prohibited under Article 45 TFEU, even if they do not either directly or indirectly discriminate based on nationality. They may, however, be justified by reasons of public interest provided that they are proportionate.

In Case C-464/02 *Commission v Denmark* [2005] ECR I-7929, Danish law required that a company car made available to an employee resident in Denmark by an employer established in another Member State be registered in Denmark. It was held that such a rule could impede access for employees resident in Denmark to employers in other Member States because the cost of registration of the vehicle, borne by the employer, made an employee resident in Denmark more expensive than an employee not resident there. The rule therefore infringed Article 45 TFEU.

In the light of this case law in which the so-called *Bosman* principle was applied, it can be questioned whether there are any boundaries to Article 45 TFEU, but in Case C-190/98 *Graf* [2000] ECR I-493 it was established that there are. Mr Graf was a German national who worked for an Austrian company but terminated his contract of employment in order to go and work in Germany. He was denied entitlement to compensation on termination of employment under Austrian law and claimed that such denial was precluded by Article 45 TFEU. The Court of Justice disagreed. The legislation in question granted entitlement to compensation on termination of employment to a worker whose contract ended without the termination being at their own initiative or attributable to themselves, but denied it to a worker who terminated their contract of employment themselves in order to take up employment with a new employer (whether in that Member State or in another Member State). Such legislation thus applied irrespective of the nationality of the worker. The Court then reiterated the *Bosman* principle, stating that provisions that, even if they applied without distinction, precluded or deterred a national of a Member State from leaving their country of origin in order to exercise their right to freedom of movement constitute an obstacle to that freedom. However, in order to be capable of constituting such an obstacle, such provisions must affect the access of workers to the labour market. The national provisions in

Graf made entitlement to compensation dependent not on the choice of the worker whether or not to stay with their current employer, but on a future and hypothetical event—namely, the subsequent termination of the worker's contract without such termination being at their own initiative or attributable to themselves. Such an event was too uncertain and indirect a possibility for legislation to be capable of being regarded as liable to hinder the freedom of movement for workers.

The public service exception

Article 45(4) TFEU reads: 'The provisions of this Article shall not apply to employment in the public service.' This provision is inspired by the fact that the public service is part of the exercise of a State's sovereignty and so States wish to retain the ability to discriminate in favour of their own nationals in selecting the people who work in the public service. The extent to which this is allowed and the way in which Article 45(4) TFEU is applied becomes clear from the case law of the Court of Justice.

In Case 152/73 *Sotgiu* [1974] ECR 153, it was made clear that it was for the Court of Justice and not the Member States to define the scope of the exception. The Court emphasized that because of the fundamental nature of
p. 512 the principles of freedom of movement and equality ↵ of treatment of workers within the EU, the exceptions made by Article 45(4) TFEU must be read bearing in mind the aim in view of which this derogation was included. Although the derogation allows Member States to protect certain interests by allowing them to restrict the admission of foreign nationals to certain activities in the public service, it could not justify discriminatory measures against workers once they had been admitted to the public service. Furthermore, the exception concerns access to all posts forming part of the public services, and the nature of the legal relationship between the employee and the employing administration was of no consequence. It was therefore irrelevant to the application of Article 45(4) whether a worker was engaged as a workman, a clerk or an official, or even whether the terms on which they were employed came under public or private law.

Thinking Point

> Why do you think the legal relationship between the employee and the employing administration is irrelevant? Does it not seem relevant whether the person concerned was hired as a workman, a clerk or an official and whether the terms of their employment were governed by public or private law when determining whether their post forms part of the public services?

The question of whether an employee is hired as a workman, a clerk or an official and whether the terms of their employment are governed by public or private law when determining whether their post forms part of the public services may be relevant. However, it is for the Court of Justice to define the scope of Article 45(4) TFEU. The legal designations mentioned can be varied at the whim of national legislatures and, as such, the Member States would be able to determine the scope of the public service exception effectively. Therefore the legal relationship between the employee and the employing administration cannot provide an appropriate criterion for interpreting what constitutes 'public service'.

As already mentioned, not all posts in the public service fall within the scope of Article 45(4) TFEU. In Case 149/79 *Commission v Belgium No 1* [1980] ECR 3881, the Commission brought an action under Article 258 TFEU alleging that the requirement of Belgian nationality as a condition of recruitment for certain posts constituted an infringement of Article 45(4) TFEU. In particular, the Commission referred to vacancies among Belgian public undertakings and local authorities looking to fill posts for trainee train drivers, loaders, plate-layers, shunters, and signallers with the national railways, unskilled workers with the local railways, posts for hospital nurses, children's nurses, night-watchmen, plumbers, carpenters, electricians, garden hands, architects, and supervisors.

The Court noted that Article 45(4) TFEU removed from the range of Article 45(1)–(3) TFEU a series of posts that involve, first, direct or indirect participation in the exercise of powers conferred by public law and, second, duties designed to safeguard the general interests of the State or of other public authorities. Such posts in fact presumed, on the part of those occupying them, the existence of a special relationship of allegiance to the State and the reciprocity of rights and duties that form the foundation of the bond of nationality.

The Court did not consider itself in a position to rule on whether Belgium had infringed Article 45(4) TFEU, so
p. 513 it asked the Commission and Belgium to re-examine the issue in the ↵ light of its considerations and to report to the Court. In doing so, the Commission and Belgium reached a solution as to the posts of technical office supervisor, principal supervisor, works supervisor, stock controller, night-watchman, and architect with the municipality of Brussels. They agreed that these fell within the scope of Article 45(4) TFEU. The Court therefore had to make a decision regarding the other posts in question on which the Commission and Belgium had failed to reach an agreement. It did so two years later, in Case 149/79 *Commission v Belgium No 2* [1982] ECR 1845, holding that none of the other posts in question constituted employment in the public service.

This decision seems to suggest that only a limited number of positions will fall within the scope of Article 45(4) TFEU and that these will be mainly supervisory or managerial positions. Indeed, it is not easy to satisfy both conditions laid out by the Court for the public service exception to apply, which are that the position involves participation in the exercise of power conferred by public law *and* the safeguarding of the general interests of the State. This was also apparent in Case 225/85 *Commission v Italy* [1985] ECR 2625, in which it was held by the Court of Justice that research posts at the national research centre of a Member State do not constitute employment in the public service within the meaning of Article 45(4) TFEU. It was held that simply referring to the general tasks of the national research centre and listing the duties of all of its researchers is not sufficient to establish that the researchers are responsible for exercising powers conferred by public law or for safeguarding the general interests of the State. Only the duties of management or of advising the State on scientific and technical questions could be described as employment in the public service within the meaning of Article 45(4) TFEU.

In the absence of secondary legislation on Article 45(4) TFEU, the Court of Justice's case law clarifies the scope of the derogation from the general prohibition of discrimination based on nationality. As is clear from the case law discussed, the Court adheres to a functional approach, making an assessment case by case with regard to the nature of the tasks and responsibilities covered by the post in question. As such, it must be noted that an individual's position may change over time; it is possible for a worker to have equal access to a certain position

as a non-national because it is not covered under Article 45(4) TFEU, but that later, when they are aiming for promotion, the new position may fall under the public service exception, so that they may not have equal access to that position.

Review Question

> Bearing in mind the criteria developed by the Court of Justice to determine whether a position is covered by the public service employment exception, do you think the position of trainee teacher qualifies as employment in the public service? And what about the position of a nurse in a public hospital? Or of a foreign-language assistant at a university?
>
> *Answer*: In Case 66/85 *Lawrie-Blum* [1986] ECR 2121, it was decided that the position of trainee teacher is not covered by Article 45(4) TFEU. In Case 307/84 *Commission v France* [1986] ECR 1725, it was decided that working as a nurse in a public hospital does not constitute employment in public service. And neither does working as a foreign-language assistant at a university, as was decided in Case 225/85 *Allué and Coonan* [1987] ECR 2625.

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Working conditions

Under Article 45 TFEU, equal treatment must be provided not only regarding access to employment, but also during the exercise of the employment. This means that discrimination based on nationality is prohibited as regards eligibility for employment, as well as the terms and conditions of employment. The former prohibition was discussed earlier in this section. The latter prohibition will be discussed here.

Article 7(1) of Regulation 492/2011, which reiterates Article 45 TFEU, states as follows.

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, OJ 2011 L141/1

Article 7(1)

> [A] worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.

There are few examples of case law regarding legislation that directly discriminates based on nationality. One can be found, however, in Case 44/72 *Marsmann* [1972] ECR 1243. Mr Marsmann was a Dutch national, resident in the Netherlands and employed in Germany. He suffered an industrial accident in Germany, resulting in a loss of earning capacity of more than 50 per cent. Under German law, workers enjoyed special protection against dismissal under such circumstances. Although this protection applied to Germans resident outside Germany, it did not apply to non-nationals resident in another Member State. It was held by the Court of Justice that this rule was discriminatory, and therefore prohibited, because the requirement of residence in Germany in order to enjoy the special protection against dismissal in the case of severe work-related injury applied only to non-nationals and not to nationals.

A substantial percentage of the cases regarding discrimination as to terms and conditions of employment involve indirectly discriminatory measures. A prime example can be found in Case 15/69 *Ugliola* [1969] ECR 363, which concerned the period of service in a Member State taken into account when calculating pay or other advantages. An Italian national employed in Germany asked for his period of military service in Italy to be taken into account in calculating his seniority with his German employer. German law provided that service in the German army was to be taken into account for such calculation, but was silent on whether service in the army of another Member State could also be taken into account. There was no direct discrimination here, since service in the German army by a non-national was to be taken into account and service of a German national in the army of another Member State was not to be taken into account. However,
p. 515 the Court held that this rule constituted prohibited indirect ↵ discrimination since it contained a criterion that, although theoretically applicable to both nationals and non-nationals, would in practice be fulfilled only by nationals.

Another example of measures that could lead to indirect discrimination is those containing residence requirements. As already explained, while discrimination based on nationality is, under certain conditions, allowed in terms of access to employment, it is not permissible once a non-national has been admitted to the public service. In Case 152/73 *Sotgiu* [1974] ECR 153, the question of discrimination arose regarding the payment of a so-called separation allowance, which was granted to workers allocated to posts away from their place of residence. Mr Sotgiu was an Italian national who worked for the German post office and was thus entitled to a separation allowance. German workers working away from home received the same allowance. At a certain point in time, however, the separation allowance was increased for those workers living in Germany at the time of recruitment, but not for those living in another Member State at the time of recruitment. Although this rule applied to Germans and non-Germans alike, it clearly affected non-Germans more, since they were less likely to have been resident in Germany at the time of recruitment.

Social and tax advantages

Following Article 7(2) of Regulation 492/2011, a worker who is a national of a Member State shall enjoy, in the territory of another Member State, the same social and tax advantages as national workers.

Social advantages

A definition of 'social advantages' in the context of Regulation 492/2011 can be found in the case law of the Court of Justice, which has defined the concept broadly. In particular, social advantages are not only those that national law confers on workers as such. The case of Case 32/75 *Cristini v SNCF* [1975] ECR 1085 concerned an Italian widow with four children, whose husband, also an Italian, had worked in France and died there in an industrial accident. Mrs Cristini requested a discount card that the French railways, SNCF, offered to large families. This was refused, based on her nationality, since French law provided that the discount card was reserved for French nationals and foreigners whose country of origin had entered into a reciprocal treaty with France. This was not the case for Italy. The question then arose whether such a discount card was a social advantage, in the sense of Article 7(2) of Regulation 492/2011, since it was not connected with the contract of employment itself. The Court of Justice observed that, although certain provisions in the Article refer to relationships deriving from the contract of employment, there are others, such as those concerning reinstatement and re-employment should a worker become unemployed, which have nothing to do with such relationships and which even imply the termination of a previous employment. In these circumstances, the concept of 'social advantages' cannot be interpreted restrictively. In the view of equality of treatment, which Article 7(2) seeks to achieve, the substantive area must be delineated so as to include all social and tax advantages, whether or not attached to the contract of employment, such as reduction in fares for large families.

In Case 207/78 *Even* [1979] ECR 2019, the Court defined social advantages as follows.

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Case 207/78 *Even* [1979] ECR 2019, 2020

> ... all those which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the Community [now Union].

The concept of 'social advantage' encompasses benefits granted by virtue of a right, but also benefits granted on a discretionary basis. In Case 65/81 *Reina v Landeskreditbank Baden-Württemberg* [1982] ECR 33, an Italian couple working in Germany applied for the grant of an interest-free childbirth loan on the birth of twins. Their application was rejected because the law required at least one of the spouses to be a German national. The Landeskreditbank, a credit institution incorporated under public law, argued that a childbirth loan was not a social advantage because it was granted mainly for reasons of demographic policy, assisting low-income families to stimulate the birth rate of the German population. As such, it was a measure adopted in the area of political rights, linked to nationality. Furthermore, it argued that the refusal to grant the loan in no way hindered the mobility of workers, and that the loan constituted a voluntary benefit and not one to which persons were entitled by virtue of a right. The Court of Justice acknowledged that the loans may be granted for reasons of demographic policy, but held that that did not mean that they could not be classed as social

advantages. In particular, the Court viewed the interest-free childbirth loans as measures to alleviate the financial burden resulting from the birth of a child for low-income families and so the concept of 'social advantage' encompasses not only the benefits accorded by virtue of a right, but also those granted on a discretionary basis.

In Case C-237/94 *O'Flynn v Adjudication Officer* [1996] ECR I-2617, it was decided that social benefits to cover the costs of funeral expenses of family members were a social advantage within the meaning of Article 7(2) of Regulation 492/2011. In Case 59/85 *Reed* [1986] ECR 1283, it was held that the ability of a migrant worker to obtain permission for his unmarried companion to reside with him could assist his integration in the host Member State and thus contribute to the achievement of freedom of movement for workers. As a consequence, that possibility was a social advantage for the purposes of Article 7(2) of Regulation 492/2011. It must also be noted that this possibility has now been codified in the Citizenship Directive (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 ..., OJ 2004 L158/77).

Cross-Reference

For an in-depth discussion of the Citizenship Directive, see 11.1 on EU citizenship.

By contrast, in Case C-566/15 *Konrad Erzberger v TUI AG* EU:C:2017:562, German legislation preventing workers employed by a subsidiary of the TUI group located in a Member State other than Germany from participating in the composition of the TUI supervisory board was considered under the equal treatment provisions of Article 45 TFEU. Further, consideration was given to the fact that if a worker were a member of the TUI supervisory board and were to wish to exercise free movement rights by moving to a Member State other than
p. 517 Germany, ↵ that worker would lose membership of the supervisory board. Mr Erzberger argued that such legislation would prevent workers from exercising their free movement rights. However, the Court disagreed and held that Article 45 TFEU did not preclude such legislation.

Case C-566/15 *Konrad Erzberger v TUI AG* EU:C:2017:562

> 33. According to the Court's settled case-law, all the provisions of the Treaty on freedom of movement for persons are intended to facilitate the pursuit by Union nationals of occupational activities of all kinds throughout the EU, and preclude measures which might place Union nationals at a disadvantage when they wish to pursue an activity in the territory of a Member State other than their Member State of origin. In that context, nationals of the Member States have in particular the right, which they derive directly from the Treaty, to leave their Member State of origin to enter the territory of another Member State and reside there in order to pursue an activity there. As a result, Article 45 TFEU precludes any national measure which is capable of hindering or rendering less attractive the exercise by Union nationals of the fundamental freedoms guaranteed by that article (see, to that effect, judgments of 1 April 2008, *Government of the French Community and Walloon Government*, C-212/06, EU:C:2008:178, paragraphs 44 and 45, and of 10 March 2011, *Casteels*, C-379/09, EU:C:2011:131, paragraphs 21 and 22).
>
> 34. However, primary EU law cannot guarantee to a worker that moving to a Member State other than his Member State of origin will be neutral in terms of social security, since, given the disparities between the Member States' social security schemes and legislation, such a move may be more or less advantageous for the person concerned in that regard (see, by analogy, judgments of 26 April 2007, *Alevizos*, C-392/05, EU:C:2007:251, paragraph 76 and the case-law cited, and of 13 July 2016, *Pöpperl*, C-187/15, EU:C:2016:550, paragraph 24).

From the case law discussed, it is clear that the CJEU has defined the concept of 'social advantages' broadly. Where it has linked social advantages to the facilitation of mobility in *Even*, it has classed certain measures as social advantages even though it is difficult to see how or whether they in fact facilitate mobility of workers. Often, it is easier to see how they facilitate the integration of the worker in the host State, which was the criterion put forward in *Reed*.

Furthermore, the Court of Justice has decided that certain financial advantages, such as a jobseekers' allowance, are also social advantages. The issue has already been touched upon in relation to the definition of a 'worker'. In its earlier case law, the Court had decided that jobseekers did not enjoy the right to equal treatment in respect of social and tax advantages; their right to equal treatment was limited to eligibility for employment or access to the labour market. The case of Case C-138/02 *Collins* [2004] ECR I-2703, however, changed this position. An Irish national moved to the UK and applied for a jobseekers' allowance one week after arriving. It was held by the Court that, in view of the establishment of EU citizenship and the right to equal treatment enjoyed by citizens, it was no longer possible to exclude from the scope of Article 45(2) TFEU a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.

p. 518 ↵ This decision seemed peculiar. The Court said that the right to equal treatment is limited to access to the labour market and does not include equal treatment in respect of social advantages. Following this, and in the light of the introduction of the notion of EU citizenship, there must also be equal treatment regarding benefits of a financial nature facilitating access to employment. This decision seems to allow for so-called welfare tourism, which means that citizens could use their free movement rights to move to whichever Member State has the most advantageous welfare system. In order to try to remedy this, the Court emphasized that it is legitimate for the Member States to seek to ensure that there is a genuine link between an applicant for an allowance in the nature of a social advantage, within the meaning of Article 7(2) of Regulation 492/2011, and the geographic employment market in question. Such a link may be determined when a jobseeker has in fact genuinely sought work in the Member State in question. A residence requirement, which is usually indirectly discriminatory, can be appropriate to ensure this.

Although not all jobseekers will be entitled to benefits facilitating their access to employment, because there is a requirement of a link between the jobseeker and the employment market of the host State, it was still difficult to reconcile this case law with the Citizenship Directive, which provides in its Article 24(2) that the host Member State is not obliged to confer entitlement to social assistance during the first three months of residence or during a longer period for jobseekers.

The Court of Justice addressed these apparent inconsistencies in Joined Cases C-22 & 23/08 *Vatsouras and another v Arbeitsgemeinschaft (ARGE) Nurnberg 900* [2009] ECR I-4585. The Court decided that '[b]enefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting "social assistance" within the meaning of Article 24(2) of Directive 2004/38' (*Vatsouras*, at para 45).

It is clear that the Court of Justice has stretched the application of Article 7(2) of Regulation 492/2011 to secure the free movement of workers. That does not mean, however, that there are no limits to the scope of this provision and the rights that can be claimed under it. In Case 207/78 *Even* [1979] ECR 2019, a French national receiving an early retirement pension in Belgium complained that he did not receive the increased rate given to Belgian nationals who served in the allied forces during the Second World War and suffered injury in service. The Court observed that the main reason for a benefit such as the increased early retirement pension rate was the service that those in receipt of the benefit had rendered in wartime to their own country and that its essential objective was to give those nationals an advantage by reason of the hardships suffered for their country. Such a benefit, which is based on a scheme of national recognition, cannot therefore be considered an advantage granted to a national worker by reason primarily of their status of worker or resident on the national territory and, for that reason, does not fulfil the essential characteristics of the 'social advantages' referred to in Article 7(2) of Regulation 492/2011.

In Case C-43/99 *Leclere* [2001] ECR I-4265, a Belgian couple were denied maternity, childbirth, and child-raising allowances in Luxembourg because they did not reside there. Mr Leclere had worked in Luxembourg and received an invalidity pension paid by the Luxembourg social security scheme. The question therefore arose whether he was entitled to these allowances as social advantages under Article 7(2) of Regulation
p. 519 492/2011. The Court held that, once the ↵ employment relationship had ended, the person concerned lost his status as a worker. This status could, however, produce certain effects after the relationship had ended. Mr Leclere was therefore entitled to the advantages linked to his former employment, such as his invalidity

pension, without discrimination and so without any residence requirement. However, since he was no longer a worker, he was not entitled to any new rights that did not derive from his previous professional activity, such as the childbirth allowances.

Tax advantages

Article 7(2) of Regulation 492/2011 states that a worker who is a national of a Member State shall enjoy, in the territory of another Member State, not only the same social advantages, but also the same tax advantages as national workers. Taxes, and therefore also tax advantages, are inherently territorial and fall within the competence of the Member States. This competence, however, must be exercised consistently with EU law. Because taxes are inherently territorial, most of the case law in this area concerns situations in which residents are treated differently from non-residents. A residence requirement will usually be indirectly discriminatory and therefore prohibited. Concerning taxation, however, this is not necessarily the case because residents and non-residents may be in non-comparable situations.

In Case C-279/93 *Schumacker* [1995] ECR I-225, a Belgian national, who worked in Germany and was taxed there as an employee, wanted to enjoy a tax advantage available for married persons. He was denied the advantage because he and his wife and children lived in Belgium. The Court of Justice noted that although tax benefits granted only to residents of a Member State could constitute indirect discrimination by reason of nationality, discrimination could arise only through the application of different rules to comparable situations or the application of the same rule to different situations. However, in relation to direct taxes, the situations of residents and non-residents were not, as a rule, comparable. Income received in the territory of a Member State by a non-resident was, in most cases, only part of that individual's total income, which was concentrated at their place of residence. Moreover, a non-resident's personal ability to pay tax, determined by reference to their aggregate income and their personal and family circumstances, was easier to assess at the place where their personal and financial interests were centred. In general, that was the place where the person resided. The situation of a resident was different insofar as the major part of their income was normally concentrated in the State of residence. Moreover, that State generally had available all of the information needed to assess the taxpayer's overall ability to pay tax, taking account of their personal and family circumstances. Consequently, the fact that a Member State did not grant to a non-resident certain tax benefits that it granted to a resident was not, as a rule, discriminatory, since those two categories of taxpayer were not in a comparable situation.

In the case of Mr Schumacker, however, the position was different because he did not receive significant income in the State of his residence—indeed, he had obtained the major part of his taxable income from an activity performed in the State of employment—with the result that the State of his residence was not in a position to grant him the benefits resulting from taking into account his personal and family circumstances. There was no objective difference between the situations of such a non-resident and a resident engaged in comparable employment such as to justify different treatment.

p. 520 ↵ Another example of a tax advantage is the possibility of deducting from income tax the negative income relating to a house used as a dwelling. In Case C-527/06 *Renneberg v Staatssecretaris van Financiën* [2008] ECR I-7735, a Dutch national applied for such a deduction, but was unsuccessful because his house was located in Belgium. The Court observed that the relevant Dutch legislation treated non-resident taxpayers less advantageously than resident taxpayers. Because Mr Renneberg derived most of his taxable income from

salaried employment in another Member State and he had no significant income in his Member State of residence, he was, for the purposes of taking into account his ability to pay tax, in a situation objectively comparable, with regard to his Member State of employment, to that of a resident of that Member State who was also in salaried employment there. Since there was no objective difference between the situation of a resident and a non-resident, the Dutch legislation was held to be discriminatory.

A discriminatory tax rule can be justified, for example, by reasons of effectiveness of fiscal supervision, as follows from *Schumacker*. There is little case law, however, where Member States have successfully relied on this justification. Another example of a justification for a discriminatory tax rule is the need to preserve the cohesion of the tax system. Again, however, this defence has often failed, mostly because there was no direct link between the discriminatory tax rule and the compensating tax advantage. An example of a situation in which a link did exist can be found in Case C-204/90 *Bachmann* [1992] ECR I-249. Belgian law gave individuals a choice regarding the cost of invalidity insurance and pension and life assurance premiums. They could choose to deduct the contributions from their taxable income and pay tax on the future benefits, or not to deduct them from their income and not pay tax on the future benefits. The contributions could not be deducted from taxable income earned in Belgium if they were paid in other Member States. The Court of Justice held that the Belgian rules were justified, even though they were discriminatory, because there was a connection between the deductibility of contributions and the liability to tax of sums payable under the insurance and assurance contracts.

11.3 Derogations to the free movement of persons

Article 45(3) TFEU expressly makes the rights following from the freedom of movement for workers subject to limitations justified on grounds of public policy, public security, or public health. Article 21 TFEU on the right of EU citizens to reside and move freely does not contain such an express derogation, although it states that this right is subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. Read in conjunction with Chapter VI of the Citizenship Directive (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 ..., OJ 2004 L158/77), which is headed 'Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health', it becomes clear that these derogations or limitations apply to the rights of all EU citizens and their family members, economically active or not.

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Thinking Point

> With consideration to all of the issues covered so far in this chapter, can you think of further circumstances that in essence amount to derogations to the free movement of persons? In particular, reflect upon the provisions concerning linguistic requirements in 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, OJ 2011 L141/1, and public service posts in Article 45(4) TFEU.

11.3.1 Public policy and public security

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 ..., OJ 2004 L158/77

Article 27

> 1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.
> 2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned.
>
>   Previous criminal convictions shall not in themselves constitute grounds for taking such measures.
>
>   The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

Article 27 of the Citizenship Directive allows Member States to restrict the free movement rights of EU citizens and their families based on reasons of public policy, public security, and public health. Measures taken on grounds of public health are the subject of the next section (see 11.3.2). It is important to note here, in regards to measures taken on any of these grounds, however, that they will be scrutinized by the Court of

Justice. Because the freedom of movement of persons is such a key freedom in the internal market, the Court of Justice has interpreted the limitations strictly. Any measure by a Member State limiting free movement
p. 522 rights ↵ without strict compliance with the requirements laid down in the Citizenship Directive will be contrary to EU law. It is also important to note here that such measures may not be taken for economic reasons (Article 27(1) *in fine*).

Measures taken on grounds of public policy or public security must be based exclusively on the personal conduct of the individual concerned, and this conduct must represent a genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society.

11.3.1.1 Personal conduct of the individual concerned

EU law does not impose a uniform scale of values as regards the assessment of conduct that may be considered as contrary to public policy. Therefore case law illustrates how this provision is to be applied. A clear requirement is that the conduct concerned must be the personal conduct of the individual. In Case 41/74 *Van Duyn* [1974] ECR 1337, a Dutch national who wanted to work as a secretary for the Church of Scientology was refused entry into the UK because the authorities considered that organization's activities to be socially harmful. She argued that the public policy ground could not be invoked by the UK because her membership of the Church of Scientology did not constitute personal conduct. Although membership of the organization was not prohibited in the UK, the Court of Justice pointed out that the personal conduct concerned did not need to be unlawful before a Member State could rely on the public policy exception. The Court also held that a person's present association with an organization could constitute personal conduct because it reflects participation in the activities of the organization, as well as identification with its aims and design. In general, however, a person's past association with an organization cannot justify a decision refusing them the right to move freely within the EU.

> *Cross-Reference*
>
> On *Van Duyn*, see also 4.1.1.4.

Case law has also made it clear that legislation requiring automatic expulsion cannot be justified on grounds of public policy and public security. This principle is now protected by Article 33 of the Citizenship Directive.

> *Cross-Reference*
>
> See 11.3.3 regarding procedural safeguards in the case of expulsion.

This issue arose in Case C-348/96 *Calfa* [1999] ECR I-11. Ms Calfa, an Italian national, was charged with possession and use of prohibited drugs while on holiday in Greece. She was sentenced by the Greek court to three months' imprisonment and ordered to be expelled for life from Greek territory—an automatic expulsion prescribed by Greek law. The Court of Justice explained that Member States can, on public policy grounds,

adopt measures against nationals of other Member States that they cannot adopt against their own nationals. It decided, however, that an automatic expulsion for life following a criminal conviction, as provided for by Greek legislation, was not permitted under EU law owing to its failure to take into account the personal conduct of the person concerned. Therefore the personal conduct of the convicted person had to be taken into account—in particular, whether that conduct created a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

Similar issues arose in Joined Cases C-482 & 493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257. Orfanopoulos, a Greek national, and Oliveri, an Italian national, both suffered from drug addiction and were convicted of several offences in Germany, where they lived. Eventually they were both expelled, as provided under German law for aliens convicted of certain offences and/or sentenced to certain sentences. The Court of Justice held
p. 523 that ↵ such automatic expulsion was contrary to EU law, as regard must be had to the personal conduct of the offender and the danger that the person represents for the requirements of public policy.

11.3.1.2 A genuine, present, and sufficiently serious threat

Orfanopoulos and Oliveri also made it clear that the personal conduct of the person concerned must represent a *present* threat to the requirements of public policy. Mr Oliveri had argued that he had become more mature because of the difficult life he had led in prison and that he no longer posed a risk of reoffending. German law did not allow this argument to be taken into account by the authorities reviewing the original expulsion decision. The Court of Justice held that, in general, the threat to public policy and security must exist at the time of the expulsion order. However, a national practice whereby the authorities reviewing the lawfulness of the original expulsion order are prevented from taking into account factors that have arisen after the order and which indicate a diminution of the present threat to public policy and security of the person involved is contrary to EU law because the limitations to free movement rights must be interpreted and applied strictly. Such practice is all the more problematic if a long time has elapsed between the original expulsion order and the review of that original decision.

It has also been held by the Court of Justice that personal conduct may not be considered *sufficiently serious* where the host Member State does not adopt repressive measures or other genuine and effective measures intended to combat such conduct on the part of its own nationals. Joined Cases 115 & 116/81 *Adoui and Cornuaille* [1982] ECR 1665 concerned two French prostitutes who were refused a Belgian residence permit on the ground that their conduct was contrary to public policy. Although Belgian law prohibited certain activities incidental to prostitution, such as the exploitation of prostitution by third parties and incitement to debauchery, prostitution as such was not prohibited. Therefore the prostitutes' conduct was not sufficiently serious to refuse them a right of residence on grounds of public policy.

11.3.1.3 General preventative measures

Article 27(2) of the Citizenship Directive specifies that 'justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted'. In other words, restrictions on the freedom of movement and residence of EU citizens, imposed by Member States, cannot be justified by considerations of general prevention. In Case 67/74 *Bonsignore* [1975] ECR 297, an Italian worker who lived in

Germany was convicted for unlawful possession of a firearm and found guilty of accidentally causing his brother's death by his careless handling of the firearm. He was fined for unlawful possession of the firearm and an order for his deportation was subsequently issued. The German court considered that the only possible justification for the deportation would be reasons of a general preventive nature, based on the deterrent effect that the deportation of an alien, found in illegal possession of a firearm, would have in immigrant circles, having regard to the resurgence of violence in large urban areas. The Court of Justice emphasized that
p. 524 derogations from the rules concerning the ↵ free movement of persons constitute exceptions that must be strictly construed. The concept of 'personal conduct' required that a deportation order may be made only for breaches of the peace and public security that might be committed by the individual affected and not for general preventative reasons.

11.3.1.4 Previous criminal convictions

Article 27(2) of the Citizenship Directive specifies that previous criminal convictions do not in themselves constitute grounds for taking measures on grounds of public policy or security. In Case 34/77 *Bouchereau* [1977] ECR 1999, a French worker in the UK was convicted of illegal possession of drugs. Before ordering his deportation, the national court asked a preliminary ruling of the Court of Justice to ensure that such deportation would not constitute an infringement of EU law. It was held by the Court that a previous criminal conviction can be taken into account only insofar as the circumstances that give rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy. In general, a finding that such a threat exists implies a propensity of the individual concerned to act in the same way in the future. However, it is possible that past conduct alone may constitute such a threat to the requirements of public policy. The Court also emphasized that recourse by a national authority to the concept of public policy presupposes, in any event and in addition to the perturbation of the social order that any infringement of the law involves, the existence of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.

11.3.1.5 Proportionality

As with any limitation on an EU citizen's rights, the requirement of proportionality also applies here. This means that Member State measures restricting free movement rights must be proportionate to their aim. Therefore national authorities are not entitled to impose measures that are so disproportionate to the offence that they in effect constitute obstacles to the free movement of persons. An example of such disproportionality can be found in Case C-157/79 *R v Pieck* [1980] ECR-2171, in which expulsion was held to be a disproportionate penalty for non-compliance with administrative formalities.

Even for more serious crimes, it must be carefully monitored whether the measure imposed by the Member State is proportionate to the aim it is pursuing (i.e. the protection of public policy and public security). As such, in Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, in which the men had been convicted of drug-related offences and sentenced to imprisonment on a number of occasions, regard must still be had to the proportionality of expulsion as a penalty. In particular, the national authorities must take into account the seriousness of the offence(s), the length of residence in the host Member State, the time that has elapsed since the offences were committed, and the offender's family circumstances.

The requirement of proportionality is now laid down in Article 28 of the Citizenship Directive.

p. 525

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 …, OJ 2004 L158/77

Article 28

1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.
2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.
3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:
   (a) have resided in the host Member State for the previous ten years; or
   (b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

The host Member State thus has to take the personal circumstances of the EU citizen concerned into account before it can issue an expulsion order. Furthermore, once the EU citizen and their family members have acquired a right of permanent residence, an expulsion decision may be made only on *serious* grounds of public policy or public security. If the citizen concerned has resided in the host Member State for ten years or more, a decision of expulsion can be justified only on *imperative* grounds of public policy or public security.

Since the public policy and public security derogations are very strictly defined, these even stricter thresholds have made expulsion of an EU citizen after they have resided in the host Member State for more than five years extremely difficult.

Thinking Point

> Can you think of an example that would be so serious as to constitute a justification on either serious or imperative grounds of public policy or public security?

An example of a situation in which such a ground could be used to justify expulsion can be found in Case C-145/09 *Tsakouridis* [2010] ECR I-11979. In this case, it was held that the fight against crime in connection with dealing in narcotics as part of an organized group was capable of being covered by the concept of 'imperative grounds of public security', which may justify a measure expelling an EU citizen who has resided in the host Member State for the preceding ten years.

p. 526

11.3.1.6 Partial restrictions

Article 22 of the Citizenship Directive now clearly provides as follows.

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 ..., OJ 2004 L158/77

Article 22

> The right of residence and the right of permanent residence shall cover the whole territory of the host Member State. Member States may impose territorial restrictions on the right of residence and the right of permanent residence only where the same restrictions apply to their own nationals.

This provision thus answers the question 'may measures restricting free movement rights prohibit residence in certain regions of a Member State only?' It appears they may not, unless such restrictions apply to their own nationals as well. The relevant case law, which preceded the Directive, provides clarity as to the relevance of the question.

In Case 36/75 *Rutili v Ministre de l'Intérieur* [1975] ECR 1219, Mr Rutili, an Italian national, was an enthusiastic trade union activist, living in France. The French authorities prevented him from living in certain regions in France, on the basis that 'he was likely to disturb public policy' there. The Court of Justice held that prohibitions on residence for reasons of public policy may be imposed only in respect of the whole of the

national territory. Prohibitions on residence that were territorially limited—such as here, where the limitation was for certain regions only—were allowed only where they may be imposed on the Member State's own nationals as well.

This position is in line with the rule in Article 22 of the Citizenship Directive. It is therefore interesting to read what the Court of Justice decided in Case C-100/01 *Ministre de l'Intérieur v Olazabal* [2002] ECR I-10981. Mr Olazabal was a Spanish national of Basque origin who was sentenced to 18 months' imprisonment—of which eight were suspended—for conspiracy to disturb public order by intimidation or terror. Later, the French authorities prevented him from living near the Spanish frontier in the light of police reports that he still maintained relations with ETA. The Court of Justice, emphasizing that the requirement of proportionality must be borne in mind, made the following statement.

Case C-100/01 *Ministre de l'Intérieur v Olazabal* [2002] ECR I-10981

> 41. In situations where nationals of other Member States are liable to banishment or prohibition of residence, they are also capable of being subject to less severe measures consisting of partial restrictions on their right of residence, justified on grounds of public policy, without it being necessary that identical measures be capable of being applied by the Member State in question to its own nationals.

p. 527 ↵ This decision seems contrary to the current rule in Article 22 of the Citizenship Directive. The rule in the Directive should, of course, be considered the current position at law, but it will be interesting to see how the Court of Justice responds to its prior case law, read together with the Directive.

11.3.2 Public health

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 …, OJ 2004 L158/77

Article 29

> 1. The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation [*sic*] and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.
> 2. Diseases occurring after a three-month period from the date of arrival shall not constitute grounds for expulsion from the territory.
> 3. Where there are serious indications that it is necessary, Member States may, within three months of the date of arrival, require persons entitled to the right of residence to undergo, free of charge, a medical examination to certify that they are not suffering from any of the conditions referred to in paragraph 1. Such medical examinations may not be required as a matter of routine.

The restriction of freedom of movement of persons can be justified only in relation to diseases with epidemic potential. Furthermore, these diseases must be the subject of protection provisions applying to nationals of the host Member State. The derogation also applies only on first entry to a Member State or within three months of arrival. After that period, the public health derogation can no longer be relied upon to order expulsion. In that respect, this derogation is more limited than the public policy and public security derogation, which can be relied upon up to five years after the person's arrival in the host Member State. It is also exclusively within those first three months after arrival that the host Member State may require the person to undergo a (free) medical examination to ensure that they are not suffering from a disease with epidemic potential. Such a medical examination may be required only if there are serious indications that it is necessary and certainly not as a matter of routine.

11.3.3 Procedural safeguards in the case of expulsion

The Citizenship Directive provides a number of procedural safeguards for people who are refused rights of entry and residence.

p. 528 ↵ Article 30 of the Directive provides that they must be notified of such refusal in writing, in such a way that they are able to comprehend the content of the decision and the implications of the decision for them. In particular, they must be informed of the public policy, public security, or public health grounds on which the decision was based, unless this is contrary to the interests of State security. The notification must also contain details of the possibilities to appeal the decision and the time allowed for the person to leave the territory of the Member State in question. Unless there are exceptional circumstances of urgency, the time allowed to leave must be at least one month.

In Case C-184/16 *Ovidiu-Mihăiţă Petrea v Ypourgos Esoterikon kai Dioikitikis Anasygrotisis* EU:C:2017:684, a Romanian national was ordered to return to Romania from Greece on the grounds that he constituted a threat to public policy and security following a conviction for robbery. Mr Petrea claimed that he had not been notified of the relevant exclusion order in a language he understood. The Court considered this aspect, amongst others, clarifying the scope of the requirement that the person be notified of such refusal in writing, in such a way that they are able to comprehend the content of the decision and the implications of the decision for them.

Case C-184/16 *Ovidiu-Mihăiţă Petrea v Ypourgos Esoterikon kai Dioikitikis Anasygrotisis* EU:C:2017:684

> 68. Consequently, it must be considered that, by its fifth question, the referring court asks, in essence, whether Article 30 of Directive 2004/38 requires a decision adopted under Article 27(1) of that directive to be notified to the person concerned in a language he understands, although he did not bring an application to that effect.
>
> 69. It should, first of all, be noted that such a requirement does not derive from the wording of Article 30(1) of that directive, which provides, more generally, that the persons concerned are to be notified in writing of any decision taken under Article 27(1) 'in such a way that they are able to comprehend its content and the implications'.
>
> 70. Next, it follows from the preparatory works to Directive 2004/38, in particular from the proposal for a directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [COM(2001) 257 final], that Article 30(1) of Directive 2004/38 does not mean that the removal order is to be translated into the language of the person concerned, but requires by contrast that the Member States take the necessary measures to ensure that the latter understands the content and implications of that decision, in accordance with the Court's findings in the judgment of 18 May 1982, *Adoui and Cornuaille* (115/81 and 116/81, EU:C:1982:183, paragraph 13).
>
> 71. Finally, it should be noted, concerning return decisions adopted against third-country nationals, that Article 12(2) of Directive 2008/115 provides that the Member States are to provide, upon request, a written or oral translation of the main elements of decisions related to return, including information on the available legal remedies in a language the third-country national understands or may reasonably be presumed to understand.
>
> p. 529 72. In the light of above, the answer to the fifth question is that Article 30 of Directive 2004/38 requires the Member States to take every appropriate measure with a view to ensuring that the person concerned understands the content and implications of a decision adopted under Article 27(1) of that directive, but that it does not require that decision to be notified to him in a language he understands or which it is reasonable to presume he understands, although he did not bring an application to that effect.

According to Article 31 of the Citizenship Directive, the persons concerned must have access to judicial and, where appropriate, administrative procedures in the host Member State to appeal against or seek review of a decision taken against them. When the person concerned appeals the expulsion decision and, at the same time, applies for an interim order to suspend their expulsion, they cannot be removed from the territory of the

Member State until the decision on the interim order has been made, except under limited circumstances. The appeal procedures must allow for an examination of the legality of the expulsion decision and the facts of the case. They must also ensure that the decision is not disproportionate. Pending the appeal, the person concerned can be excluded from the territory of the host Member State, but this may not prevent them from submitting their defence in person, except if this would cause serious problems for public policy or public security, or when the appeal concerns a denial of entry to the host Member State.

Article 32 of the Directive provides for persons excluded on grounds of public policy or public security to submit an application for lifting the exclusion order after a reasonable period, depending on the circumstances, and in any event after three years from enforcement of the final exclusion order. The Member State concerned must reach a decision on this application within six months of the submission of the application.

It is important to note that a Member State cannot automatically expel an EU citizen from its territory for life. This issue arose in Case C-348/96 *Calfa* [1999] ECR I-11, in which Ms Calfa, an Italian national, was ordered by a Greek court to be expelled for life from Greek territory. The Court of Justice decided that an automatic expulsion for life following a criminal conviction, as provided for by Greek legislation, was not permitted under EU law. The personal conduct of the convicted person had to be taken into account—in particular, whether that conduct created a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

Cross-Reference

On *Calfa*, see 11.3.1.1.

11.4 Free movement of persons and Brexit

The transition period post Brexit, during which EU law continued to apply in the UK, including free movement of persons, ended on 31 December 2020. This means the UK is no longer participating in the internal market and free movement of persons no longer applies. That being said, agreements were made in relation to movement of persons between the UK and the EU. Some issues were covered in the Withdrawal Agreement and other rules replacing the internal market were agreed in the Trade and Cooperation Agreement (TCA).

Cross-Reference

For a detailed discussion of the Withdrawal Agreement and the Trade and Cooperation Agreement see Chapter 16.

p. 530 ↵ The Withdrawal Agreement sets out the rights of UK and EU citizens and their family members who exercised free movement rights from the UK to the EU or from the EU to the UK before the end of the transition period. There is a prohibition against discrimination and a right to equal treatment as well as residence rights and a right to permanent residence after five years. In order to formalise these residence rights of EU citizens in the UK, the UK has set up the EU settlement scheme. This allows EU citizens to apply for pre-settled status if they have lived in the UK for less than five years and settled status, equivalent to permanent residence, if they have lived in the UK for more than five years.

The TCA provides for social security coordination between the UK and the EU with a view to prevent discrimination and to secure equal treatment of UK citizens living in the EU and EU citizens living in the UK when it comes to social security benefits such as sickness benefits, maternity/paternity benefits, invalidity benefits, pensions and unemployment benefits.

The TCA also provides that UK and EU citizens enjoy visa-free travel to each other's territories for short-term visits (maximum 90 days per 180-day period).

Finally, it is worth noting that the TCA gives UK citizens a right to necessary medical treatment in the EU and vice versa. Practically speaking this means that UK citizens can continue to use their European Health Insurance Card (EHIC) or, if they did not apply for one before 1 January 2021, they can obtain a Global Health Insurance Card (GHIC) to receive necessary medical treatment in the EU. Generally speaking, therefore, free movement rights between the UK and EU no longer exist in the way they did before Brexit, but the UK and EU have agreed what could be considered limited free movement rights under the Withdrawal Agreement and the TCA.

Summary

- Free movement of workers (Article 45 TFEU):
  - A 'worker', for the purposes of European Union law is not defined within the Treaty or secondary legislation, but has been defined by case law to include performance of genuine and effective economic activity for remuneration and can include part-time working.
  - The Citizenship Directive, Directive 2004/38, provides more favourable rights to move and reside freely for workers than for the non-economically active.
  - A fundamental right to equal treatment exists, which includes the prohibition of direct and indirect discrimination and the prohibition of national measures that impede the free movement of workers (subject to justification).
  - An exception to the right to equal treatment of workers can be found within the public service exception of Article 45 TFEU.
- EU citizenship (Article 20 TFEU):
  - All EU citizens have the right to exit and enter a Member State and reside for a period up to three months unless they are an unreasonable burden on the social assistance system of the host Member State.

- EU citizens have a right of residence for more than three months (subject to conditions) if they are economically active/independent citizens or students.
- EU citizens acquire a right of permanent residence after five years' residence, with a more favourable regime existing for formerly economically active citizens.

p. 531

- EU citizens have a fundamental right to equal treatment (subject to exceptions regarding social advantages).
- EU citizens enjoy a number of other rights, which include diplomatic protection and the right of citizens' initiative.

- Derogations:
  - Derogations to free movement rights exist on the grounds of public policy, public security, and public health, with procedural safeguards in place.

Brexit

- The Withdrawal Agreement protects residence rights and equal treatment of UK and EU citizens who exercised their free movement rights before the end of the transition period.
- The TCA provides for social security coordination between the UK and the EU and visa-free travel for short stays.

Further Reading

Articles

J Lonbay, 'The Free Movement of Persons' (2004) 53(2) ICLQ 479

Critical discussion of developments in case law and legislation.

RCA White, 'Free Movement, Equal Treatment, and Citizenship of the Union' (2005) 54(4) ICLQ 885

Detailed discussion of EU citizens' right to free movement, with particular emphasis on the prohibition of discrimination.

Books

C Barnard, *The Substantive Law of the EU: The Four Freedoms*, 6th edn (Oxford: Oxford University Press, 2019), esp chs 6, 7, 9, and 10

Thorough analysis of relevant legislation and case law, with critical commentary, background, historical developments, and visual aids.

P Craig and G de Búrca, *EU Law: Text, Cases, and Materials*, 7th edn (Oxford: Oxford University Press, 2020), esp chs 22, 24, and 25

Focused and accessible account of relevant cases and materials.

F Goudappel, *The Effects of EU Citizenship: Economic, Social and Political Rights in a Time of Constitutional Change* (The Hague: Asser Press, 2010)

Overview of developments regarding EU citizenship.

E Guild, S Peers, and J Tomkin, *The EU Citizenship Directive: A Commentary* (Oxford: Oxford University Press, 2019)

Excellent, yet accessible, commentary on the Directive, with relevant case law.

N Foster, *Foster on EU Law*, 8th edn (Oxford: Oxford University Press, 2021), esp chs 9 and 11

Focused account of relevant topics including recent developments.

Question

Hussein, a Dutch national, is a librarian at his local library. He has recently been told that, due to the economic climate, a decision has been made to close a number of libraries and that, unfortunately, the library in which he works is one of those that will close. Hussein has looked for employment opportunities elsewhere in the Netherlands, but, unsurprisingly, librarian posts are few and far between. Becoming increasingly concerned about his ability to support his family financially, Hussein has decided to go abroad to seek work and has identified Belgium, where he has supportive friends, as a suitable destination.

p. 532 ↵ Whilst he is looking for work, Hussein, his wife Shannon (a Canadian national), and his son Adam (a Dutch national) plan to live with Hussein's friends in Belgium. Shannon hopes to find casual work and Adam plans to attend the local school. Hussein is confident that he will be able to find work within a year and he then plans to purchase a property. He has spotted a couple of part-time posts in Belgian libraries, but it has been suggested that part-time employment would not provide him with a right to stay in Belgium. He has also become concerned by a recent newspaper article suggesting that some Belgian provinces reserve librarian posts for Belgian nationals because of the 'public service' nature of such posts. Furthermore, the article went on to say that, at times, non-nationals were paid less and had less employment protection than Belgian nationals.

As the day of departure approached, Hussein went out with friends for a farewell party. Unfortunately, Hussein drank heavily and, whilst in an intoxicated state, became involved in an altercation with another man. Hussein has since been charged with assault. He fears that this charge will give the Belgian authorities cause to deny him and his family entry.

Advise Hussein, Shannon, and Adam as to all of the issues raised in connection with the free movement of persons within the EU.

Visit the online resources for an outline answer to this question *<https://iws.oupsupport.com/ebook/access/content/eulaw-complete5e-student-resource/eulaw-complete5e-chapter-11-guidance-on-answering-assessment-questions?options=showName>*, **and additional self-test questions** *<https://iws.oupsupport.com/ebook/access/content/eulaw-complete5e-student-resource/eulaw-complete5e-chapter-11-self-test-questions?options=showName>* **with feedback.**

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