Free Movement of Persons in the EU

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CHAPTER 11A

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11.1 Introduction

Labour is one of the factors of production that needs to move freely for an internal market to function, and free movement of labour means free movement of persons. Free movement of persons, however, is one of the most complex and challenging of the EU freedoms, both legally and politically. People, after all, are rather more complex than cars, cheese or cassis liqueur. Unlike goods, for example, people get sick, need housing and schooling, have accidents, lose their job, marry and start families, perhaps divorce again, or, in some cases, commit criminal offences. All of these actions affect some of the most sensitive political areas, including social security, healthcare, immigration and public order. Even more than the other freedoms, therefore, free movement of persons has political implications, as the recent debate on Brexit demonstrated in a somewhat tragic manner.[1]

The free movement of persons has developed significantly since its inception in the 1957 Treaty of Rome. Initially, the free movement of persons only concerned workers and other economically active persons. It then became clear that to make the free movement of workers effective, EU law also needed to grant rights to workers' families. Subsequently, the free movement of persons further expanded to include more and more individuals, even if they were not directly economically active. A major development then took place with the introduction of Union citizenship in the Treaty of Maastricht, as several free movement rights were attached directly to the status of EU Citizen.

This Chapter gives a brief overview of the free movement of persons in the EU and its development over time. In line with the other free movement chapters, the overview primarily focuses on the negative integration developed through the seminal case law of the CJEU, but also looks at some of the key

1 See in this context also the deal struck with Cameron before the referendum, in which limiting the right of new workers to social benefits was the key element. The deal can be found in the Conclusions of the European Council of 18–19 February 2016, Annex I, EUCO 1/16. For analysis, see 'Editorial comments: Presiding the Union in times of crisis: The unenviable task of the Netherlands' (2016) 53(2) *Common Market Law Review*, 327–328.

pieces of EU legislation, as harmonization played a relatively big role in this area of EU law.[2]

11.2 Free Movement of Workers

The free movement of workers is laid down in Article 45 TFEU, which has both vertical and horizontal direct effect.[3]

> 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 the public service.'*

2 For further information and analysis on this extensive area of EU law see amongst many others S. O'Leary, 'Free movement and persons and services' in P. Craig and G. de Búrca (eds.) *The Evolution of EU law* (2nd edn, OUP 2011), E. Spaventa, *Free Movement of Persons in the EU: Barriers to movement and their constitutional context*. (Kluwer, 2007), A Tryfonidou, 'In search of the aim of the EC free movement of persons provisions: Has the Court of Justice missed the point?' (2009) 46 *Common Market Law Review*, 1591, or J. Shaw, 'Citizenship: Contrasting dynamics at the interface of integration and constitutionalism' in in P. Craig and G. de Búrca (eds.) *The Evolution of EU law* (2nd edn, OUP 2011).

3 Case 41/74 *Van Duyn* [1974] ECR 1337, Case C-281/98, *Angonese* ECR 2000, p. I-4139 and case C-415/93 *Bosman*, [1995] ECR I-4921. Note though that the right only applies to EU citizens moving to another Member State. Third country nationals cannot rely on Article 45 TFEU, nor can EU citizens in their own state.

As with the other free movement provisions, Article 45 TFEU only provides a limited framework that had to be further developed by the CJEU. One of the main open questions was the definition of 'worker' itself. As EU law is autonomous, after all, one may not use national definitions of worker or employee to interpret the concept of worker under EU law.[4] Again in line with the other freedoms, the CJEU developed a very broad and inclusive definition of worker, thereby expanding the group of persons that could rely on it.[5] In *Lawrie Blum*, which concerned the question if a trainee-teacher qualified as a worker, the CJEU for instance held that:

> Since freedom of movement for workers constitutes one of the fundamental principles of the Community, the term 'worker' in article [45] may not be interpreted differently according to the law of each member state but has a community meaning. Since it defines the scope of that fundamental freedom, the community concept of a 'worker' must be interpreted broadly.[6]

The CJEU then continued to provide the following definition of worker:

> The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.
>
> 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. (...) 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.
>
> 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 occupation in point is not a bar to the application of article [45](1) if the service is performed under the conditions of an activity as an employed person.
>
> (...)

4 See also EU Chapter 4.

5 Case C-337/97, *Meeusen* [1999] ECR I-3289.

6 Case 66/85 *Lawrie-Blum* ECR 02121, par. 16.

> The fact that trainee teachers give lessons for only a few hours a week and are paid remuneration below the starting salary of a qualified teacher does not prevent them from being regarded as workers. In its judgment in Levin, the Court held that the expressions 'worker' and 'activity as an employed person' must be understood as including persons who, because they are not employed full time, receive pay lower than that for full-time employment, provided that the activities performed are effective and genuine. The latter requirement is not called into question in this case.[7]

Individuals, therefore, already qualify as workers if they perform relatively small jobs against relatively low wages, as long as the work is 'effective and genuine'. Students that go and study in another Member State and work there for one day a week against minimum wages, for instance as a waiter, therefore qualify as a worker. The broad scope of the concept of worker was further confirmed in *Trojani*, which involved an individual doing some chores for the salvation army in return for housing and some pocket change. The CJEU held that:

> Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration
>
> Moreover, neither the sui generis nature of the employment relationship under national law, nor the level of productivity of the person concerned, the origin of the funds from which the remuneration is paid or the limited amount of the remuneration can have any consequence in regard to whether or not the person is a worker for the purposes of Community law.
>
> With respect more particularly to establishing whether the condition of the pursuit of real and genuine activity for remuneration is satisfied, the national court must base its examination on objective criteria and make an overall assessment of all the circumstances of the case relating to the nature both of the activities concerned and of the employment relationship at issue.

7 Idem, paras. 17–21.

> In this respect, the Court has held that activities cannot be regarded as a real and genuine economic activity if they constitute merely a means of rehabilitation or reintegration for the persons concerned.
>
> However, that conclusion can be explained only by the particular characteristics of the case in question, which concerned the situation of a person who, by reason of his addiction to drugs, had been recruited on the basis of a national law intended to provide work for persons who, for an indefinite period, are unable, by reason of circumstances related to their situation, to work under normal conditions.
>
> In the present case, as is apparent from the decision making the reference, Mr Trojani performs, for the Salvation Army and under its direction, various jobs for approximately 30 hours a week, as part of a personal reintegration programme, in return for which he receives benefits in kind and some pocket money.
>
> (...)
>
> Having established that the benefits in kind and money provided by the Salvation Army to Mr Trojani constitute the consideration for the services performed by him for and under the direction of the hostel, the national court has thereby established the existence of the constituent elements of any paid employment relationship, namely subordination and the payment of remuneration.
>
> For the claimant in the main proceedings to have the status of worker, however, the national court, in the assessment of the facts which is within its exclusive jurisdiction, would have to establish that the paid activity in question is real and genuine.
>
> The national court must in particular ascertain whether the services actually performed by Mr Trojani are capable of being regarded as forming part of the normal labour market. For that purpose, account may 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.[8]

The ultimate decision whether Trojani qualified as a worker was left to the Belgian referring court, yet the CJEU did provide some criteria to establish the minimum requirements. One key criterion is if the relevant activities are normally provided on the labour market, or if they are more designed to keep

8 Case C-456/02, *Trojani*, ECLI:EU:C:2004:488, paras. 15–24.

certain persons occupied without really forming genuine work.[9] The fact that *Trojani* was even concerned a border case in itself, however, already indicates how broad the concept of worker is interpreted under EU law.

In addition, the CJEU also held that, to ensure Article 45 TFEU can achieve its objective effectively, those seeking work also had to receive some protection. The right to work, after all, is seriously limited where one does not have the right to first seek work. At the same time, one cannot give too many rights solely on the basis that someone is looking for a job. The CJEU balanced both arguments by holding that those objectively qualifying as job seekers have a right of residence for a limited time of six months, after which, if they do not find a job, they have to leave.[10]

As to exceptions, and again in line with the case law on the other freedoms, the CJEU does allow rule of reason exceptions in addition to the exceptions in the TFEU, but interprets both restrictively.[11] The CJEU also gave a very restrictive interpretation to the 'public-service exception' contained in Article 45 paragraph 4 TFEU. This exception only applies where the post in question involves *both* the exercise of a power conferred by public law *and* the safeguarding of the general interests of the State. States can, therefore, not simply bypass Article 45 TFEU by qualifying a position as a public service one: a position in a State school, for instance, will not meet these standards.[12] Instead, the function at stake must entail a real exercise of public authority, such as a judge, a minister or a police officer.

11.3 The Rights of Workers and their Family Members

Once a person qualifies as a worker, both primary and secondary EU law provide several rights to the worker and her family members.[13] Firstly, the worker

9 Cf. also Case 344/87 *Bettray* [1989] ECR 1621, par. 17 for an example of a person not qualifying as a worker.

10 Case C-292/89 *Antonissen* ECLI:EU:C:1991:80.

11 As many of the rights on free movement have now been laid down in secondary legislation, however, any exceptions to them must be assessed under the secondary legislation, not the Treaty Articles. See on this relation between primary and secondary law EU Chapter 9 as well as Case C-5/77 *Tedeschi* ECLI:EU:C:1977:144. Where restrictions do fall under primary law, the familiar test for restrictions applies, meaning the restriction must serve a legitimate aim in a proportionate manner.

12 Case 66/85, *Lawrie-Blum v. Land Baden-Würtemberg* [1986], ECR 2121.

13 For the definition of family member now see Article 2 of Directive 2004/38.

and the family members have a right to reside in the Member State.[14] Secondly, the worker is entitled to complete equal treatment with national workers. This includes equal treatment in the areas of remuneration, dismissal, social and tax advantages, trade unions and education rights. These rights already derived from Article 45 TFEU, but are now also laid down in Regulation 492/2011.[15] Based on the right to complete equal treatment of the worker, the family members also enjoy many (derived) social rights and benefits such as student grants and loans and access to child care.[16] The idea is that people would be hindered in accepting a job in another Member State if they would not have the same rights, or if their family members would not receive benefits that nationals do, and the worker would have to cover all kinds of costs for the family members herself.

The rights of workers and their family members, moreover, apply from the very moment an individual becomes a worker. If an Estonian lawyer accepts a job in Hungary, for example, he will have an immediate right to complete equal treatment including all social benefits Hungarian workers are entitled to, and his children will be immediately entitled to student grants or other benefits awarded to children of Hungarian workers.

EU law also tries to support free movement of workers by requiring or simplifying the mutual recognition of diplomas. To begin with, the non-recognition of a diploma can constitute a restriction of Article 45 TFEU, which must be justified and sufficiently motivated.[17] This negative integration has also been complemented by positive integration in the form of elaborate legislation on the mutual recognition of diplomas.[18]

14 These rights of residence derive from Article 45 TFEU but are now also laid down in the general Citizens Directive 2004/38 OJ L [2004] 158/77. The right of residence may also extend for a period after the worker becomes unemployed. See Article 7 of Directive 2004/38.

15 Regulation 492/2011 on freedom of movement for workers within the Union OJ [2011] L1/1. This regulation replaced Regulation 1612/68 [1968] OJ L257/2.

16 See also Case C-370/90 *Singh* ECLI:EU:C:1992:296.

17 See for example Case 2/74, *Reyners* [1972], ECR 631 or Case C-340/89, *Vlassopoulou*, ECR 1991, p. 2357.

18 See especially Directive 2005/36 on the recognition of professional qualifications OJ [2005] L255/22.

11.4 Union Citizenship and Directive 2004/38

In line with the economic rationale behind free movement, the rights described above only applied to economically active people, with family members deriving certain rights from the economically active person as well.[19] Gradually, however, free movement rights were extended to persons who were not or no longer economically active.[20] The major expansion of the free movement of persons, and the most far reaching separation of this right from economic activity, took place with the introduction of Union citizenship in the Treaty of Maastricht. Union citizenship is intended to capture and strengthen the bond between the EU and the individual citizen, and is established and bestowed by 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;*
>   (. . .)
>
> *These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.*

19 Note that service providers and entrepreneurs establishing a business in another Member State also have right to move and reside, and hence fall under the category of economically active people that enjoy free movement rights. Their situation, however, will be discussed in more detail in EU Chapter 12 on services and establishment, even though one could also consider them as part of the free movement of persons.

20 See for example the adoption of three directives in the early nineties extending the free movement rights of non-economically active or no longer economically active persons: Directive 90/364, granting rights of residence for non economically active persons (primarily pensioners); Directive 90/365, granting rights of residence to employees and entrepreneurs having ended their professional activities; Directive 93/96, granting rights of residence to students. All of these have now been replaced by Directive 2004/38.

Article 20 TFEU captures the secondary nature and normative claim of EU citizenship. Even though Union citizenship is 'destined to be the fundamental status' of individuals, it remains subordinated to the national citizenship of a Member State, and does not replace it.[21] This secondary citizenship also symbolizes the constitutional middle-ground occupied by the EU and represents the challenges and opportunities in developing a democracy based on multiple *demoi* instead of one *demos*.[22]

Even though it remains a secondary status,[23] EU citizenship forms an important step in EU integration. Since its creation, moreover, Union citizenship has developed rather spectacularly, and an increasing number of rights have been connected to it, including free movement rights. As Article 21 TFEU provides: '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.'[24] These limitations and conditions can now mostly be found in Directive 2004/38, known as the Citizens Directive.

Directive 2004/38 gives three 'layers' of movement and residence rights, subject to increasingly stringent criteria. Firstly, Articles 5 and 6 of Directive 2004/38 give a right of entry and the right to reside for up to three months to all Union citizens who move to or reside in a Member State other than that of which they are a national, as well as to their family members. The right of entry under Article 5 entails that Member States may only require a valid identity card or passport, but no other documentation or formalities upon entry.[25] The right to reside for up to three months may also not be subject to any other conditions than to hold a valid identity card or passport. Any EU citizen with

21 See case C-184/99 *Grzelczyk* [2001] ECR I-6193, par. 31.

22 J.H.H. Weiler, 'European democracy and its critics: polity and system', and 'To be a European citizen: Eros and civilization', in: J.H.H. Weiler *The Constitution of Europe: Do the New Clothes have an Emperor?* (CUP 1999), 264, 324, and especially 344 et seq. On the confederal middle-ground occupied by the EU see A. Cuyvers, *The EU as a Confederal Union of Sovereign Member Peoples, Exploring the potential of American (con)federalism and popular sovereignty for a constitutional theory of the EU*, (Diss. Leiden), Zutphen: Wöhrmann 2013.

23 See however cases C-369/90 *Micheletti* [1992] ECR I-4239 and C-135/08) *Rottmann* [2010] ECR I-1449 on the limits imposed by EU citizenship on the rights of Member States to grant or especially to remove national citizenship, and thereby EU citizenship.

24 These rights have direct effect. See for example Case C-413/99, *Baumbast*, ECR I-7091.

25 For third country family members see Article 5(2) a.o.

a passport, therefore, may reside in any other Member State for up to three months.[26]

Secondly, Article 7 of Directive 2004/38 grants a right of residence for *more* than three months to three categories of Union citizens, being those that:

(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 and have comprehensive sickness insurance; or,
(c) Students that have comprehensive sickness insurance and 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.

As long as a Union citizen falls in one of these categories, he has the right to reside. This right extends, furthermore, to the family members of the Union citizen, even if these family members are not EU citizens themselves.[27]

The main reasoning behind these three categories of citizens with open-ended residence rights is that EU citizens and their family members should have a right to freely reside in the EU as long as they do not become a burden on the host state. This also means that the resources Union citizens need to have under 7(b) and (c) do not have to be very high, they just have to be sufficient for them not to have to rely on the host state for assistance and thereby become a burden.

The third, and most far reaching, right of residence is granted when a citizen has resided legally for a continuous period of at least five years in the host Member State and acquires *permanent residence*.[28] As of that moment, these Union citizens no longer have to meet the requirements under Article 7 of Directive 2004/38 to have residence rights, and they acquire even more rights to equal treatment. Permanent residency can therefore be seen as a very

26 On the possible grounds for expelling citizens, also during this three month period, if they violate certain rules, see the discussion on expulsion below.

27 Directive 2004/38 Art. 7(2).

28 Article 16 2004/38 and Council Directive 2003/109 concerning the status of third-country nationals who are long-term residents OJ [2004] L16/44. For the five year requirement, continuity of residence is not undermined 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 12 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.

substantial status that is one step below acquiring citizenship of another Member State. Once acquired, the right of permanent residency is only lost where the Union citizen leaves is absent from the host state for a period exceeding two consecutive years.

As soon as EU citizens rely on their rights and move to another Member State, they fall under the scope of EU law and under Article 24 of directive 2004/38 also have a right to equal treatment:

> 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.*
> 2. *By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, 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 families.'*

Crucially, Article 24(2) of Directive 2004/38 restricts the rights of EU citizens to entitlements or social assistance in the first three months, for the six month-period granted to job-seekers and to student aid or grants. This restriction ensures that Union citizens cannot simply move to another Member State and then request social benefits, as this would undermine national social security.

Article 27 of Directive 2004/38 allows for certain restrictions on the right of residence on grounds of public policy, public security or public health. In line with the Treaty exceptions, these are interpreted very narrowly, and a proportionality check has to be satisfied. In addition, Articles 28 to 32 of Directive 2004/38 regulate the possible expulsion of Union citizens on the grounds of public policy, public security or public health. Expulsion, however, may only be based on individual behavior and the fact that the individual presents a future risk as well. The protection against expulsion, furthermore, increases with the time the citizen spent in the host Member State.[29]

29 See for example Case C-348/09, *Remscheid* ECLI:EU:C:2012:300.