

FREE MOVEMENT WITHIN THE EU - A FUNDAMENTAL RIGHT

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ABSTRACT: *Free movement of people is a basic pillar of the single area the European Union (EU) has been building since its creation. It is acknowledged as a fundamental right for EU citizens. A right of free movement across the EU was originally envisaged only for the working population, as a single market could not be achieved while limitations to workforce mobility remained in existence. The Schengen Convention was the first agreement to abolish controls on people at the internal borders of the signatories, to harmonise controls at the external frontiers of the 'Schengen area' and to introduce a common policy on visas and other accompanying measures like police and judicial cooperation. The Schengen signatories agreed that each country could only reintroduce controls on their mutual borders in certain well-specified circumstances. The right of every European citizen to move and reside freely within the territory of the Member States is enshrined in the Charter of Fundamental Rights of the EU, adopted in December 2000. The charter also states that these rights 'may' be granted to third-country nationals.*

KEY WORDS: *movement of people, European citizen, European Union, *acquis*, principle of non-discrimination*

Free movement of people is a basic pillar of the single area the European Union (EU) has been building since its creation. It is acknowledged as a fundamental right for EU citizens. Yet, implementing this principle by abolishing border controls at internal borders has been more difficult than for those underpinning the free circulation of capital, goods and services. Further steps are being taken to ensure that free movement is applied in a coherent and simplified way throughout the EU Member States, and that checks and controls at the EU's external frontiers are reinforced to a level that will guarantee the Union's internal peace and security.

The free movement of persons between the Member States of the EU is one of the basic aims of the Union. What has become true for capital, goods and services has to be a reality for people too. A right of free movement across the EU was originally envisaged only for the working population, as a single market could not be achieved

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while limitations to workforce mobility remained in existence. Yet, thanks to the rising social and human dimension of the European area, the right to free movement has since been extended to include all categories of citizens, to dependants, to students and to those who are no longer economically active. Since the integration of the Schengen Acquis into Community law, the notion of "free movement" is used in two senses. First, in the traditional sense of free movement and secondly in the sense of being able to cross the internal borders without undergoing checks.

What does the traditional right to free movement for EU citizens entail? The right to free movement means that every EU citizen is entitled to travel freely around the Member States of the European Union, and settle anywhere within its territory. No special formalities are required to enter an EU country. This fundamental right extends to members of the EU citizen's family, and applies regardless of their situation or the reason for travel or residence.

Free movement stemming from the abolition of internal border controls. Although free movement was already enshrined in the EEC Treaty, not all the Member States went as far as abolishing internal border checks. The effective application of free movement was given a boost in 1985 when Germany, France and the Benelux countries (Belgium, the Netherlands and Luxembourg) signed an inter-governmental agreement on this issue of gradually abolishing internal border checks, in the small Luxembourg border town of Schengen. The Schengen Agreement was followed in 1990 by the Schengen Convention, which finally came into force in 1995.

The Schengen Convention was the first agreement to abolish controls on people at the internal borders of the signatories, to harmonise controls at the external frontiers of the 'Schengen area' and to introduce a common policy on visas and other accompanying measures like police and judicial cooperation. The Schengen signatories agreed that each country could only reintroduce controls on their mutual borders in certain well-specified circumstances. The Schengen Convention, however, did not aim at regulating the right to long-term residence and work, neither for EU citizens nor for third-country nationals. Today, the Schengen Convention has been incorporated into the EU's Treaties. As of March 2001, 13 EU Member States have signed up to Schengen. They are Belgium, Denmark, Germany, Greece, Spain, France, Italy, Luxembourg, Netherlands, Austria, Portugal, Finland and Sweden. Ireland and the United Kingdom - which never signed up to the Schengen Convention - will take part, in the future, in those aspects of the Schengen acquis that deal with cooperation between police forces and judicial cooperation, but they will not end border controls with other Schengen States. Two other non-EU Member States, Norway and Iceland, apply the Schengen provisions completely on the basis of a specific agreement.

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How does the EU maintain its internal security? The Schengen Convention, now integrated in the EU framework, includes a detailed series of measures designed to compensate for a lack of internal border controls by reinforcing security at the Union's external frontiers. Key among these measures is the requirement that Member States

with an external EU frontier have a responsibility to ensure that proper checks and effective surveillance are carried out at the EU's external frontiers. Once a person is inside the Schengen area, he or she is free to move around wherever he or she wants for a short time period. It is therefore vital that checks and controls at the EU's external frontiers be rigorous enough to stop illegal immigration, drug smuggling and other unlawful activities. Schengen also provides for better cooperation and coordination between police services and judicial authorities as an aid to Member States' internal security, and in particular to fight effectively against organised crime. This is the context for the creation of the Schengen information system (SIS). The SIS is a complex database that enables the law-enforcement, judicial and consular authorities of EU Member States to exchange data on certain categories of persons and on lost or stolen goods.

The European Commission shares the right to initiate proposals with Member States in this area. This means that the Commission is partly responsible for proposing policies and actions, as well as implementing and executing them.

What accompanying measures have been taken? Beyond recognising freedom of movement as a fundamental right, the EU has taken several accompanying measures in order to facilitate its implementation, including: simplified formalities for EU nationals; harmonised entry conditions for non EU nationals; harmonised visa policy; improved documents security.

On the security perspective, a new image archiving system called FADO is to be set up, allowing EU Member States to exchange information on EU official documents and help detect any papers that may be counterfeit.

European Union citizenship, a wide set of rights and obligations. Every person holding the nationality of a Member State of the European Union is, as a result, a citizen of the Union. Citizenship of the Union supplements national citizenship without replacing it. It is made up of a set of fundamental rights and obligations enshrined in the EC Treaty among which it is worth underlining the right not to be discriminated on the basis of the nationality.

An evolving concept. Since the treaty of Maastricht, the concept of *European citizenship* is enshrined in the Treaty establishing the European Community (Articles 17- 22 and 255). It has evolved as the European integration moved on as creating an ever closer Union among the peoples of Europe became the first aim of the European Union to be mentioned in the EU Treaties completed with the objective of strengthening the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union.

The Maastricht Treaty, signed in 1992, aimed to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union. The European citizenship confers, notably, on every European citizen a fundamental and personal right to move and reside freely without reference to an economic activity. With this Treaty also came additional voting active and passive rights in European and local elections. It enhanced as well diplomatic and consular protection by giving the right to EU citizens to ask for the help of any Member State represented in a third Country if his/her own Member State is not represented there.

The Treaty of Amsterdam, which entered into force on 1st May 1999, extended citizens rights/obligations by introducing a clause allowing EU institutions to take measures against discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation to the Treaty. Amsterdam also reinforced the *free movement of people* by integrating the Schengen Convention into the Treaty. Furthermore, it affirmed the commitment of each Member State to raise the quality and free access to education at national level to the highest level of knowledge possible with, in particular, the view to tackling unemployment.

The Treaty of Nice, signed in 2001 facilitated legislating relating to free movement and residence by introducing qualified majority for the decision-making in Council.

A definition opening the access to specific rights:

- The legal definition for the European citizenship can be found in Article 17 of the *Treaty establishing the European Community*: “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 complement and not replace national citizenship.”
- In practice, it means that any person who holds the nationality of an EU Member State is automatically a European citizen. The question of whether an individual possesses the nationality of a Member State is settled solely by reference to the national law of the Member State concerned. Thus it is for each Member State to lay down the conditions for the acquisition and loss of nationality.
- As for any legal system dealing with rights and liberties, it must be of course well understood that the EC treaty construction also encompasses all the obligations related to the rights mentioned.
- A specific set of rights is attached in the treaty to the European citizenship, namely: the right *to move and reside freely within the EU* (article 18 of the TEC) – subject to certain limitations introduced by community law; the right *to vote for and stand as a candidate* at municipal and European Parliament elections in whichever Member State an EU citizen resides (article 19 of the TEC); access *to the diplomatic and consular protection* of another Member State outside the EU (article 20 of the TEC) if his/her Member State is not represented there; the right *to petition the European Parliament and to complain to the European Ombudsman* (article 21 of the TEC).

This list should not be considered as exhaustive. Moreover, those rights an expression of the right to considered as a national in any EU Member State and therefore not to be discriminated on the basis of the nationality (Article 12 TEC). *The principle of Non-discrimination* should be considered as a cornerstone of the whole construction. In addition to the rights specifically attached to the citizenship of the European Union that are explicitly mentioned in the Treaties, there is a whole series of fundamental rights and obligations which stem from the EU Treaties, the case-law of the Court of Justice of the European Communities, the Council of Europe’s Convention on Human Rights and the constitutional traditions of the Member States. Other rights such as for instance, the right to contact and receive a response from any EU institution in one of the EU official languages, the right to access European

Parliament, European Commission, and Council documents under certain conditions or the right of equal access to the Community civil service find their place here.

The treaty gives the European Commission the right to put forward proposals to strengthen or to add to the rights specifically attached to the EU Citizenship. On this basis, the Council after consulting the European Parliament may adopt unanimously provisions that it shall recommend to the Member States for adoption in accordance with their respective constitutional system (Article 22 TEC).

A regularly monitored application of the concept. Article 22 of Tec requires the EC Commission to report every three years on the application of the treaty provisions related to EU Citizenship. The fourth Commission report – (COM (2004) 695 – was issued on 26 April 2004 and covers the period from May 2001 to April 2004 report.

The Charter of fundamental Rights. Fundamental rights as respected by the EU have been assembled into a single, simple text called the Charter of Fundamental Rights of the European Union, which was proclaimed by the European Parliament, the European Commission, and the EU Council of ministers in Nice in December 2000. The Charter was then incorporated in the Treaty establishing a Constitution for Europe signed in October 2004 and under process of ratification.

By now, the Charter commits the European institutions and the Member States when applying the EU legislation. The Court of First instance, in January 2002, referred to the Charter as the expression of the constitutional traditions common to the Member States mentioned in Article 6 §2 of the TUE. New legislation will simplify conditions and administrative formalities for applying EU citizens' right to move and reside freely throughout the European Union. The Directive 2004/38/EC on the right of citizens of the European Union and their family members to move and reside freely within the territory of the EU has been adopted by the European Parliament and the Council on 29 April 2004 (JOL 158 du 30 04 2003). It brings together the complex body of legislation that existed in this area. It introduces more flexibility by eliminating the need for EU citizens to obtain a residence card, introducing a permanent right of residence, defining more broadly the situation of family members and restricting the scope for the authorities to refuse or terminate residence of non national EU citizens.

Latest developments. The Member States are currently transposing the Directive 2004/38/EG on the right of citizens of the European Union and their family members to move and reside freely within the territory of the EU. They have until 30 April 2006, to achieve the complete and correct transposition of the directive. To that end, the EU Commission has been organising meetings with Member States from June 2005 to January 2006. The EU Commission is preparing the third report on the implementation of the three Directives on the right of residence of Union citizens and their family members, of whatever nationality, who are not economically active in the host Member State, covering the period 2003-2006.

Four major judgments were given by the EU Court of Justice on the interpretation of directives 93/96, 90/364 et 90/365. (Cases C-456/02; C-200/02; C-209/03 and C-157/03). On these occasions, the Court recalled that the right to reside in the territory of a EU Member State is conferred directly on every citizen of the Union by article 18(1) EC and that citizenship of the Union is destined to be a fundamental

status of nationals of EU Member States, enabling those who find themselves in the same situation to receive the same treatment in law irrespective of their nationality. The Court also underlined the need to interpret the right of free movement in the light of fundamental rights with particular regard for the right to protection of family life and the principle of proportionality.

Historical developments:

- *Free movement of persons* has existed since the foundation of the European Community in 1957. It was introduced from an economic point of view, since the right was linked to a person's status as a salaried worker and it was part of the broader project of realising a common market with free movement of capital, goods and services. The right was then extended to self-employed persons and service providers. Family members were entitled to the same rights. [...] Then, this right has been progressively extended to encompass all categories of citizens.
- In years 90's, three directives were adopted, which guarantee the rights of residence to categories of persons other than workers: retired persons, students, and inactive people.
- In 1992, the Maastricht Treaty introduced the concept of citizenship of the European Union which confers on every European citizen a fundamental and personal right to move and reside freely without reference to an economic activity. The Amsterdam Treaty, which came into force in 1999, further strengthened the rights linked to European Union citizenship by integrating the Schengen Convention into the Treaty.
- The European Court of Justice recognised the direct applicability of Article "18" of the TEC [or 12 ex 6?], giving thus each EU citizen the right to ask for the respect of that article, subject to limitations- *Arrêt 12 Mai 1998, Martinez Sala, affaire C-85/96, rec.I-2691 et Arrêt 24 Novembre 1998, Bickel et Franz, affaire C-274/96, rec.I-7637.*
- *The Treaty of Nice* which entered into force on 15 February 2003 facilitated the legislative process by introducing qualified majority voting in the EU decision making process in the field of free movement and residence.

Free movement and right of residence. The new legal and political environment entailed by EU citizenship has allowed for a fresh look to be taken at arrangements for European citizens to exercise their rights, and fulfil their obligations in this regards through the creation of a single set of rules governing freedom of movement. European citizens can, *mutatis mutandis*, move between Member States on similar terms as *nationals* of a Member State moving around or changing their place of residence inside their own *country*. European citizens have the right to enter, reside and remain in the territory of any other Member State for a period of up to three months simply by presenting a valid passport or national identity card: no other formality is required. If they intend to remain for a period exceeding three months, a residence permit must be obtained. The conditions for granting a residence permit depend on the status of the citizen (employed or self-employed person, student, retired or inactive person).

Any EU citizen can take up an economic activity in another Member State either as an employed or self-employed person. In this case, he/she will be issued a

residence permit by simply presenting an identity document (passport or ID) and proof of employment or self-employment. If a citizen wants to reside in another Member State without exercising any activity or to study, he/she can do so provided he/she can prove (and in the case of students, declare) that he/she has sufficient financial resources not to become a burden for the host Member State's social assistance system and that he/she is covered by a sickness insurance policy. He/she must also prove that he/she has sufficient financial resources and sickness insurance for each member of his/her family who is entitled to reside with him/her.

Family members, irrespective of their nationality, have the right to accompany and establish themselves with a European citizen who is residing in the territory of another Member State. Family members who can enjoy rights under Community law include the spouse, minor (under 21) or dependent children, and dependent ascendants, though in the case of students only the spouse and dependent children enjoy this right. If the family members are not EU citizens, they may be required to hold an entry visa by the Member State where they intend accompany the EU citizen. They shall be granted this visa free of charge and with all facilities by that Member State. More information about your precise rights when you move to another country can be obtained at: Dialogue with citizens and business site.

Flanking measures to strengthen the freedom of movement and right of residence. Over the years, the Commission has initiated a wide range of measures designed to make the right to free movement a practical reality. For example, laws relating to the recognition of academic and professional qualifications across the EU are now in place. The employment web site, EURES, offers job-seekers and employers EU-wide information and advisory service in order to facilitate labour mobility. Country guides for people wishing to enter and/or live in another Member State are also available.

The Directive 2004/38/EC on the right of the EU citizens and their family members to move and reside freely within the territory of the Member States. Despite impressive advances, EU citizens could still face problems when they moved to another Member State. Common difficulties concerned notably the lack of information about the extent of their rights, lengthy administrative procedures in obtaining residence documents and the precise definition of the rights of family members. The Directive adopted by the Parliament and Council on 29 April 2004, on a Commission's proposal (COM (2001) 257 in JOC 270 E of 25 09 2001) was meant to overcome these difficulties.

The main objectives of the Directive are:

- To replace all the previous EC legislation in this field by a single text instead of Regulation (EEC) n° 1612/68 and the Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC et 93/96/EEC.
- To give the rights to move and to reside to EU citizens as such and not anymore to categories of people identified as workers, students, self-employed and so on.
- To simplify the conditions and administrative formalities associated with the exercise of the right of free movement and residence in the Member States. For residence of less than three months, the only requirement is the possession of a

valid identity document. For residence of more than three months, the need to hold a residence card for citizens of the Union is abolished and replaced, if provided by national legislation, by registration in the population register of the place of residence, validated by a certificate issued immediately on presentation of proof that the conditions attached to the right of residence are complied with. EU citizens must be either workers or self-employed persons or else dispose of sufficient resources not to become a burden on the social assistance system of the host Member State and a comprehensive sickness insurance. Members of the family must provide proof of identity and of the family link to an EU citizen.

- To introduce the right of permanent residence for EU citizens after five years of continuous residence. They will no longer be subject to any conditions on the exercise of their right of residence, with virtually complete equality of treatment with nationals.
- To facilitate the movement of family members irrespective of whether they are EU nationals or not. The definition of 'family members' covers for the first time registered partners under the legislation of a Member State, if the legislation of the host Member State treats registered partners as equivalent to marriage. Other partners of EU citizens will not have an automatic right to entry and residence in the host Member State. However, the host Member State will have to "facilitate" the entry and residence of the partners with whom the EU citizen has a "durable relationship duly attested", taking into consideration their relationship with the EU citizen. Family members who are nationals of third countries also enjoy greater legal protection, for example in the event of death of the EU citizen on whom they depend, or the dissolution of the marriage under certain circumstances.
- To clarify the limitations to the right of residence on grounds of public policy, public security and public health in order to ensure that citizens of the European Union enjoy better administrative and legal protection in the context of measures restricting their right of residence, and to guarantee strong protection against expulsion for minors and persons who have resided in the host Member State for a long period of time.

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