

CITIZENSHIP OF THE UNION, MOBILITY AND INTEGRATION IN THE EUROPEAN AREA

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While it is often heralded as one of the great successes of European integration, the mobility of EU citizens in Europe still experiences difficulties. These concern internal market actors such as migrant workers, including frontier workers. Their access to social rights in the host State is currently facing resistance that one might have thought overcome by now. Meanwhile, economically inactive citizens' right to residence is threatened by expulsion measures that are often taken in an automatic manner, when a citizen lacks adequate resources. More generally, we still witness efforts to prevent the long-term settlement of migrant citizens in the host State. In addition, special attention is paid to student mobility, which raises the issue of access to university studies and its financing. Finally, the treatment of the vulnerable Roma population is a problem with an inarguably European dimension that must be addressed without delay.

1. Introduction: access to citizenship of the Union and its importance for mobility

Malta's recent decision to put its national citizenship on sale, and consequently turn citizenship of the Union into a market good, has elicited strong reactions from European actors.¹ This decision, along with the existence of other national provisions (Cyprus, Austria, Belgium, Portugal) allowing third-country nationals to acquire national citizenship in return for substantial

1. See, for example, European Parliament Resolution of 16 January 2014 on EU citizenship for sale, 2013/2995 (RSP).

investments, should **reopen the debate on the relationship between citizenship of the Union and Member State nationalities**. Under article 20.1 TFEU, holding Member State nationality automatically confers citizenship of the Union. Since granting and withdrawing nationality lies within the field of States' reserved competence, the Union cannot define its subjects in an autonomous manner, which is paradoxical for a transnational political and social community. Yet, as European Commission Vice-President Viviane Reding highlighted, "awarding citizenship to a person gives this person rights vis-à-vis the 27 other Member States." Thus, given that a State's decision to grant its nationality produces transnational effects, this power should be exercised in accordance with Union law,² which includes a set of common values.

Both legally, in terms of the treaties, and conceptually, in the mind of the citizens themselves,³ citizenship of the Union is essentially associated with mobility. The latter takes shape through the right to move and reside freely, provided for in article 21.1 TFEU and implemented by directive 2004/38.⁴ The mobility of people throughout the European Union is crucial to forging a European identity and consciousness. While the European legal regime of mobility is a noteworthy achievement, there are still gaps to be filled and problems to be solved. The approval of the proposal "against mass immigration" (which is mainly intra-European) in the Swiss referendum held on 9 February 2014 illustrates the urgency of initiating an enlightened debate touching upon all of these issues.

2. Access to social rights for migrant workers, including frontier workers

The **free movement of workers**, which constitutes the foundation of citizenship of the Union and the most complete form of mobility of people, is currently **facing considerable resistance in**

2. See ECJ, 7 July 1992, *Micheletti*, C-369/90 and ECJ, 2 March 2010, *Rottmann*, C-135/08.

3. According to the responses of European citizens themselves to various surveys conducted by the European Commission, the Union essentially signifies the freedom to travel, study and work everywhere in Europe.

4. 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, OJEU L 158 of 30 April 2004, p. 77.

certain Member States. This resistance particularly (but not exclusively) focuses on the arrival of workers from central and eastern European countries that joined the Union in 2004 and 2007.⁵ It partly stems from the economic crisis: the constraints the crisis has placed on national budgets and the increase in unemployment. However, most worrisome is that reservations about European immigration are voiced not only by populist political parties (whose growing importance is itself a matter of concern), but also feature in the official discourse of national governments and legislators, in blatant disregard of European commitments. The best example is the debate in the United Kingdom about social advantages, especially family benefits paid to Polish workers. According to statements made by Prime Minister David Cameron in January 2014, it is “wrong” to pay child benefit to support migrant Polish workers’ family remaining in Poland. However, this issue should be considered to have long been definitively resolved. Under article 7.2 of Regulation 1612/1968,⁶ now replaced by article 7.2 of Regulation 492/2011,⁷ migrant workers have access to the same social (and tax) advantages as national workers.⁸ The measure’s rationale is hard to dispute: the idea is to recognise and reward the migrant worker’s contribution to the host country’s economy. Indeed, from the taxpayer’s perspective, by paying contributions and taxes migrant workers participate in the funding of the host country’s welfare state, from which they can therefore not be excluded. Yet current British reactions to the alleged “social tourism” of Polish workers sadly illustrates that **the free movement of workers is not sociologically recognised as a done deal; European and State actors must continuously renew their commitment to it. Public awareness campaigns should be held so that citizens might properly appreciate the (very often misun-**

5. See, most recently, the fears expressed in the political and journalistic circles of several Member States about the lifting, since 1 January 2014, of transitional measures for Romanian and Bulgarian workers.

6. Regulation 1612/68/EEC of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJCE L 257 of 19 October 1968, p. 2.

7. Regulation 492/2011/EU of the European Parliament and Council of 5 April 2011 on freedom of movement for workers within the Union, OJEU L 141 of 27 May 2011, p. 1.

8. The Court of Justice provided a generous interpretation of this provision, which usefully completes Regulation 883/2004/EC of the European Parliament and Council of 29 April 2004 on the coordination of social security systems (OJEU L 166 of 30 April 2004, p.1), which replaced Regulation 1408/71/EC on the same subject. One of the cardinal principles of this instrument is the equal treatment of national and migrant workers.

derstood) contribution of migrant workers to the economic development of their country.⁹ More generally, civil society actors and academics should conduct comprehensive studies to evaluate national implementation of the European framework for the mobility of people¹⁰ and alert citizens and European actors of possible deviations in this area.¹¹

Furthermore, among migrant workers, **special attention should be paid to the category of frontier workers, who face particular and thorny difficulties**, which the Commission and European Parliament have long singled out.¹² A recent problem stemming from the case law of the Court of Justice is of special note. Indeed, while frontier workers should not be treated any differently from migrant workers in terms of access to social benefits, the Court of Justice recently approved national measures requiring frontier workers to demonstrate sufficient links with the State of employment.¹³ In its *Giersch* ruling, the Court held in a broad statement, that “the frontier worker is not always integrated in the Member State of employment in the same way as a worker who is resident in that State.”¹⁴ This situation justifies that the State of employment ask the frontier worker to demonstrate a connection beyond participation in the labour market¹⁵. To this end, the Court has accepted that student financial aid to the children of a frontier worker may be conditional on the parent having worked in Luxemburg “for a certain minimum period of time.”¹⁶ This solution considerably weakens the position of frontier workers, by

9. In this respect it is unfortunate that the British government is delaying the publication of an official report of the Home Office that debunks the theory of social tourism and shows all the benefits of European immigration for the British economy.

10. See, for example, the 2013 research report by J. Shaw, N. Miller & M. Fletcher, *Getting to grips with EU citizenship: understanding the friction between UK immigration law and EU free movement law*, <http://www.law.ed.ac.uk/overlap>.

11. See, for example, the editorial by N.N. Shuibhne, “Quicksand”, (2013) 38 *European Law Review*, p. 135.

12. See, already in the 1980s, the communication of the Commission to the Council, to the European Parliament and to Member States on the issue of frontier populations, COM/85/529 final, October 1985 and the European Parliament’s report on the problems of frontier workers in the Community of 21 October 1988, doc. A2-227/88.

13. ECJ, gr.ch., 18 July 2007, *Hartmann*, C-212/05; ECJ, gr.ch., 18 July 2007, *Geven*, C-213/05; ECJ, 11 September 2007, *Hendrix*, C-287/05; commentary on the three rulings by Ch. O’Brien, 45 (2008) *Common Market Law Review*, p. 499. ECJ, 20 June 2013, *Giersch*, C-20/12; comm. D. Martin, *Journal de Droit Européen*, September 2013, p. 270.

14. Point 65 of the *Giersch* ruling.

15. Even though this participation suffices, in principle, to attest to integration: see ECJ, 14 June 2012, *Commission/Netherlands*, C-542/09.

opening the way for the State of employment to impose additional conditions compared to other migrant workers for them to enjoy social advantages. This is questionable in the light of the traditional approach that solely focuses on the status of “worker”.

3. The expulsion of economically inactive citizens

Regarding **economically inactive European citizens**, it is important to note the very large increase since 2011, and particularly in 2013, in expulsions of European citizens (especially French nationals) from Belgium on grounds of lacking adequate means of support. It is true that directive 2004/38 provides that, in order to be able to reside in the host State between 3 months and 5 years,¹⁷ a citizen without any professional activity and the members of his/her family must have medical insurance and sufficient resources not to become an unreasonable burden on the social assistance system. Yet, codifying on this point the solution of the *Grzelczyk* ruling,¹⁸ the same directive specifies that the removal of a migrant citizen cannot be an *automatic* consequence of the migrant’s claim to social assistance.¹⁹ In such a case, national authorities must examine whether the claim stems from temporary difficulties and take into account the migrant citizen’s personal circumstances, the length of residence, and the amount of aid granted.²⁰ More generally, **national authorities must implement directive 2004/38 in the light of the requirements of citizenship, of fundamental rights, of the principle of proportionality, and (in the case of French nationals expelled from Belgium) of the reality of cross-border regions** that have contributed so much to European integration in everyday life.

16. Point 80 of the *Giersch* ruling. According to the Court, requiring a certain period of work can also prevent the risk of “student grant forum shopping” (ibid). A period of 5 years seems reasonable in this respect.

17. According to the graduated system established by directive 2004/38, residence of up to 3 months is not subject to any conditions besides possession of a valid passport or identity card. This right is maintained so long as the migrant does not become an unreasonable burden on the social assistance system of the host State. After five years of legal and continuous residence, the citizen of the Union and family members acquire the right to permanent residence, free of any economic constraint.

18. ECJ, 20 September 2001, *Grzelczyk*, C-184/99.

19. Article 14.3 and recital 16 of directive 2004/38.

20. Recital 16 of the directive 2004/38.

4. Barriers to the long-term settlement of migrant citizens in the host State

Moreover, **several barriers are frequently raised to the long-term settlement of migrant citizens in the host State, reflecting the will to “keep them out”**. Thus, despite a solid legislative and case-law *acquis* forbidding them, various restrictions on acquiring real estate²¹ and the levying of discriminatory local taxes or registration fees²² continue to exist. In the same spirit, national authorities tend to restrictively interpret the 5-year “legal residence” that is necessary to acquire the right of permanent residence (free of any economic condition and allowing for almost complete equal treatment with nationals).²³ Thus, residence under national humanitarian law,²⁴ or even under Union law, that does not fulfil the economic conditions of possession of sufficient resources and health insurance,²⁵ does not allow for the acquisition of the right of permanent residence. These solutions, which the Court of Justice has unfortunately validated, are regrettable because they ignore the reality of citizens’ integration into their living place. **Directive 2004/38 should be amended by the European legislator in order to allow, in view of acquiring the right of permanent residence, to take into account legal residence for a continuous period of 5 years in the host State *irrespective of its particular circumstances*.**

5. Access to university studies and the funding of student mobility

European integration is significantly advanced by **student mobility**. Indeed, education shared among several States is an important means of strengthening solidarity and tolerance, and is a factor driving the dissemination of culture throughout the Union. The increase in the financial package allocated to the

21. See the recent Flemish regulation making land purchases conditional on the existence a “sufficient link” between the purchaser and target district, condemned in: ECJ, 8 May 2013, *Libert and others*, C-197/11 and C-203/11; L.W. Gormley, “Keeping EU citizens out is wrong”, *Journal de droit européen*, 2013, p. 316.

22. See, for example, the Anvers authorities’ intention, announced in February 2013, to increase registration fees for non-nationals from 17 to 250 euros.

23. This is the key innovation of directive 2004/38, provided for in its article 16.

24. ECJ, gr.ch., 21 December 2011, *Szeja and Ziolkowski*, C-424 and 425/10.

25. ECJ, 8 May 2013, *Alarape*, C-529/11.

Erasmus programme, even while the 2014-2020 European budget decreased compared to the previous programming, sent an important political signal recognising student mobility as a European priority. Yet this mobility, which goes beyond the Erasmus framework, raises two important issues: the funding of studies and access to specific University courses.

— Regarding the first issue, since most migrant students cannot benefit from the host State's student maintenance aid provisions,²⁶ they are increasingly turning to their home State to secure the necessary funding. It would therefore behove States to provide portable grants and loans. States that already provide these, such as Germany, should ensure that the conditions of portability are not disproportionate and therefore ultimately restrictive of the free movement of students.²⁷ Eventually, **States should agree on a binding European instrument regulating the funding of student mobility**; this system would provide for the inter-State transfer and reimbursement of tuition costs in proportion to the professional career of those benefiting from it.²⁸

— Regarding the second issue, solutions should be found to the particular problem creating tensions in **Belgium and Austria**. These two countries have set **conditions that discriminate against EU students concerning access to medical and paramedical University studies**. These conditions aim to staunch the flow of French and German students who come to study (respectively) in Belgium and in Austria, and then return to practice their profession in their home State. The Belgian and Austrian governments pleaded before the Court of Justice²⁹ that this situation

26. Under article 24.2 of directive 2004/38, the host State is not obliged, prior to acquisition of the right of permanent residence (that is, before completing 5 years of legal and continuous residence), to grant maintenance aid for studies in the form of grants or loans, to persons other than workers, persons who retain such status and members of their families. Thus, students who arrive to a Member State cannot apply for maintenance aid for studies. However, they can benefit, on an equal footing with national students, from *aid linked to access to education*, such as aid that covers registration fees.

27. Several rulings of the Court of Justice deal with the restrictive conditions that several German Länder imposed on the portability of student funding : ECJ, gr.ch., 23 October 2007, *Morgan and Bucher*, C-11/06 and C-12/06; ECJ, 18 July 2013, *Prinz and Seeberger*, C-523/11 and C-585/11; ECJ, 24 October 2013, *Elrick*, C-275/12; ECJ, 24 October 2013, *Ingemar*, C-220/12.

28. For thought-provoking observations on this subject, see M. Gérard, "Le financement de la mobilité des étudiants 'Bologne'", *Revue économique*, 2010/3, p. 577.

29. ECJ, 7 July 2005, *Commission v. Austria*, C-147/03; ECJ, gr.ch., 13 April 2010, *Bressol*, C-73/08; comm. S. Garben, (2010) 47 *Common Market Law Review*, p. 1493

threatened the quality of their national education systems and represented a risk for public health given the shortage of doctors and veterinarians in certain parts of their territory. A solution balancing these legitimate concerns with the need to guarantee student rights should be reached through political dialogue, which could be promoted by European bodies.

6. The Roma, European citizens “unlike the others”

Finally, the greatest challenge facing citizenship of the Union nowadays is the situation of the **Roma, citizens “unlike the others”**. Victims of systemic discrimination, great poverty and racist violence in their home States, the Roma also face particularly hostile reactions in the host States. French Minister of the Interior Manuel Valls made telling statements in this regard on the “vocation” of the Roma to remain in, or return to, Romania, and on their “lack of vocation” to integrate into French society. Through both these statements and his actions, the Minister fell in line with the attitude of the previous French government. The dismantling of several Roma camps in the summer of 2010 and the expulsion of several hundred Roma of Romanian and Bulgarian nationality to their home State had led to a vigorous conflict with the European Commission in the fall of 2010.³⁰ This episode revealed that French authorities had failed to correctly implement several provisions of directive 2004/38, particularly those on substantive and procedural guarantees to which a citizen facing expulsion is entitled.³¹

The experience of exclusion that most often ensues when the Roma exercise their right of residence contrasts with the permanent requirement for inclusion, which is inherent to any citizenship, including citizenship of the Union. The application of directive 2004/38 alone cannot be an adequate response, because it was conceived for a type of mobility that has different characteristics; this directive does not take into account the particularities of the collective migration of members of a “disadvantaged and

30. For more on this entire issue, see our paper “‘Le temps des gitans’: à propos de la libre circulation des Roms dans l’Union”, *Europe*, January 2011, p. 5.

31. The application of European guarantees in the event of an expulsion of citizens of the Union has faced difficulties in several countries. With regard to Spain see N. Ferreira, “The EU free movement of persons from a Spanish perspective: exploring its evolution and derogations”, (2013) 19 *European Public Law*, p. 397.

vulnerable minority” that requires “special protection”.³² Consequently, it needs to be completed through **the adoption of legislative and other measures on the Roma in which both home States and host States bear responsibility**. Indeed, the situation of the Roma in Europe is a test case for the Union and its citizenship. The ability to guarantee the rights of the most vulnerable is proof of the effectiveness of European citizenship as a legal status protecting individuals.

7. Conclusion/recommendations

- Public awareness campaigns should be held so that citizens might properly appreciate the (very often misunderstood) contribution of migrant workers, including frontier workers, to the economic development of their country.
- European institutions should remain firm in the face of State attempts to roll back the legislative and case-law *acquis* on migrant workers’ (including frontier workers’) access to social rights in the host State.
- Directive 2004/38 must be implemented by national authorities in the light of the requirements of citizenship, of fundamental rights, and of the principle of proportionality. This directive should be amended by the European legislator in order to allow, in view of acquiring the right of permanent residence, to take into account legal residence for a continuous period of 5 years in the host State *irrespective of its particular circumstances*.
- A binding European instrument regulating the funding of student mobility should be adopted. This system could provide for the inter-State transfer and reimbursement of tuition costs in proportion to the professional career of those benefiting from it.
- Legislative and other measures promoting the social inclusion of the Roma, such that *both the home State and the host State bear responsibility*, should be adopted.

32. Terms used by the European Court of Human Rights in its Grand Chamber judgments of 13 November 2007, *D.H. and others v. Czech Republic*, req. n° 57325/00 and of 16 March 2010, *Orsus and others v. Croatia*, req. n° 15766/03.

