ACCESS TO SOCIAL ADVANTAGES FOR EU CITIZENS AND THIRD COUNTRY NATIONALS UNDER THE LAW OF THE EUROPEAN UNION

essential text, cases and materials

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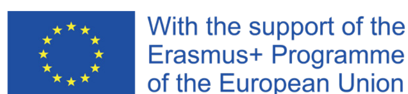

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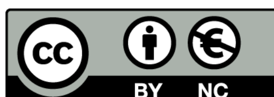

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PART I

Mobile EU citizens’ access to social advantages

1. Introduction

The right of EU mobile citizens to access social advantages in the host Member State is a **key-component of free movement law**. It materialises the **prohibition of discrimination on grounds of nationality** and favors the **static dimension of free movement**, that is to say the EU citizen's decision to settle on a stable basis in a Member State different from the one of origin.

At the same time, crucially, it is a highly politically sensitive subject, which places itself at the centre of two opposing needs: on the one hand, the Member States' objective of safeguarding the **financial stability of their welfare systems** and, on the other, the systemic need to promote free movement via **financial solidarity** vis-à-vis mobile EU citizens. In particular, while fewer controversies arise when it comes to economically active mobile EU citizens, it is in cases concerning **economically inactive EU citizens** that access to social advantages becomes a particularly **debated subject**.

The following selected texts and materials provide an overview of this complex topic, by focusing on the conditions and limits in the light of which various categories of mobile EU citizens - namely workers, self-employed persons, job seekers, frontier workers and economically inactive citizens - can get access to social advantages abroad.

2. The conditions for enjoying access to social advantages

Different conditions for enjoying access to social advantages apply, depending on whether the mobile EU citizen concerned is economically active or not. Indeed, as will be seen, **economically active mobile EU citizens** enjoy a **privileged position** compared to economically inactive individuals.

2.1. Economically active mobile EU citizens

We may identify four different categories of economically active mobile EU citizens: workers, self-employed persons, jobseekers re-entering the job market and frontier workers. For each of these categories of individuals, a **different degree** of access to social advantages is granted, depending on the level of **integration** in the Member State concerned. In particular, while mobile EU workers and self-employed persons **residing** in their Member State of work/self-employment enjoy the **most secure right to equal treatment** as regards access to social advantages, **non-resident** workers or self employed persons such as frontier workers enjoy **more limited protection**. As for **job seekers**, their entitlement to social advantages varies depending on whether they have already worked in the Member State concerned and are thus re-entering the job market or not.

2.1.1. Workers

When it comes to access to social advantages, mobile EU workers enjoy **the most privileged position** compared to other categories of economically active EU citizens. In fact, these individuals are considered to be **fully integrated** in the host Member State by virtue of at least two factors:

- their participation in the employment market,[1] and
- the circumstance that they contribute to the financing of the social assistance system of the host Member State by paying taxes.[2]

Before diving deeper into this topic, it is necessary to primarily recall what is meant by **'worker'** under EU law.

The notion of 'worker' is a fundamental notion in EU law and its meaning has been defined in the case-law of the Court of Justice. In the *Unger* case of 1963, the Court qualified the notion of worker as an **autonomous notion** under EU law, which cannot be defined by reference to the legislation of the Member States and must **not** be **interpreted narrowly**.[3] Indeed, according to the Court, if the definition of worker was left within the competence of national law, it would be possible for each Member State to modify the meaning of the concept of 'migrant worker', thus eliminating at will

[1] Judgment of Court 14 June 2012, Case C-542/09, *Commission v the Netherlands*, EU:C:2012:346, para. 65.

[2] *Ivi*, para. 66.

[3] Judgment of the Court of 19 March 1964, Case 75/63, *Unger*, ECLI:EU:C:1964:19.

the protection provided by the Treaties to this category of persons. In its subsequent case-law, the Court of Justice defined a worker as

> any person who, for a certain period of time, performs services for and under the direction of someone else in return for remuneration. The amount of remuneration is immaterial, provided that the economic activity is genuine and effective.[4]

Overall, the notion of worker has been interpreted **extensively** by the Court to include

- **part-time employment** with a salary lower than the minimum required for subsistence, since it represents a way to improve the living conditions of the worker;[5]
- the preparatory service of a trainee teacher, when the activity is remunerated;[6]
- job-seekers.[7]

Moreover, even after **retirement** former mobile EU workers continue to qualify as workers under EU law in the host Member State where they were employed.[8]

However, the Court has **excluded** from the notion of 'worker' under EU law

- **activities** on such a small scale as to be regarded as purely **marginal** and **ancillary**;[9]
- **activities** that are meant for the **rehabilitation and reintegration** of the person concerned, such as therapeutic work part of a drug rehabilitation programme.[10]

Individuals that qualify as 'workers' benefit from a series of fundamental rights laid out in the Treaties and in secondary law. In particular, **Article 45 TFEU** guarantees the **freedom of movement for workers** and lays down a **prohibition of discrimination** between national and non-national workers. Article 45(2) TFEU specifies that the non-discrimination principle applies as regards employment, remuneration and other

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[4] See, inter alia, Judgment of the Court of 23 March 1982, Case 53/81, *Levin*, ECLI:EU:C:1982:105 and Judgment of the Court of 31 May 1989, Case 344/87, *Bettray*, ECLI:EU:C:1989:226.

[5] Judgment of the Court of 23 March 1982, Case 53/81, *Levin*, cit.

[6] Judgment of the Court of 3 July 1986, Case 66/85, *Lawrie-Blum*, ECLI:EU:C:1986:284.

[7] Judgment of the Court of 23 March 2004, Case C-138/02, *Collins*, ECLI:EU:C:2004:172.

[8] Judgment of the Court of 18 June 1987, Case 316/85, *Lebon,* EU:C:1987:302, para. 14.

[9] See, inter alia, Judgment of the Court of 3 July 1986, Case 66/85, *Lawrie-Blum*, cit., paras. 16 and 17; Judgment of the Court of 23 March 2004, Case C-138/02, *Collins*, cit., para. 26 and judgment of the Court of 7 September 2004, Case C-456/02, *Trojani,* ECLI:EU:C:2004:488, para. 15.

[10] Judgment of the Court of 31 May 1989, Case 344/87, *Bettray*, cit., para. 17.

conditions of work and employment. The prohibited grounds of discrimination are further broadened by Article 7 of Regulation (EU) 492/2011,[11] which states that non-discrimination also applies to dismissal, reinstatement or re-employment and issues that are not immediately related to the labour relationship. In particular, **Article 7(2)** of **Regulation (EU) 492/2011**[12] states that mobile workers are entitled to **equal treatment** as regards, *inter alia*, **social and tax advantages**.

As far as the meaning of '**social advantages**' is concerned, the Court has held that such a notion must be interpreted **broadly**. In particular, in the *Even* case of 1979, the Court clarified that the notion refers to

> "all those [advantages] 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".[13]

In its subsequent case-law, the Court further broadened the notion of social advantages to include

- subsidy for a newborn;[14]
- old age allowances;[15]
- assistance granted for education;[16]
- a train's reduction card for large families.[17]

However, the **principle of non-discrimination** between national and non-national workers as regrads access to social advantages established in Article 7(2) of Regulation (EU) 492/2011 is **not absolute**, but may be subject to restrictions. In principle, to **justify a difference in treatment** between national and non-national

[11] Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union Text with EEA relevance, OJ L 141.

[12] Previously Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257.

[13] Judgment of the Court of 31 May 1979, Case 207/78, *Ministère public v Even*, ECLI:EU:C:1979:144, para. 22.

[14] Judgment of the Court of 14 January 1982, Case 65/81, *Reina*, Case 65/81, ECLI:EU:C:1982:6.

[15] Judgment of the Court of 6 June 1985, Case C-157/84, *Frascogna*, ECLI:EU:C:1985:243.

[16] Judgment of the Court of 26 February 1992, Case C-3/90, *Bernini*, ECLI:EU:C:1992:89.

[17] Judgment of the Court of 30 September 1975, Case C-32/75, *Cristini*, ECLI:EU:C:1975:120.

workers, Member States must demonstrate that they pursue **objective considerations of public interest** in a **proportionate manner.**[18] The most frequent justifications put forward by Member States to limit access to social advantages are

- the need to avoid an unreasonable burden on their social assistance system,[19] and
- the lack of a real and genuine link of integration between the claimant and the society or labour market of the Member State concerned.[20]

Nevertheless, as previously noted, **economically active mobile EU citizens** enjoy a **privileged position**, as they benefit from an **inderogable** and **absolute** right to equal treatment. This clearly emerges from *Commission v the Netherlands* case, where the Court held that:

> “the fact that [mobile workers and frontier workers] have participated in the employment market of a Member State establishes, in principle, a sufficient link of integration with the society of that Member State, allowing them to benefit from the principle of equal treatment, as compared with national workers, as regards social advantages [...], whether or not linked to a contract of employment”.[21]

Conversely, as will be seen in the next paragraph, mobile EU workers who do not reside in the Member State in which they work, such as frontier workers, are more exposed to the real link justification.

The Commission v the Netherlands case (C-542/09)

Facts: The son of a mobile EU worker residing in the Netherlands was denied portable **funding granted to students** on the ground that he had not lawfully resided in the Netherlands for at least three of the six years preceding his enrolment for higher education. The Commission launched an infringement procedure against the Netherlands, claiming that such a **residence requirement** violated EU law provisions, particularly Article 45 TFEU and

[18] See, *inter alia*, judgment of the Court of 11 July 2002, Case C-224/98, *D'Hoop*, EU:C:2002:432, para. 36.

[19] See, *inter alia*, judgment of Court 14 June 2012, Case C-542/09, *Commission v the Netherlands*, cit., paras. 57-58.

[20] *Ivi*, paras. 65-66. See also judgment of the Court of 11 July 2002, Case C-224/98, *D'Hoop*, cit., judgment of the Court of 15 March 2005, Case C-209/03, *Bidar*, EU:C:2005:169 and judgment of the Court of 26 February 2015, Case C-359/13, *Martens*, EU:C:2015:118.

[21] *Ivi*, para. 65.

Article 7(2) of Regulation No 1612/68 (now Article 7(2) of Regulation (EU) 492/2011).

<u>**Judgment**</u>**:** The Court began by recalling the **prohibition of discrimination** between national and non-national workers, both direct and indirect, laid down in **Article 45(2) TFEU** and the right of mobile EU workers to have access to the same **social and tax advantages** as national workers, established in **Article 7(2) of Regulation No 1612/68** (paras. 31-33 and 37). Then, the Court underlined that **study finance** granted by a Member State to the children of workers, such as the one granted by Dutch authorities in the case at issue, **constituted a social advantage** for the purposes of Article 7(2) of Regulation No 1612/68 (paras. 34-36).

Against this background, the Court found that the residence requirement laid down in the Dutch legislation constituted **indirect discrimination** which, unless objectively justified and compliant with the principle of proportionality, was in breach of Article 7(2) of Regulation 1612/68 (paras. 54-55). In fact, the residence requirement primarily operated to the detriment of mobile workers who were nationals of other Member States, in so far as non-residents are usually non-nationals (paras. 37-38). As for the existence of **objective justifications**, the Court rejected the Dutch government's argument that the residence requirement was intended to **avoid an unreasonable financial burden** on its social assistance system (para. 57). Indeed, according to the Court, accepting that budgetary concerns may justify a difference in treatment between mobile workers and national workers would imply that the application and scope of the principle of non-discrimination on grounds of nationality, which is of fundamental importance in EU law, might vary depending on the state of the public finances of Member States (para. 58). As for the justification pertaining to the existence of a **link of integration**, the Court stated that such a justification cannot be accepted, insofar as the fact that mobile workers have participated in the **employment** market of a Member State establishes, in principle, a **sufficient link of integration** with the society of that Member State, allowing them to benefit from the principle of equal treatment with national workers as regards social advantages (para. 65). In particular, the Court clarified that the link of integration arises from the fact that **workers pay taxes** in the Member State where they work and, in so doing, they contribute to the financing of the social policies of that State (para. 66). Lastly, the Court rejected the Netherland's argument that the residence requirement could be justified on the basis of the need to **promote mobility of Dutch students** who, in the absence of that scheme, would otherwise pursue their education in that Member State (paras. 70-89). In fact, although the promotion of student mobility may in principle constitute an overriding reason relating to the public interest capable of justifying a restriction on the principle of non-discrimination on grounds of nationality, the Netherlands had failed to demonstrate that the requirement did not go beyond what was necessary to pursue such an

objective (paras. 81-87). In particular, the Court found that the residence requirement was **too exclusive** and prioritised an element, the length of residence, which was not necessarily the sole element representative of the actual degree of attachment between the party concerned and the Member State (para. 86).

Lastly, it shall be recalled that the right to equal treatment as regards access to social advantages established in Article 7(2) of Regulation (EU) 492/2011 can also be relied upon by the **family members of mobile EU workers**, even if they are third-country nationals and if they are economically inactive. In particular, the family members falling under the scope of Article 7(2) are those listed in Article 2(2) of Directive 2004/38/EC,[22] namely

- the spouse;
- 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;
- direct descendants who are under the age of 21 or are dependants and those of the spouse or partner;
- the dependent direct relatives in the ascending line and those of the spouse or partner.

In particular, as clarified in the *Lebon* case,[23] family members can only obtain benefits **if they constitute social advantages for their mobile worker family members**. In other words, if a mobile worker is entitled to social advantages, their family members may also **indirectly** benefit from them.[24] Moreover, as clarified in the seminal *Cristini* judgment,[25] Article 7(2) of Regulation (EU) 492/2011 may also be invoked after the death of the worker by the family members remaining in the State in which the person was employed.

[22] 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 amending Regulation (EEC) No 1612/68 and repealing 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 and 93/96/EEC (Text with EEA relevance), OJ L 158.

[23] Judgment of the Court of 18 June 1987, Case 316/85, *Lebon,* cit.

[24] *Ivi*, para. 12.

[25] Judgment of the Court of 30 September 1975, Case C-32/75, *Cristini*, cit.

The *Lebon* case (316/85)

<u>Facts</u>: Mrs. Lebon, a French national, lived in Belgium with her father, also of French nationality and who had worked in Belgium until retirement. She claimed disbursement of minimum subsistence benefits in her capacity as direct descendant of her father, a former mobile EU worker. However, Belgian authorities rejected her request, on the ground that she had reached the age of majority and was not dependent on her father.

<u>Judgment</u>: The Court primarily clarified that family members may only **indirectly** benefit from the right to equal treatment accorded to mobile EU workers as regards access to social benefits by Article 7(2) of Regulation No 1612/68 (para. 12). In particular, it is only in case a measure qualifies as a social benefit for the worker that his/her family member(s) may indirectly benefit from it (*Ibidem*).

As far as direct descendants are concerned, the Court clarified that they may only indirectly benefit from social advantages granted to their mobile EU worker family member if they are **under the age of 21** or if they are **dependent** on him/her (para. 13). The same conditions were also applicable to **former mobile EU workers who reached the age of retirement** and continued residing in the Member State in which they worked (para. 14). In particular, the Court held that the **notion of dependency** for the purpose of Article 7(2) of Regulation 1612/68 was **the result of a factual situation** resulting from the fact that the person concerned was supported by the worker, without there being any need to determine the reasons for recourse to the worker's support or to raise the question whether the person concerned was able to support himself by taking up paid employment (para. 22). To provide otherwise would, according to the Court, excessively restrict the provisions of the treaties establishing the freedom of movement of workers, which must be construed broadly (para. 23).

The *Cristini* case (C-32/75)

<u>Facts</u>: The widow of an Italian citizen who had worked in France applied for a reduction card in railway fares for large families. However, French authorities rejected her application on the ground that such a benefit could only be disbursed to French citizens and, in any case, the reduction card did not qualify as a ‘social advantage’ within the meaning of Article 7 of Regulation No 1612/68.

<u>Judgment</u>: First of all, the Court held that a reduction card in railway fares for large families such as the one at issue in the main proceedings qualified as a social advantage for the purposes of Article 7(2) of Regulation 1612/68 (paras. 11-13). In fact the notion of ‘social advantages’ must be interpreted broadly and

should include all social and tax advantages, whether or not attached to a contract of employment (para. 13). It follows that such a reduction card could not exclusively be granted to national citizens, insofar as that would be in breach of the principle of equal treatment between national and non-national workers established in Article 7 of Regulation 1612/68. Subsequently, the Court established for the very first time that **family members of mobile EU workers** may derive **equal treatment** rights from Article 7(2) Regulation 1612/68 with regard to social advantages **even after the worker' death** (paras. 14-19). To provide otherwise would not only amount to a difference in treatment between survivors of a national worker and survivors of a non-national worker, but would also be in contrast with Regulation 1251/70 (now Regulation 635/2006), which grants family members of workers the right to equal treatment, as well as the right to remain in the territory of a Member State after the death of their family member worker (paras. 16-18).

2.1.2. Self-employed persons

The principle of equal treatment between national and non national workers as regards access to social benefits applies also to **self-employed persons**.[26] It follows that self-employed persons enjoy **the most encompassing right to equal treatment** as regards access to social benefits in their country of establishment, in the same way as workers do in their Member State of employment.

2.1.3. Jobseekers

As previously noted, jobseekers' access to social advantages depends on whether they are re-entering the job market - i.e. have **already worked** in the Member State concerned or not. In the former case, pursuant to Article 7(3)(b) of Directive 2004/38/EC, **jobseekers retain the status of 'workers'** under EU law on condition that

- they are in duly recorded involuntary unemployment after having been employed for more than one year in the Member State concerned and
- they have **registered as a jobseeker** with the relevant employment office.

Moreover, pursuant to Article 7(3)(c) of Directive 2004/38/EC, EU citizens who have **worked for less than a year** may also keep their status of worker for **'not less than' six months**. It follows that, if both of these conditions are met, jobseekers will

[26] Judgment of the Court of 14 January 1988, 63/86, *Commission* v *Italy*, EU:C:1988:9, paras. 12 to 16.

have access to social benefit under the same conditions applicable to workers highlighted in paragraph 2.1.1 above.

Conversely, for all other categories of jobseekers, some specific conditions apply.

In *Antonissen*, the Court held that jobseekers do not enjoy the full rights of a worker, but are still covered by Article 45 TFEU.[27] In particular, the Court held that Member States have to allow jobseekers to **enter** their territory and to remain there **for a reasonable time in order to look for employment**.[28] In this respect, according to the Court, six months was a reasonable period of time to allow people searching for work to find employment.[29] In the subsequent case of *Commission v Belgium*, the Court held that three months was a reasonable time,[30] and this particular point has now been codified in Article 6 of Directive 2004/38/EC, which grants all Union citizens the right to move to any Member State for up to three months without formalities or specific requirements other than holding a valid passport and not becoming an unreasonable burden on the social assistance of the host Member State in case of Union citizens that are economically inactive.

As far as jobseekers' access to social benefits is concerned, as previously noted during the first three months of residence Article 24(2) of Directive 2004/38/EC expressly authorises Member States to deny **social assistance** to **jobseekers and their family members.** Furthermore, Art. 7(2) of Regulation (EU) 492/2011 entitles jobseekers to equal treatment **only** as regards **access to employment**, and not as regards social and tax advantages. This point was particularly made clear in the *Collins* case,[31] where the Court held that jobseekers must have a sufficiently **close connection with the labour market** of the Member State concerned in order to claim benefits intended to facilitate access to employment.

The *Collins* case (C-138/02)

Facts: Mr Collins was a dual Irish and American national. Between 1980 and 1981 he did part-time and casual work in pubs and bars and in sales in the UK. Then he went back to the US and subsequently worked in the US and Africa. In 1998, 17 years after his first stay in the country, he returned to the UK to find a

[27] Judgment of the Court 26 February 1991, Case C-292/89, *Antonissen*, EU:C:1991:80, paras. 9-14.

[28] *Ivi*, para. 16.

[29] *Ivi*, para. 21.

[30] Judgment of the Court of 20 February 1997, Case C-344/95, *Commission v Belgium*, ECLI:EU:C:1997:81.

[31] Judgment of the Court of 23 March 2004, Case C-138/02, *Brian Francis Collins v Secretary of State for Work and Pensions*, ECLI:EU:C:2004:172.

job in the social service sector and claimed a jobseeker’s allowance which intended to facilitate jobseekers' entry into the job market. However UK authorities rejected his application on the ground that he had not been residing in the UK for an appreciable time and did not qualify as a worker for the purpose of Regulation 1612/68 (now repealed by Regulation (EU) 492/2011)

Judgment: The Court began by recalling that the **notion of worker**, which is an autonomous notion of EU law not to be interpreted narrowly, designates **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 (para. 26). In particular, the Court underlined that, according to its settled case-law, the essential feature of an employment relationship 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** (*Ibidem*).

In the light of this, the Court proceeded to verify whether Mr Collins qualified as a worker for the purposes of EU law. The Court’s answer was in the negative. Indeed, although Mr Collins held the status of worker when he did part-time casual work in the UK in 1980 and 1981, no link could be established between that activity and the search for another job more than 17 years later (para. 28). Therefore, in the absence of a sufficiently close connection with the UK employment market, Mr Collins’ position had to be compared with that of any **national of a Member State looking for his first job** in another Member State (para. 29).

As for the entitlement of a mobile EU citizen in circumstances such as those of Mr Collins to receive a jobseeker allowance, the Court held that nationals of a Member State seeking employment in another Member State enjoy the right to **equal treatment** laid down in the Treaty, but **only as regards access to employment** (paras. 57-58).

Finally, as for the **residence requirement** imposed by the UK legislation, the Court held that although it is legitimate for a State to require that a jobseeker has a genuine link with its employment market in order to receive an allowance, such a residence condition had to be applied in a proportionate and non-discriminatory way in order to comply with EU law (para. 72). Indeed, in the Court’s view equal treatment as regards access to employment, when interpreted in the light of EU citizenship, includes the entitlement of a job-seeker to a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State, provided that the jobseeker proves a sufficiently close connection with the labour market of the host State (paras. 63-72).

2.1.4. Frontier workers

Frontier workers are individuals who pursue an economic activity as an employed or self-employed person in one Member State, while continuing to reside in another, returning there daily or weekly.[32] Frontier workers are also covered by the freedom of movement of workers and by the prohibition of discrimination, both direct and indirect, between national and non-national workers granted by EU law. In particular, they may rely on the principle of equal treatment as regards access to social advantages established in Article 7(2) of Regulation (EU) 492/2011, and the same applies, in principle, to their family members falling under the scope of Article 2(2) of Directive 2004/38/EC.

However, as in the case of workers, the right to equal treatment enjoyed by frontier workers is also **not absolute**.[33] In particular, as highlighted above, **frontier workers** are **more exposed to the real link justification**. This is mainly due to the fact that frontier workers forge **ties** both with their **Member State of residence** and with the **Member State where they are economically active** and, as a consequence, their **degree of integration** in either Member State **varies**. Indeed, frontier workers are not always integrated in the Member State of employment in the same way as a worker who is resident in that State.[34] For this reason, the Court of Justice has allowed the introduction of **limitations** to frontier workers' right to access social advantages.

For instance, in the *Geven* case,[35] the Court held that a frontier worker engaged in **minor employment** could be refused access to a child raising allowance because that type of employment did not configure a **sufficient link of integration** with the society or labour market of the Member State concerned. It follows that, in principle, **the stronger** the economic activity carried out and, thus, **the link of integration forged in the Member State of employment**, **the stronger and the more secure the right to equal treatment**. In any event, in compliance with the Court's consisten case-law, restrictions based on the real link justification are only lawful if applied in a **proportionate** manner. This was particularly evident in the cases *Giersch*,[36] *Bragança*

[32] Note that, according to the Court of Justice, frontier workers do not necessarily have to work in a Member State other than their Member State of origin, while continuing to reside there, in order to qualify as frontier workers. Conversely, as clarified in case C-830/18, *Landkreis Südliche Weinstraße*, ECLI:EU:C:2020:275, paras. 22-25, reverse frontier may also exist, namely persons who work in their Member State of origin, while residing in another Member State.

[33] See, inter alia, Judgment of the Court of 18 July 2007, C-212/05, *Hartmann*, EU:C:2007:437, para. 30.

[34] Judgment of the Court of 20 June 2013, Case C-20/12, *Giersch,* EU:C:2013:411, para. 65.

[35] Judgment of the Court of 18 July 2007, Case C-213/05, *Geven*, ECLI:EU:C:2007:438.

[36] Judgment of the Court of 20 June 2013, Case C-20/12, *Giersch,* cit.

Linares Verruga[37] concerning the grant of study finance to children of frontier workers under Luxembourg legislation.

The *Geven* case (C-213/05)

<u>Facts</u>: Mrs. Geven, a Dutch national, applied for a child-raising allowance in Germany, where she was employed as a frontier worker in minor employment of less than 15 hours a week with a monthly remuneration not exceeding one seventh of the monthly reference amount set by national law. However, German authorities rejected her application on the ground that she did not reside in Germany and was engaged in minor employment (less than 15 hours a week).

<u>Judgment</u>: The Court began by recalling that **frontier workers**, just like regular workers, **can rely on Article 7(2) of Regulation No 1612/68** in order to claim equal treatment as regards access to social advantages, such as the child raising allowance at issue in the main proceedings (paras. 15-16). Then, the Court underlined that EU law prohibits **both direct and indirect discrimination** between national and non-national workers, unless the discriminatory measure appears to be objectively justified and proportionate to the aim pursued (paras. 18-19).

Against this background, the Court found that the residence requirement laid down in the German legislation constituted **indirect discrimination**, insofar as it could be more easily met by national workers than by workers from other Member States (para. 20). However, the Court deemed that the measure could be **justified** on the basis of the real link justification. In fact, the German legislation did not consider residence as the sole requirement to benefit from the allowance, but also enabled frontier workers who did not reside in Germany to receive it, provided that they were engaged in an **occupation of a more than minor extent** (paras. 23-25). According to the Court, this condition was **appropriate and proportionate** to ensure that the benefit was reserved to those who had a sufficiently close connection with German society (paras. 26-30).

The *Giersch* case (C-20/12)

<u>Facts</u>: Some students residing in Belgium, but whose parents were frontier workers employed in Luxembourg, applied for the grant of financial aid for their higher education studies granted by the government of Luxembourg. However,

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[37] Judgment of the Court of 14 December 2016, Case C-238/15, *Bragança Linares Verruga*, EU:C:2016:949. See also Judgment of the Court 10 July 2019, Case C-410/18, *Aubriet*, ECLI:EU:C:2019:582.

their applications were rejected on the ground that they did not reside in that Member State.

Judgment: First of all, the Court held that the family members of frontier workers, such as their direct descendants, may also **indirectly benefit from the right to equal treatment as regards access to social benefits established in the Treaty and in Article 7(2) of Regulation No 1612/68**, provided that the benefit sought qualifies as a **social advantage for the frontier worker** (paras. 34-40). In addition, the Court recalled that **financial aid granted for education purposes,** such as the one at issue in the main proceedings **constituted a social advantage** within the meaning of Article 7(2) of Regulation No 1612/68, particularly where the worker continued to support the child (paras. 38-39).

Against this background, the Court found that the residence requirement laid out by the legislation of Luxembourg constituted **indirect discrimination**, which unless objectively justified and proportionale to the aim pursued, was in breach of Article 7(2) of Regulation 1612/68 (paras. 42-46). In fact, the residence requirement was liable to operate mainly to the detriment of nationals of other Member States, as non-residents are in the majority of cases foreign nationals (para. 44). As for the existence of a legitimate objective, the Court accepted that the aim of bringing about an **increase in the proportion of residents holding a higher education degree** pursued by the law could constitute a **legitimate objective in the public interest** (paras. 47-56). Moreover, the Court noted that a residence condition such as the one established by the Luxembourg legislation could be **appropriate** to pursue such an objective (paras. 57-69). Indeed, students who were residing in Luxembourg when they were about to start their higher education studies might have be more likely than non-resident students to settle in Luxembourg and become integrated in its labour market after completing their studies, even if those studies were undertaken abroad (para.67). However, according to the Court, the residence condition went beyond what was necessary to achieve that aim, insofar as it was **too exclusive** in nature (paras. 70-82). In fact, in the Court's view, the existence of a reasonable probability that the recipient of the financial aid would settle in Luxembourg and make themselves available to its labour market in order to contribute to its economic development could be achieved on the basis of elements other than a prior residence requirement in relation to the student concerned (paras. 76-77). By way of example, the Court suggested **how to amend the law** by proposing the introduction of two less restricting alternatives:

- making the grant of the financial aid conditional on the **student returning to Luxembourg** after his/her studies abroad in order to work and reside there, thus avoiding adversely affecting the children of frontier workers;

- making the financial aid conditional on the **frontier worker having worked** in that Member State **for a certain minimum period of time**, thus avoiding the risk of 'study grant forum shopping'.

The Bragança Linares Verruga case (C-238/15)

Facts: The case concerned the refusal on the part of the Luxembourg authorities to grant a student whose parents were frontier workers in that Member State the same **financial aid granted for education purposes** the Court had previously ruled upon in *Giersch*. The refusal was due to the fact that the condition laid down in the law amended following that judgment was not met. In particular, the amended law made the grant of the financial aid conditional upon the parents of the student having worked in Luxembourg **for a continuous period of at least five years** at the time the application was made.

Judgment: The Court found that the new condition intoroduced after the *Giersch* ruling constituted once again **indirect discrimination**, insofar as it operated mainly to the detriment of nationals of other Member States. Indeed, non-residents were in the majority of cases foreign nationals (paras. 39-44). As for the existence of a legitimate objective, the Court accepted once again that the aim of bringing about an **increase in the proportion of residents holding a higher education degree** pursued by the law could constitute a **legitimate objective in the public interest** (paras. 45-47). Furthermore, the Court deemed the **condition of a minimum period of work** in Luxembourg on the part of the frontier worker parent required by the amended law to be **appropriate** to pursue such an objective (paras. 48-58). However, the Court ultimately concluded that the requirement went once again beyond what was necessary to attain the legitimate objective pursued (paras. 69-70). In fact, the condition was **too rigid** insofar as it required the parent of the student to have resided in Luxembourg for a **continuous** period of at least five years, without permitting the competent authorities to grant that aid where, as in the main proceedings, the parents, notwithstanding a few short breaks, had worked in Luxembourg for a significant period of time corresponding to almost eight years (para. 69).

2.2. Economically inactive mobile EU citizens

Economically inactive mobile EU citizens may also benefit from the right to equal treatment as regards access to **social assistance benefits**, namely

> all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his/her own basic needs and those of his/her family.[38]

However, as previously noted, economically inactive mobile EU citizens have **limited equality rights** when compared to economically active EU citizens. Indeed, as will be seen, in most cases economically inactive mobile EU citizens enjoy access to social assistance exclusively if they have **sufficient resources** and comprehensive **sickness insurance**. This is intended to ensure that these citizens do not become a burden for the national welfare states, a matter which has always been a source of concern for the Member States.[39]

The exact meaning and scope of the sufficient resources requirement has been shaped by the case-law of the Court of Justice, whose approach has changed greatly over the years. Indeed, while between the 1990s and the early 2000s the Court tried to soften the requirement of having sufficient resources on the basis of the idea that citizenship of the EU conferred in itself an autonomous entitlement to social rights, with the beginning of the financial crisis in 2010 he Court started taking a more restrictive stance.

As a result of this restrictive phase, at present economically inactive mobile Union citizens have the **right to be treated equally** to nationals of the host Member States, when it comes to access to social assistance, **exclusively if their residence** in the territory of the host Member State **complies with the conditions of Directive 2004/38/EC**:

- during the **first three months of residence** in the host Member State, economically inactive citizens only have a **limited access to social assistance**. In fact, Article

[38] Judgment of the Court of 19 September 2013, Case C-140/12, *Brey*, ECLI:EU:C:2013:565, para. 61.

[39] See Costamagna, F. and Giubboni, S. (2022). *EU citizenship and the welfare state* in Kostakopoulou, D. and Thym, D. (eds). *Research Handbook on European Union Citizenship Law and Policy* (Hart Publishing 2022), p. 233-235.

24(2) of the Directive expressly authorises Member States to deny social assistance to economically inactive EU citizens or jobseekers and their family members. Member States can also deny economically inactive EU citizens and their family members "maintenance aid for studies, including vocational training, consisting of student grants or student loans" until they acquire the right of permanent residence;

- for **periods of residence of up to five years**, social assistance may only be granted to economically inactive EU citizens and their family members if they comply with the conditions listed in Article 7 of the Directive, namely if 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 and a **comprehensive sickness insurance** cover in the host Member State;
- **after five years of legal and continuous residence**, EU citizens who have acquired the **right of permanent residence** under Article 16 of Directive 2004/38/EC are entitled to **virtually full material equality and equal access** for themselves and their families **to social assistance** as nationals of the host Member State, regardless of their lack of resources or health insurance. This derives from the consideration that, as provided for in Recital 18 of the Directive, the right of permanent residence is intended to be a genuine vehicle for integration into the society of the host Member State.

The next subparagraphs will provide a detailed analysis of the Court's 'restrictive' and 'expansionary' phase.

2.2.1. The expansionary phase

Between the **1990s-early 2000s** the Court of Justice delivered a series of judgments which opened up new **avenues of access to national welfare systems by economically inactive citizens**. In particular, the Court attempted to **close the gap** between workers and economically inactive citizens with regard to access to social assistance, **levelling up** the position of the latter toward that of the former.

This **judicially induced evolution** was based on the idea that **EU citizenship**, established in Articles 20 and 21 TFEU, **confers in itself an autonomous entitlement to social rights** and departed from **two interconnected moves**. First, the Court heavily relied on Treaty **anti-discrimination provisions** to circumvent the limits set by secondary legislation.

Second, it excluded that the sufficient resources requirement could be read as entailing an automatic exclusion from lawful residence and, thus, from social assistance benefits if it was not met. Instead, the Court required national authorities to carry out an **individualised assessment**, in order to assess whether the exclusion from the

required benefit was proportionate. This was first established in the *Martinez-Sala* case,[40] where the Court linked Article 20 TFEU to the prohibition of discrimination on grounds of nationality enshrined in what is now Article 18 TFEU. In particular, the Court held that:

> "Article 8(2) of the Treaty [now Article 20 TFEU] attaches to the status of citizen of the Union the rights and duties laid down by the Treaty, including the right, laid down in Article 6 of the Treaty [now Article 18 TFEU], not to suffer discrimination on grounds of nationality within the scope of application *ratione materiae* of the Treaty".[41]

In the subsequent cases *Grzelczyk* and *Bidar*, the Court went even further and claimed that the institution of **EU citizenship** entailed the acceptance of "a certain degree of **solidarity** between nationals of a host Member State and nationals of other Member States"[42] and that, as a consequence, Member States "must, in the organisation and application of their social assistance systems, show a certain degree of **financial solidarity** with nationals of other Member States".[43] In other words, according to the Court, national authorities could not automatically assume that anyone seeking assistance was bound to become a burden and, consequently, could be denied the right to reside along with the right to access social assistance granted to residents.

The *Grzelczyk* case (C-184/99)

Facts: Mr Grzelczyk, a French national studying in Belgium, applied for the grant of a minimum subsistence allowance (minimex) to finance his final year of study. However, Belgian authorities rejected his application on the ground that the allowance was destined to Belgium nationals only and, in any event, entitlement to the minimex could only be extended to workers.

Judgment: First of all, the Court rejected the idea that aid granted to students for maintenance could be considered as falling outside the scope of application of EU law, even though it had held otherwise in previous judgments (paras. 29-

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[40] Judgment of the Court of 12 May 1998, Case 85/96, *Martínez Sala,* ECLI:EU:C:1998:217.

[41] *Ivi*, para. 62.

[42] Judgment of the Court of 20 Septembre 2001, Case C-184/99, *Grzelczyk*, ECLI:EU:C:2001:458, para. 44.

[43] Judgment of the Court of 15 March 2005, Case C-209/03, *Bidar*, cit., para. 56.

46). Indeed, according to the Court, nothing in the amended text of the Treaty suggested that students who were citizens of the Union could lose their Treaty rights when moving to another Member State (para. 35). Therefore, Union citizens pursuing university studies in a Member State other than that of their nationality fall under the scope of the prohibition of all discrimination on grounds of nationality laid down in the Treaty (para. 36).

As for the conditions subject to which students might benefit from these rights, the Court recalled that Directive 93/96 (now repealed by Directive 2004/38/EC) required students who moved to another Member State to have **sufficient resources** and a **comprehensive sickness insurance** in order to enjoy a right of residence there (para. 38). However this **did not prevent** Member States from taking the view that a **student who had recourse to social assistance no longer fulfilled those conditions** (para. 43). Indeed, according to the Court Directive 93/96 accepted a certain degree of **financial solidarity** between nationals of a host Member State and nationals of other Member States, particularly if the **difficulties** which a beneficiary of the right of residence encountered were **temporary** (paras. 44-45). In other words, according to the Court the mere fact that a student was asking for social assistance did not necessarily mean that that person did not have sufficient resources. Conversely, an individual assessment of the case was needed, especially when the difficulties were just temporary.

The *Bidar* case (C-209/03)

Facts: Mr Bidar, a French national studying in England, applied for the grant of a subsidised student loan after having lived in the UK for three years. However, the UK authorities rejected his application, on the ground that he did not satisfy the requirement of having sufficient resources and, as a consequence, was not lawfully residing in England.

Judgment: First of all, the Court confirmed that economic aid granted to students falls within the scope of EU law and, more specifically, is covered by the principle of non-discrimination (paras 28–48). As for the residence condition established in the UK legislation, the Court found that it constituted **indirect discrimination**, which could only be justified if based on objective considerations independent of the nationality of the persons concerned and if proportionate to the aim pursued (paras. 49-54). Although the Court deemed that it was legitimate for Member States to require that students had a certain degree of integration into the society of the State in order to receive social assistance (para. 57), it excluded that national authorities could rely on formal criteria, such as the duration of the residence. Instead, in the Court’s view, national authorities had to take into consideration other aspects such as the existence of a **genuine link** with the society of the State (para. 63). In

particular, the Court reached this conclusion on the basis of the assumption that Member States must, in the organisation and application of their social assistance system, show a certain degree of **financial solidarity** with nationals of other Member States (para. 56).

2.2.2. The restrictive phase

With the arrival of the **financial crisis** that stormed the EU in **2010**, the Court's approach became much more **restrictive**. Indeed, Member States began complaining that the Court's judicial activism of the expansionary phase had been promoting **social tourism** at the expense of their capacity to ensure the sustainability of their welfare states. In addition, in 2013 the UK, Austria, Germany and the Netherlands formally asked the Commission to propose the amendment of Directive 2004/38/EC, in order to provide national authorities with more effective tools to combat a "type of immigration [that] burdens the host societies with considerable additional costs".[44] Although this argument was not and is still not presently backed up by empirical evidence,[45] the Member States' pressure on the Court ultimately induced it to take a more cautious stance.

Overall, the Court's restrictive phase developed along **two main lines**. On the one hand, the Court shifted its focus from the rights enshrined in Treaty provisions on EU citizenship to a **strict interpretation of Directive 2004/38/EC**, which became the sole yardstick to evaluate the compatibility with EU law of the restrictions posed by Member States to access to their welfare. On the other, it progressively **extended** the scope of application of the **limits to the right to reside set in the Directive** by adopting an increasingly broad reading of the notion of 'social assistance'. This evolution took place gradually and developed over the course of three landmark judgments: *Brey*, *Dano* and *Alimanovic.*

In *Brey*,[46] the Court took a rather ambiguous position, which was still partially linked to the previous expansionary phase. Indeed, the Court reiterated that Directive 2004/38/EC recognised a **certain degree of financial solidarity** between nationals of

[44] In 2013 the UK, Austria, Germany and the Netherlands formally asked the Commission to propose the amendment of Directive 2004/38/EC, in order to provide national authorities with more effective tools to combat a "type of immigration [that] burdens the host societies with considerable additional costs". The statement of the Member States concerned is available at http://docs.dpaq.de/3604-130415_letter_to_presidency_final_1_2.pdf.

[45] See European Commission (2021). *Annual Report on Intra-EU Labour Mobility 2020*, available at https://ec.europa.eu/migrant-integration/library-document/annual-report-intra-eu-labour-mobility-2020_en. The report indicates that out of the 11.9 million EU-28 movers of working age (20 to 64 years), 9.9 million were economically active movers.

[46] Judgment of the Court of 19 September 2013, Case C-140/12, *Brey*, cit.

a host Member State and nationals of other Member States[47] and that, as a consequence, national authorities could not automatically exclude economically inactive citizens from welfare benefits without carrying out an **individual assessment** of their personal circumstances.[48] However, the Court went one step further, as it required authorities to assess whether such citizens would represent an **unreasonable burden** on the basis of a **systemic evaluation**, taking into account "a **range of factors** in the light of the principle of **proportionality**".[49] Indeed, according to the Court, it was only after having assessed "the specific burden which granting that benefit would place on the **social assistance system as a whole**"[50] that Member States could reject the application of a social assistance benefit made by an economically inactive person. However, as rightfully pointed out by several commentators,[51] this requirement poses significant difficulties when it comes to its practical implementation, given that it places upon national authorities an **evidentiary burden almost impossible** for them **to discharge**, since there is no case in which a State could ever prove that the granting of 'that benefit' would make the system collapse. Thus, as observed by Verschueren, the *Brey* judgment "increased, rather than alleviated, legal uncertainty and confusion"[52] with regard to the determination of what an unreasonable burden is.

The *Brey* case (C-140/12)

Facts: Mr Brey and his wife, both of German nationality, moved to Austria. Mr Brey applied for the grant of a compensatory supplement , but Austrian authorities rejected his application on the ground that, owing to his low retirement pension, he did not have sufficient resources to establish his lawful residence in Austria.

Judgment: The Court began by stating that, as it followed from its consistent case-law, EU law did not prevent national legislation under which the grant of social security benefits to economically inactive Union citizens was made

[47] *Ivi*, para. 72.

[48] *Ivi*, para. 64.

[49] *Ivi*, para. 72

[50] *Ivi*, para. 64.

[51] Verschueren, H. (2014). *Free Movement and Benefit Tourism: The Unreasonable Burden of Brey*, in *European Journal of Migration and Law* 16(2), p. 147-179; Thym, D. (2015). *The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens*, in *Common Law Market Review* 52(1), p. 17-50; Giubboni, S. (2016). *EU Internal Migration Law and Social Assistance in Times of Crisis*, in *Rivista del diritto della sicurezza sociale* 16(2), p. 247-270; Carter D. and Jesse, M. (2018) *The Dano Evolution: Assessing Legal Integration and Access to Social Benefits for EU Citizens*, in *European Papers* 3(3), p. 1179-1208.

[52] Verschueren, H. (2015). *Preventing Benefit Tourism in the EU: A Narrow or a Broad Interpretation of the Possibilities Offered by the ECJ in Dano?*, in *Common Market Law Review* 52(2), p. 367.

> conditional upon those citizens meeting the necessary requirements for obtaining a legal right of residence in the host Member State (paras. 39-44). In this respect, the Court recalled that Article 7 of Directive 2004/38/EC allowed a Member State to require nationals of another Member State wishing to reside on its territory for a period of longer than three months without being economically active to have a **comprehensive sickness insurance** and **sufficient resources** for themselves and their family members, with a view to preserving the **Member State's public finances** (para. 47). Therefore Directive 2004/38 allowed the Member States to impose legitimate restrictions in connection with the grant of certain benefits to Union citizens who did not or no longer had worker status, so that those citizens would not become an unreasonable burden on the social assistance system of that Member State (paras. 54-57).
>
> However, according to the Court, the mere fact that a person had applied for social assistance was not sufficient to show that he/she constituted an unreasonable burden on the social assistance system of the host Member State (para. 64). Conversely, competent authorities had to carry out an **overall assessment** of the **specific burden** which granting that benefit would place on the **social assistance system as a whole**, by reference to the **personal circumstances** of the person concerned and taking into account a range of factors in the light of the principle of **proportionality** (para. 77).

The subsequent case of *Dano*[53] marked the Court's official departure from its previous expansionary phase. Indeed, the Court clearly stated that economically inactive mobile EU citizens could **only** benefit from **equal treatment** as regards access to social assistance benefits if their **residence** on the territory of the Member State concerned **complied with** the conditions of **Directive 2004/38/EC**.[54] In so doing, the Court relied on a **strictly literal interpretation of the Directive**, which effectively paved the way for Member States to **almost automatically exclude citizens who were not self-sufficient from social assistance**. More broadly, in *Dano* the Court **prioritised** the **objective of avoiding mobile citizens becoming a burden on national social assistance systems** over the promotion of intra-EU mobility, with a view to reassuring the Member States worried that its case-law might encourage welfare tourism. This is particularly evident in the description of the factual background of the case, where the Court took great care in painting Ms Dano as the prototypical example of a social tourist.[55] It should also be noted that in *Dano* the Court no longer

[53] Judgment of the Court of 11 November 2014, Case C-333/13, *Dano*, ECLI:EU:C:2014:2358.

[54] *Ivi*, para. 69.

[55] *Ivi*, para. 39.

required national authorities, as it had previously established in *Brey*, to demonstrate that the grant of the benefit would represent an unreasonable burden. Conversely, it merely required them to carry out an individual assessment taking into account the financial situation of the applicant, an element which significantly lowers the threshold to be met in order to justify a refusal to grant social assistance.

The *Dano* case (C-333/13)

Facts: Ms Dano and her son, both of Romanian nationality, resided in Germany. There, they lived in the apartment of Ms Dano's sister, who provided for them materially. Ms Dano had not worked either in Germany or in Romania and, although her ability to work was not in dispute, there was nothing to indicate that she had looked for a job. She applied for the grant of social security benefits, but German authorities rejected her application.

Judgment: In answering the question on the legality of the rejection of Ms Dano's request, the Court started by saying that EU citizens could only claim equal treatment with regard to access to social benefits if they had a right of residence under Directive 2004/38/EC (para. 69). In particular, for periods of residence longer than three months, the right of residence was subject to the conditions set out in **Article 7(1) of the Directive**, namely having **sufficient resources** and **comprehensive sickness insurance** (para. 71). In the Court's view, this requirement was aimed at preventing economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence (para. 76).

Moving on from this background, the Court concluded that Member States are fully entitled to refuse to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance, although they do not have sufficient resources to claim a right of residence (para. 78). Lastly, the Court maintained that, in order to determine whether the applicant falls into the category of those who can be excluded, the State had to take into consideration the financial situation of the person concerned (para. 80).

Finally, in the case of *Alimanovic*,[56] the Court pushed the involution set in motion by *Dano* even further. Indeed, the Court maintained that **no individual assessment** to determine whether the person concerned may represent an unreasonable burden for the social assistance system is required **where the applicant**, after having **worked for**

[56] Judgment of the Court of 15 September 2015, Case C-67/14, *Alimanovic*, ECLI:EU:C:2015:597.

less than one year in the host State, had subsequently **lost his/her status of worker** after six months in compliance with Article 7(3)(c) of Directive 2003/38/EC analysed in paragraph 2.1.3 above. This was due to the fact that, according to the Court, the Directive established a **gradual system** for the maintenance of the status of worker, which already took into due consideration the personal situation of the individual concerned, thus making the **proportionality test redundant**.[57] More broadly this reasoning, which the Court also followed in the subsequent case of *García-Nieto*,[58] is based on the consideration that, if an automatic exclusion from social benefits is admitted in respect of jobseekers having worked for less than a year, the 'same applies *a fortiori*'[59] with regard to persons that have no previous links with the host State's job market. Yet, this approach has been widely criticised as it **worsens** the **already precarious condition of jobseekers** and **neglects** the **establishment of any rule of reason** taking into consideration factors such as the reasonable prospect of the person finding a new job or the fact that the person is actively looking for one.

The Alimanovic case (C-67/14)

<u>Facts</u>: The case concerned the entitlement of Ms Alimanovic and her three German born children, all of Swedish nationality, to German social welfare benefits. In contrast with the *Dano* case, in which the EU citizen in question had never worked and was not seeking work, Ms Alimanovic and her oldest daughter had **temporary jobs for less than a year.** However, according to the Job Centre, Ms Alimanovic and her daughter had lost their 'employee' status six months after becoming involuntarily unemployed. Consequently, they could be refused the benefits on the basis of the German provision which excluded jobseekers from entitlement to social assistance benefits. Uncertain about the lawfulness of the refusal, the national court referred the matter to the Court of Justice, essentially asking it to clarify whether the loss of the status of worker was enough to automatically exclude Ms Alimanovic and her daughter from the benefit or whether German authorities had to take into consideration their specific situation.

<u>Judgment</u>: The Court started by recalling its finding in *Dano* that a Union citizen can only claim equal treatment with regard to social assistance if his/her residence in the territory of the host Member State complies with the conditions of Directive 2004/38/EC (paras. 49-50). In the light of this, the Court maintained that only two provisions of Directive 2004/38 might confer on individuals in the

[57] *Ivi*, paras. 59-62.

[58] Judgment of the Court of 25 February 2016, Case C-299/14, *García-Nieto*, EU:C:2016:114, para. 48.

[59] *Ivi*, para. 48.

situation of Ms Alimanovic and her daughter a right of residence under that Directive: Article 7(3)(c) and Article 14(4)(b) thereof (para. 52).

Article 7(3)(c) of the Directive provides that if the worker 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 12 months and has registered as a jobseeker with the relevant employment office, he/she retains the status of worker for no less than six months and and may, consequently, rely on the principle of equal treatment, laid down in Article 24(1) of the Directive (para. 53-54). However, 6 months had already passed since Ms Alimanovic and her daughter's last employment (para. 55). Therefore, they no longer fell under the scope of such provision.

Article 14(4)(b) of the Directive provides that Union citizens who have entered the territory of the host Member State in order to seek employment **may not be expelled** for as long as they can provide evidence that they are **continuing to seek employment** and that they have a genuine chance of being engaged (para. 56). Although Ms Alimanovic could rely on this provision to establish a right of residence, the Court observed that the Member State could in any event rely on the **derogation in Article 24(2)** of Directive 2004/38/EC in order not to grant that citizen the social assistance sought (paras. 57-58). In fact, Art 24 provides that the host Member State may refuse to grant any social assistance to a Union citizen whose right of residence is based solely on Art 14 (*Ibidem*).

In the light of the foregoing, the Court proceeded to make a **powerful statement**. The Court acknowledged that, according to its previous decisions, the Directive would require national authorities to carry out an individual assessment to determine whether the person concerned may represent an unreasonable burden for the social assistance system (para. 59). However, it held that **no individual assessment** was due in the case at hand. The reason for departing from its own case-law laid in the **gradual system** established by Directive 2004/38/EC with regard to the retention of the status of worker (para. 60). In other words, the Court held that Directive 2004/38/EC guarantees a significant level of legal **certainty** and **transparency** in the context of the award of social assistance, which enables those concerned to know what their rights and obligations are, while complying with the principle of **proportionality**. According to it, this was sufficient to exclude, in circumstances such as those at issue in the main proceedings, an obligation to carry out an individual assessment.

2.2.3 .The *Jobcenter Krefeld* case: the continuing relevance of the distinction between economically active and economically inactive citizens

The analysis of the Court's case-law regarding economically inactive mobile EU citizens would not be complete without mentioning the ***Jobcenter Krefeld* case**.[60] In fact, this judgment marked a **partial departure** from the Court's restrictive case-law, although its **scope** of application is **limited** to a **specific category of individuals**: **jobseekers having children enrolled in schools in the host Member State**.

The *Jobcenter Krefeld* case concerned the refusal by German national authorities to pay basic social security benefits to a mobile EU citizen and his two daughters, who were under his exclusive custody. The refusal was motivated by the fact that the EU national had lost his job more than six months earlier and was residing in Germany only to seek new employment. The key question was

- whether the EU citizen was entitled to claim equal treatment with regard to access to the basic social security benefit on the basis of the right of residence derived from **Article 10 of Regulation 492/2011**, which grants workers' children a right to access general education, apprenticeships and vocational training under the same conditions as nationals of the host Member State, provided that the child resides in the Member State where the worker is employed, or
- whether national authorities were entitled to deny it on the basis of **Article 24 Directive 2004/38/EC**, since he no longer met the requirements for lawful residence set in that act.

Ultimately, the Court decided in favour of the first option. Indeed, it ruled that **residence** based on **Article 10 of Regulation 492/2011** entitles **children in education** and their **primary carers** to **equal treatment** as regards **social advantages**, including social assistance, **even if the parents have lost the status of worker and are seeking work**. In particular, the Court clarified that the derogation from equal treatment laid down in Article 24(2) of Directive 2004/38/EC does not apply to these individuals. In so doing, the Court seemed to **partially depart from its strict interpretation of Directive 2004/38/EC**, refusing to further strengthen its normative status in a belated attempt to undo some of the damage done by previous decisions, such as *Alimanovic*.

The Jobcenter Krefeld v JD case (C-181/19)

<u>Facts</u>: JD, a Polish national, was the sole carer of his two daughters, with whom he had settled in Germany. The employment centre Jobcentre Krefeld

[60] Judgment of the Court of 6 October 2020, Case C-181/19, *Jobcenter Krefeld*, ECLI:EU:C:2020:794.

refused to continue paying JD basic social security benefits on the ground that he had lost his job more than six months earlier and was residing in Germany only to seek new employment. In response to this, JD brought a judicial action before the Sozialgericht Düsseldorf, which upheld the Decision. In particular, the Social Court observed that, while it was true that JD could no longer rely on a right of residence derived from previous employment according to the national legislation transposing Directive 2004/38/EC, he could derive such right from that enjoyed by his daughters on the basis of Article 10 Regulation (EU) 492/2011. Indeed, JD was the sole carer of two children who had commenced school attendance in Germany when he was a worker and who were entitled to reside in the host State regardless of their father subsequently losing his job. Jobcentre Krefeld brought an appeal against that judgment before the referring Court, which decided to stay the proceedings and to submit a preliminary ruling to the Court of Justice.

Judgment: After having recalled the content of the Articles 7 and 10 of Regulation (EU) 492/2011, the Court underlined that the right of residence conferred upon the children of a worker by Article 10 Regulation (EU) 492/2011 triggers the right to equal treatment provided for under Article 7 of the Regulation (paras. 34-55). Subsequently and most importantly, the Court stressed that, **in circumstances such as those in the main proceedings**, **equal treatment** was **autonomous from Directive 2004/38/EC** and the limits set therein on the basis of **three main arguments**. First, the derogation set in Article 24(2) of Directive 2004/38/EC makes clear that it operates only with regard to “all Union citizens residing on the basis of this Directive in the territory of the host Member State” (para. 62). Second, the Directive was not meant to constitute a gateway to equal treatment for any type of mobile citizen, exhaustively codifying limits and conditions to the exercise of the right of free movement (paras. 63-65). Third, the objective of preserving the financial soundness of national welfare states plays no role in the case at hand and, thus, it cannot be invoked by national authorities to justify any restriction upon the right of equal treatment with regard to access to social benefits (para. 66).

Notwithstanding all of the above, as previously noted the downside of the *Jobcenter Krefeld* case is that it concerns only a limited portion of mobile citizens, namely jobseekers having children enrolled in school in the host State. This was clearly confirmed in the subsequent *GC* case,[61] where the Court held that an economically inactive person, without sufficient resources for her and her children, whose residence therefore did not comply with the requirements set by Article 7 of Directive 2004/38/EC, could not claim entitlement to social benefits on a non-discriminatory basis, as provided

[61] Judgment of the Court of 15 July 2021, Case C-709/20, *GC*, ECLI:EU:C:2021:602.

for by Article 24 the Directive. The *GC* case, which has been rightfully criticised,[62] has therefore confirmed the decisive role played by Directive 2004/38/EC, and its restrictive conditions, in determining access to social assistance benefits by economically inactive EU citizens, limiting a more expansive reading to exceptional circustances such as those present in *Jobcenter Krefeld.*

The *GC* case (C-709/20)

Facts: GC, holding dual Croatian and Dutch nationality, was the single mother of two young children. She had no resources for herself and her children and was living in a women's refuge in Northern Ireland on the basis of a temporary right of residence in the UK. In particular, she had been granted pre-settled status, which was not subject to any condition as to resources. She requested access to a social assistance benefit known as Universal Credit, but the national authorities rejected her application on the ground that holders of a temporary right of residence were excluded from the category of potential beneficiaries of such benefit.

Judgment: The referring judge asked the Court to clarify whether the eligibility conditions set by the national legislation were discriminatory on grounds of nationality and, hence, in breach of Article 18 TFEU. However, the Court deemed it necessary to **reformulate** the question referred for preliminary ruling, as in its view it was in the light of **Article 24 of Directive 2004/38/EC**, and not of Article 18 TFEU that the question was to be assessed (paras. 67-72). Indeed, according to the Court, Article 18 TFEU is intended to apply independently only to situations governed by EU law with respect to which the FEU Treaty does not lay down specific rules on non-discrimination, whereas **Article 24 of Directive 2004/38/EC gives concrete expression to the principle of non discrimination** in relation to Union citizens who, like the applicant in the main proceedings, exercised their **right to move and reside within the territory of the Member States** (paras. 65-66).

In the light of this, the Court reiterated that, as it had previously established in *Dano*, a Union citizen can claim equal treatment so far as concerns access to social assistance only if his or her **residence** in the territory of that Member State **complies with the conditions of Directive 2004/38/EC**, particularly with the conditions set out in Article 7 thereof (paras. 75-79). Since the applicant GC did not have sufficient resources for her and her children, her residence did not comply with the requirements set by Article 7 Directive 2004/38/EC and, as a consequence, she could not claim entitlement to social benefits on a non-

[62] O'Brien, C. (2021). *The Great EU Citizenship Illusion Exposed: Equal Treatment Rights Evaporate for the Vulnerable (CG v The Department for Communities in Northern Ireland)*, in *European Law Review* n. 6, p. 801-817. See also Costamagna, F. and Giubboni, S. (2022). *EU citizenship and the welfare state*, cit., p. 246-247.

discriminatory basis, as provided for by Article 24 Directive 2004/38/EC (*Ibidem*). The Court also stated that Member States are free to specify the consequences of a right of residence granted on the basis of national law alone and, thus, to exclude economically inactive Union citizens who do not have sufficient resources from benefits that are guaranteed to nationals in the same situation (para. 83).

Finally, in the last part of the judgment the Court underlined that national authorities are obliged to respect the claimant's fundamental rights by complying with the Charter, in particular human dignity, as protected by Article 1 of the Charter, the right to private and family life, as protected by Article 7 of the Charter, to be read in conjunction with the obligation to take into consideration the best interest of the child, as recognised by Article 24(2) of the Charter (paras. 85-92). However, no further guidance as to the practical application of these articles was provided.

PART II

Third-country nationals' access to social advantages

1. Introduction: the EU legal framework governing third-country nationals' access to social advantages

Unlike in the case of European citizens, EU primary norms do not contain a non-discrimination clause that applies to third-country nationals. Their access to social advantages is governed by an **articulated set of EU secondary acts,** depending on the **category of third-country nationals** involved.

Overall, we may identify five[63] Directives containing provisions on this matter:

- Directive 20011/98/EU - the Single Permit Directive;
- Directive 2003/109/EC - the Long Term Residents' Directive;
- Directive 2014/36/EU - the Seasonal Workers' Directive;
- Directive 2021/1883/EU - the Blue Card Directive;
- Directive 2011/95/EU - the Reception Conditions Directive.

Moreover, national practices remain for the most part **fragmented**, with some Member States granting wider access to their welfare states, while others follow a more restrictive approach.

This section provides a brief overview of the essential elements of the relevant normative framework and of the related case-law of the Court of Justice.

Before diving deeper into this analysis, it is necessary to clarify the **branches of social security** which third-country nationals may in principle have access to. These are listed in **Article 3(1)** of **Regulation (EC) 883/2004**[64] **on the coordination of social security systems** and are:

[63] The present contribution does not analyse the Researchers Directive (Directive 2016/801/EU), since the related equal treatment clause is identical to the Single Permit Directive, and the Directive on Intra-corporate Transfers Directive (Directive 2014/66/EU), due to its limited relevance in the current practice.

[64] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166.

(a) sickness benefits;
(b) maternity and equivalent paternity benefits;
(c) invalidity benefits;
(d) old-age benefits;
(e) survivors' benefits;
(f) benefits in respect of accidents at work and occupational diseases;
(g) death grants;
(h) unemployment benefits;
(i) pre-retirement benefits;
(j) family benefits.

It is important to underline that, if any, access to each of these social advantages varies depending on the category of third-country nationals involved.

Lastly, it shall be noted that, as far as access to **social assistance** is concerned, equal treatment is generally **excluded** in respect of third-country nationals, **except** in case of **long-term residents** falling under the scope of Directive 2003/109/EC. In fact, the requirement of having sufficient resources "without having recourse to the social assistance system of that Member State" is often laid out as a condition for the grant of a right of residence to third-country nationals.

2. Single permit holders - Directive 2011/98/EU

Directive 20011/98/EU[65] lays down the procedure for the issuance of a **single permit** to **third-country nationals** who reside in the territory of a Member State **for the purpose of work**, along with a common set of **rights** applicable to single permit holders based on **equal treatment with nationals of that Member State**.

Article 12(1)(e) of the Directive grants the third-country nationals falling under its scope **equal treatment** as regards the **branches of social security defined in Regulation (EC) 883/2004** mentioned above. Conversely, equal treatment with respect

[65] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L 343.

to **social assistance** is expressly **excluded** by Recital 27 of the Directive. In particular, as far as social security is concerned, the right to equal treatment applies to third-country nationals

- who have been admitted to a Member State for the purpose of work in accordance with Union or national law (Article 3(1)(c) of the Directive), or
- who have been admitted to a Member State for purposes other than work in accordance with Union or national law, who are allowed to work and who hold a residence permit in accordance with Regulation (EC) 1030/2002 (Article 3(1)(b) of the Directive).

However, four **derogations** to the right to equal treatment may be introduced.

First, **Article 12(2)(b), first subparagraph** of the Directive contains a **general limiting clause** which expressly enables Member States to establish limitations to the right to equal treatment in the branches of social security covered by Regulation 883/2004, **except** for third-country workers who are **in employment** or who have been **employed for a minimum period of six months** and who are **registered as unemployed**.

Second, pursuant to **Article 12(2)(b), second subparagraph** of the Directive, access to **family benefits** may be denied to third-country nationals who have been authorised to work in the territory of a Member State for a period not exceeding six months, to third-country nationals who have been admitted for the purpose of study, or to third-country nationals who are allowed to work on the basis of a visa.

Third, as clarified in **Recital 24**, the Directive does not confer rights in relation to **family members residing in a third country**. Conversely, the Directive grants rights only in relation to family members who join third-country workers to reside in a Member State on the basis of family reunification or family members who already reside legally in that Member State.

Finally, **Article 12(4)** of the Directive provides for a right to export acquired rights to benefits related to old age, invalidity and death in case of **migration to a third country**, but allows Member States to pay lower benefits if they also pay lower benefits to their own nationals moving outside the EU. Single permit holders' survivors who reside in a third country and who derive rights from an EU Blue Card holder may also benefit from the right to equal treatment.

The right to equal treatment with respect to social security benefits established in Article 12(1)(e) of Directive 2011/98/EU has been subject to a series of judgments of

the Court of Justice involving the criteria set by Italian law to access family benefits such as family, maternity or childbirth allowance (*assegno per il nucleo familiare, assegno di maternità* or *bonus bebè*).

In the first of these judgments, the *Martinez Silva* case,[66] the Court clarified that a benefit may be regarded as a **social security benefit** under Regulation (EC) 883/2004 if it relates to one of the **risks** expressly listed in **Article 3(1)** of the Regulation and if it is granted to recipients **without** any **individual and discretionary assessment** of personal needs on the basis of a **legally defined position**.[67] In particular, according to the Court, in order to understand whether a benefit falls within the scope of the Regulation, it is necessary to look at its **constituent elements**, namely its **purpose** and the **conditions for its grant**, and not on whether it is classified as a social security benefit by national legislation.[68] Furthermore, the Court underlined that the **right to equal treatment** established in Directive 2011/98/EU shall be the **general rule**, whereas **limitations** from that right can **only** be relied upon if the Member State authorities responsible for the implementation of the Directive have **stated clearly** that they i**ntended to rely on them**.[69]

The *Martinez Silva* case (C-449/16)

Facts: Mrs Martinez Silva, was a third-country national who lived in Italy with her three minor children on the basis of a single work permit valid for longer than six months. She applied to receive a benefit provided for by Italian law for households with at least three minor children and with income below a certain limit. However, her application was rejected on the ground that Italian law only allowed the grant of such a benefit to long-term residents.

Judgment: First of all, the Court held that the family benefit at issue in the main proceedings qualified as a family benefit falling under the scope of Article 3(1) of Regulation (EC) 883/2004 in respect of which single permit holders shall enjoy the right to equal treatment under Article 12(1)(e) of Directive 2011/98/EU (paras. 18-25). Indeed, such a benefit was awarded without any individual and discretionary assessment of the claimant's personal needs with a view to supporting one of the risks expressly listed in Article 3(1) of

[66] Judgment of the Court of 21 June 2017, Case C-449/16, *Martinez Silva*, ECLI:EU:C:2017:485.

[67] *Ivi*, para. 20.

[68] Ibidem.

[69] Judgment of the Court of 21 June 2017, Case C-449/16, *Martinez Silva*, cit., para. 29.

Regulation No 883/2004, particularly in order to support the recipients in meeting family expenses (para. 24).

In the light of this, the Court recalled that, pursuant to Article 12(1)(e) of Directive 2011/98/EU, single permit holders shall enjoy the right to equal treatment with national of the Member State as regards the the branches of social security defined in Regulation (EC) 883/2004 (paras. 26-29). In particular, the Court underlined that the right to equal treatment shall constitute the **general rule**, whereas **derogations** to such a right are only allowed when the **authorities of the Member State** concerned have **stated clearly** that they intended to rely on them (para. 29). However, as rightfully observed by the referring court, the Italian Republic had not exercised the option of restricting equal treatment by having recourse to the derogations provided by the Directive, therefore Mrs Martinez Silva could not be excluded from receiving the benefit at issue in the main proceedings.

In the subsequent *WS* case,[70] the Court addressed the case of single permit holders having family members residing in a third-country as opposed to the territory of the Member State where they worked. In particular, the Court was asked to determine whether the Italian law **excluding from the right to equal treatment** under Directive 2011/98/EU single permit holders whose **family members** did not **reside** in Italy, but **in a third country**, was contrary to Article 12 (1)(e) of the Directive. Contrary to the position of the Italian government, the Court maintained that none of the derogations provided in the Directive allowed for such exclusion and that, as a consequence, such workers must enjoy the right to equal treatment.

The *WS* case (C-302/19)

Facts: WS was a third-country national holding a single work permit. The Italian National Social Security Institute (INPS) refused to pay him a family allowance, on the ground that his wife and two children did not reside in Italy, but in a third country.

Judgment: The Court began by recalling that Article 12(1)(e) of Directive 2011/98/EU grants single permit holders the right to **equal treatment** with nationals of the Member States as regards the branches of social security listed in Article 3(1) of Regulation (EC) 883/2004 (paras. 22-26). In particular, the right to equal treatment shall be the **general rule**, although Member States may resort to the **derogations** listed in Article 12(2) of Directive 2011/98/EU,

[70] Judgment of the Court of 25 November 2020, Case C-302/19, *WS*, ECLI:EU:C:2020:957.

provided that the competent authorities have **stated clearly** that they intended to rely on them (paras. 25-26).

As for the Italian law at issue in the main proceedings, the Court underlined that **none of the derogations** laid down in Directive 2011/98/EU allow Member States to exclude from the right to equal treatment a worker holding a single permit whose family members reside not in the territory of the Member State concerned but in a third country (paras. 27-28). Neither could such a conclusion be inferred from **Recitals 20 and 24** of the Directive (paras. 29-33). Indeed, on the one hand Recital 20 refers to the situation in which the family members of a worker from a third-country who is the holder of a single permit **benefit directly** from the right to equal treatment provided for in Article 12 thereof, **in their own capacity as workers**, although their arrival in the host Member State was due to the fact that they were family members of a worker who was a third-country national (para. 30). On the other hand, Recital 24 merely seeks to clarify that the Directive does not in itself require Member States to pay social security benefits to family members who do not reside in the host Member State (para. 31). The Court further stated that, contrary to the submissions of the Italian governments, it cannot be accepted that the derogations contained in Directive 2011/98 should be interpreted in such a way as to include additional derogations solely because they are contained in other acts of secondary legislation, such as Regulation (EU) No 1231/2010 or Directive 2003/109 (paras. 35-39). Lastly, the Court noted that any difficulties in checking the situation of beneficiaries with regard to the conditions for granting the family unit allowance when the members of the family do not reside in the territory of the Member State concerned could justify a difference in treatment (para. 44).

In the light of the above, the Court found that the conduct of the Italian authorities was contrary to the right to equal treatment laid down in Article 12(1)(e) of Directive 2011/98, since it constituted a difference in treatment between holders of a single permit and Italian nationals (para. 40-47).

Next, in the *O.D. and Others* case,[71] the Court was asked to rule on the compatibility with Eu law of the Italian legislation granting maternity or childbirth allowance exclusively to third-country nationals who were long-term residents. In particular, the Court assessed the compatibility of the Italian legislation not only with Article 12(1)(e) of Directive 2011/98/EU, but also with **Article 34 of the Charter**, which grants equal treatment to any legally resident person in matters of social security and social advantage. Once again, the Court found that the Italian law was contrary to the principle of equal treatment laid down in

[71] Judgment of the Court of 2 September 2021, Case C-350/20, *O.D. and Others*, ECLI:EU:C:2021:659.

Article 12(1)(e) of Directive 2011/98/EU, which gives specific expression to the entitlement to social security benefits provided for in Article 34 of the Charter.[72]

The *O.D. and Others* case (C-350/20)

Facts: O.D. and seven other third country nationals holding single permits applied for family benefits, in particular maternity or childbirth allowances (*assegno di maternità* or *bonus bebè*). However, the Italian National Social Security Institution (INPS) rejected their applications on the ground that only Italian nationals, EU citizens, and third-country national long-term residents were eligible under Italian law. O.D and the other applicants appealed the decision, arguing that the allowance had to be considered as social security under Regulation (EC) No 883/2004 and that, as a consequence, they were entitled to have access to it pursuant to Article 12(1)(e) of Directive 2011/98/EU. Their case ultimately reached the Italian Constitutional Court, which decided to make a preliminary reference to the Court of Justice in the light of the growing influence of EU law in the field.

Judgment: The preliminary reference asked the Court to clarify whether the childbirth and maternity allowances at issue in the main proceedings could be considered as branches of social security under Regulation (EC) 883/2004, so that they would fall under the scope of application of Art.12 Directive 2011/98/EU and Art. 34(2) of the Charter.

The Court began by recalling that Article 12(1)(e) of Directive 2011/98/EU gives **specific expression** to the entitlement to social security benefits provided for in Article 34(2) of the Charter and applies to the third-country nationals referred to in Article 3(1)(b) and (c) of the Directive: holders of a single work permit and holders of a residence permit for purposes other than to work, who have been given access to the labour market in the host Member State (paras. 43-49). Subsequently, the Court found that the childbirth allowance and the maternity allowance at issue in the main proceedings constituted **benefits falling within the branches of social security listed in Article 3(1) of Regulation (EC) 883/2004** (paras. 50-63). Indeed, such allowances were granted automatically to households satisfying certain legally defined, objective criteria, without any individual and discretionary assessment of the applicant's personal needs, and with a view to contributing to the family expenses (paras. 58-62). Lastly the Court noted that the Italian Republic had not availed itself of the option available to Member States of restricting equal treatment under Directive 2011/98/EU (para. 64). Therefore, the Court concluded that the Italian

[72] *Ivi*, para. 46.

legislation at issue in the main proceeding was in breach of the right to equal treatment established in Article 12(1)(e) of Directive 2011/98/EU.

Finally, in *ASGI and Others*,[73] the Court dealt with the compatibility with Directive 2011/98/EU of the exclusion of third-country nationals from eligibility to a **family card** established by Italian law. In this judgment, the Court did not find any violation of Directive 2011/98/EC, insofar as the family card at issue could not be considered as a family benefit under Regulation (EC) 883/2004.[74] Indeed, the discounts and price reductions offered to the recipients of the family card were directly financed by the undertakings participating in the family card and therefore could not be considered as a public contribution in the form of a contribution by society towards family expenses.[75] Despite this, the Court found that the Italian law at issue violated the right to equal treatment with regard to access to and the supply of goods and services granted by Article 11(1)(f) of Directive 2003/109, Article 12(1)(g) of Directive 2011/98, and Article 14(1)(g) of Directive 2009/50.[76]

3. Long-term residents - Directive 2003/109/EC

Directive 2003/109/EC[77] lays down a common set of criteria concerning the status of third-country nationals who are **long-term residents**. In particular, Article 4 of the provides that the Member States are to grant long-term resident status to third-country nationals who have resided legally and continuously on their territory for five years immediately prior to the submission of the relevant application. In addition, Article 5 of the Directive makes the acquisition of long-term resident status conditional upon evidence that the third-country nationals who wish to enjoy that status have sufficient resources and sickness insurance. Finally, Article 7 of the directive lays down the procedural requirements for acquisition of that status

Article 11(1)(d) of Directive 2003/109/EC contains an equal treatment provision in relation to **both social security and social assistance benefits**. In particular, the benefits covered by Article 11(1)(d) of Directive 2003/109 are "**social security, social**

[73] Judgment of the Court of 28 October 2021, Case C-462/20, *ASGI and Others*, ECLI:EU:C:2021:894.

[74] *Ivi*, para. 25.

[75] *Ivi*, para 28.

[76] *Ivi*, paras. 37-39.

[77] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16.

assistance and social protection as defined by national law". It follows that the definition of those concepts is left to national law, unlike the social security benefits falling under the scope of Directive 2011/98/EU, which have been defined in the case-law of the Court of Justice. Yet, as clarified in the *Kamberaj* case,[78] Member States do not enjoy unlimited discretion when defining the social security, social assistance and social protection measures subject to the principle of equal treatment established in Directive 2003/109/EC. Conversely, when doing so, they must act in compliance with **Article 34 of the Charter** and refrain from acting in a manner which would undermine the **effectiveness** of the Directive itself.[79]

Once again, the right to equal treatment may be subject to **derogations**. Indeed, pursuant to **Article 11(2) and (4) of Directive 2003/109/EC**, Member States may decide to **grant equal treatment only**:

- to cases where the **registered** or **usual place of residence** of the long-term resident, or that of family members **on behalf of whom** he/she claims benefits, lies **within the territory of the Member State concerned**;
- to **core benefits,** i.e. minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care.

However, in the *Kamberaj* case,[80] the Court clarified that the derogations must be interpreted **strictly** and can only be relied upon by the Member States if they **clearly stated** their **intention** to do so. Furthermore, the derogations are **exhaustive**. Indeed, in the *VR* case,[81] the Court held, similarly to what it had established in the *WS* case mentioned above,[82] that none of the derogations provided in Directive 2003/109/EC allow for the exclusion from the right to equal treatment of long term resident third-country nationals whose **family members resided in a third-country**.

The *Kamberaj* case (C-571/10)

Facts: Mr Kamberaj, an Albanian national, was the holder of a residence permit for an indefinite period in Italy. He was denied access to certain housing benefits on the ground that the funds for those benefits were exhausted. Indeed, the benefits were allocated differently to EU citizens compared to third-

[78] Judgment of the Court of 24 April 2012, Case C-571/10, *Kamberaj*, ECLI:EU:C:2012:233.

[79] *Ivi*, paras. 78-81.

[80] Judgment of the Court of 24 April 2012, Case C-571/10, *Kamberaj*, cit. See also judgment of the Court of 10 June 2021, Case C-94/20, *KV*, ECLI:EU:C:2021:477, paras. 34-49.

[81] Judgment of the Court of 25 November 2020, Case C-303/19, *VR*, ECLI:EU:C:2020:958.

[82] Judgment of the Court of 25 November 2020, Case C-302/19, *WS*, cit.

country nationals. Mr Kamberaj appealed the decision, arguing that the rejection decision amounted to discrimination incompatible with Directive 2003/109/EC.

Judgment: The Court was asked to assess whether a mechanism for the allocation of funds for housing benefit such as the one at issue in the main proceedings was in conformity with the principle of equal treatment enshrined in Article 11(1)(d) of Directive 2003/109/EC.

First of all, the Court recalled that Directive 2003/109/EC expressly precludes the EU legislator from giving an autonomous and uniform definition of the **concepts of social security and social protection** under Article 11(1)(d) thereof (para. 77). Thus, it was for the national Court to assess whether the housing benefit at issue fell under the concept of social security and social protection subject to the principle of equal treatment enshrined in Article 11(1)(d) of Directive 2003/109/EC (para. 81). Yet, the Court underlined that, when doing so, **Member States do not enjoy unlimited discretion**, but must act in compliance with Article 34 of the Charter (para. 80).

Secondly, assuming that the referring judge found that the housing benefit fell under Article 11(1)(d) of the Directive 2003/109, the Court assessed whether the Italian authorities could limit the principle of equal treatment in respect of such housing benefit on the basis of the **derogation** pertaining to **'core benefits'** set in **Article 11(4) of the Directive**. In this respect, the Court held that the meaning and scope of the concept of 'core benefits' must be sought taking into account the **context** of that article and the **objective** pursued by Directive 2003/109/EC, namely the **integration** of third-country nationals who have resided legally and continuously in the Member States (para. 90). In particular, according to the Court, a benefit qualifies as a 'core benefit' if it fulfills the purpose set out in **Article 34 of the Charter**, which recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources (para. 92).

Finally, the Court clarified that in any event the derogation provided in Article 11(4) of Directive 2003/109/EC must be interpreted **strictly** and may only be relied upon by the Member States if they **stated clearly** that they intended to rely on that derogation (paras. 86-87). Since the Italian Republic did not rely on the derogation, the Court concluded that Article 11(1)(d) of Directive 2003/109/EC must be interpreted as precluding a national or regional law such as the one at issue in the main proceedings which provides, with regard to the grant of housing benefit, for different treatment for long-term resident third-country nationals compared to nationals when the funds for the benefit are allocated, in so far as such a benefit falls within one of the three categories

referred to in that provision and the derogation listed in Article 11(4) of that directive does not apply (para. 93).

The *VR* case (C-303/19)

Facts: VR was a third-country national holding a long term residence permit. The Italian National Social Security Institute (INPS) refused to pay him a family allowance, on the ground that his wife and two children did not reside in Italy, but in a third country.

Judgment: The Court began by recalling that Article 11(1)(d) of Directive 2003/109/EC provides for a right to equal treatment between long-term residents and nationals of the Member States which shall be the general rule, whereas the derogations from such a right are to be interpreted strictly (paras. 19-23). Then, the Court underlined that **none of the derogations** laid down in Directive 2003/109/EC **allow** Member States to **exclude** from the right to equal treatment **long term residents** whose **family members reside** not in the territory of the Member State concerned but in a **third country** (paras. 24-30). Thus, according to the Court, the non-payment of a family allowance and the reduction of its amount, depending on whether all or some of the family members are absent from the territory of a Member State, are contrary to the right to equal treatment provided for in Article 11(1)(d) of Directive 2003/109/EC, since they constitute a difference in treatment between long-term residents and nationals of the member States (para. 33). Lastly, the Court noted that any difficulties in checking the situation of beneficiaries with regard to the conditions for granting the family unit allowance when the members of the family do not reside in the territory of the Member State concerned could justify a difference in treatment (para. 35).

4. Seasonal workers - Directive 2014/36/EU

According to Directive 2014/36/EU[83] seasonal workers are

> third-country nationals who retain their principal place of residence in a third country and stay legally and temporarily in the territory of a Member State to carry out an activity dependent on the passing of the seasons, under one or more fixed-term work contracts concluded directly between that third-country national and the employer established in that Member State.

Article 23(1)(d) of the Directive grants seasonal workers the right to equal treatment as regards the **branches of social security defined in Regulation (EC) 883/2004**, whereas Recital 46 of the Directive expressly states that the latter does not cover social assistance. However, pursuant to 23(2)(i) of the Directive, Member States may exclude from the right to equal treatment **family benefits** and **unemployment benefits**. At the present, the Court of Justice has not ruled on the equal treatment provisions contained in Directive 2014/36/EU.

5. EU Blue Card Holders - Directive 2021/1883/EU

Directive 2021/1883/EU[84] sets forth the conditions of entry and residence in the Member States of third-country nationals for the purpose of **highly qualified employment**. The Directive repeals the previous Directive 2009/50/EC to simplify its procedures and qualifying criteria.

Article 16(1)(e) of the Directive grants EU blue card holders equal treatment with nationals of the Member State issuing the EU Blue Card as regards the **branches of social security defined in Regulation (EC) 883/2004**. Moreover, Article 16(3) of the Directive provides for a right to export acquired rights to benefits related to old age,

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[83] Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94.

[84] Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC, OJ L 382.

invalidity and death, statutory pension in case of **migration to a third country**. EU Blue Card holders' survivors who reside in a third country and who derive rights from an EU Blue Card holder may also benefit from the right to equal treatment. Unlike the previous Directives, **no derogation** to the right to equal treatment as regards social security applies.

Conversely, equal treatment as regards **social assistance** is **excluded**. Indeed, Article 8(c) of the Directive provides that the EU Blue Card may be withdrawn or not renewed "where the EU Blue Card holder does not have sufficient resources to maintain himself or herself and, where applicable, the members of his or her family without having recourse to the social assistance system of that Member State".

6. Beneficiaries of international protection - Directive 2011/95/EU

Pursuant to Directive 2011/95/EU,[85] **beneficiaries of international protection** (*i.e.* refugees[86] and beneficiaries of subsidiary protection[87]) may also benefit from the right to equal treatment as regards to social benefits. In particular, **Article 29(1) of Directive 2011/95/EU** provides that Member States shall ensure that beneficiaries of international protection receive, in the Member State that has granted such protection, "**the necessary social assistance** as provided to nationals of that Member State". However, by way of **derogation** from this general rule, Article 29(2) of the Directive

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[85] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337.

[86] Pursuant to Article 2(d) of Directive 2011/95/EU, 'refugee' means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it and to whom Article 12 of the Directive does not apply.

[87] Pursuant to Article 2(f) of Directive 2011/95/EU, 'person eligible for subsidiary protection' means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15 of the Directive, and to whom Article 17(1) and (2) thereof does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

allows Member States to limit social assistance provided to **core benefits**, although such derogation applies to **subsidiary protection holders only**.

It follows from the foregoing that Article 29(1) of Directive 2011/95/EU prohibits as a general rule differences of treatment between beneficiaries of international protection and nationals of the Member States. Furthermore, the Directive prohibits differences of treatment between beneficiaries of international protection based on the **length of their stay** in the Member State concerned. Indeed, in the *Ayubi* case,[88] the Court clarified that granting refugees with a temporary right of residence less social benefits than nationals of the Member States and refugees with a permanent right of residence is incompatible with Article 29 of the Directive. In particular, the Court highlighted that the right of refugees to equal treatment with nationals of the respective state with regard to social assistance stems from the Geneva Convention,[89] which does not make the rights to which refugees are entitled dependent on the length of their stay in the respective State. Moreover, the Court underlined that Article 29 has a direct effect and may be relied upon directly by refugees before national courts.

As for the benefits covered by Article 29 of Directive 2011/95/EU, in principle, the definition of social assistance can be found in the case law of the Court of Justice as referring to "all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his or her own basic needs and those of his or her family".[90] However, it remains unclear whether the notion of social assistance for the purposes of Article 29 of the Directive may also cover the branches of social security defined in Regulation (EC) 883/2004.

The *Ayubi* case (C-713/17)

Facts: Mr Ayubi was a third-country national holding subsidiary protection status in Austria, entitling him to a **temporary residence permit** for three years. He submitted an application for the provision of the means of subsistence and housing for himself and his family. However, his application was rejected on the ground that a person in Mr Ayubi's position, with only

[88] Judgment of the Court of 21 November 2018, Case C-713/17, *Ayubi*, ECLI:EU:C:2018:929.

[89] Convention relating to the Status of Refugees, Geneva, 28 July 1951, United Nations, *Treaty Series*, Vol. 189, p. 137.

[90] Judgment of the Court of Judgment of the Court of 11 November 2014, Case C-333/13, *Dano*, ECLI:EU:C:2014:2358, para. 63 and Judgment of the Court of 15 September 2015, Case C-67/14, *Alimanovic*, ECLI:EU:C:2015:597, para. 44.

temporary residence, could claim only the minimum subsistence benefits under Austrian law.

Judgment: The Court began by recalling that Article 29(1) of Directive 2011/95/EU lays down a general rule requiring that the level of social benefits paid to beneficiaries of international protection by the Member State which granted that protection be the same as that offered to nationals of that Member State (para. 25). Moreover, the Court clarified that the derogation laid out in Article 29(2) of the Directive, allowing Member States to limit social assistance to core benefits, applies with regard to beneficiaries of subsidiary protection only (para. 20).

As for the Austrian legislation at issue in the main proceedings, the Court underlined that the level of social security benefits paid to refugees, whether they have a temporary or a permanent residence permit, must be the same as that offered to nationals of that Member State (para. 26-33). In particular, according to the Court, this stems from Article 23 of the Geneva Convention which, just like Article 29(1) of the Directive, covers all refugees and does not make the rights to which they are entitled depend on the length of their stay in the Member State concerned or the duration of the residence permit they have (para. 28). Furthermore, the Court excluded that the term 'necessary' in Article 29(1) of the Directive may be interpreted as allowing Member States to fix the benefits at a lower level than that granted to nationals of the Member State (paras. 21-22). Indeed, although Article 29(1) of the Directive confers on Member States a certain margin of discretion as regards the determination of the level of social assistance they consider necessary, the fact remains that that provision imposes on each Member State, in unambiguous terms, an obligation consisting in ensuring that every refugee to which it grants its protection enjoys the same level of social assistance as that provided for its nationals (para. 38). Finally, the Court held that Article 29(1) of the Directive has direct effect, meaning that refugees can rely upon it directly before national courts to challenge any provision of national law contrary to it.

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