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Impediments for realizing free movement for EU citizens

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1. Introduction

The right to free movement has several dimensions, including the right to cross the border and the right to stay in the new Member State. A major dimension of the right to free movement is that persons does not lose social security rights that s/he has already acquired before leaving the country of origin and that s/he continues to be covered by social security after crossing the border.
Since the latter dimension is so important, it has already been ensured for economically active persons since the very establishment of the European Community IN 1958 (Regulation 3). Without such protection people are not willing and are often unable to make use of their right to free movement. For this reason the right to free movement and a regulation of access to social rights are closely connected.
Since the 1990s there is also a right to free movement for economically non-active persons and also here the access to social rights is an essential element in order to make their right to free movement real. There are, however, important differences between the rules for the economically active and inactive persons. Equal treatment of economically non-active persons is a politically sensitive issue, as it is feared that their free movement may lead to so-called 'benefit tourism'. In order to protect national systems, both EU and national legislation put up barriers against economically non-active persons attempting to claim social rights. These barriers are the topic of this paper. I will discuss the rules applicable to economically active persons, since these may in some cases be applicable to non-economically active persons as well and subsequently I will discuss the case law of the Court of Justice on the Citizenship directive vis-à-vis social rights. Also legal barriers created by some Member States will be analysed. From this I will focus on the major findings and draw conclusions and give some recommendations.

2. The rules relevant to economically active persons

In order to understand better the position of the economically non-active persons it is useful to mention first the rules pertaining to economically active persons. These are currently laid down in Regulation 883/2004 on the coordination of social security systems,[2] also known as the Coordination Regulation. These rules include rules on the aggregation of periods taken into account under the laws of the several countries for the purpose of acquiring and retaining the right to benefit and on calculating the amount of benefit; rules on payment of benefits to persons resident in the territories of Member States; and rules prohibiting discrimination on ground of nationality.
Actually, it is not correct any more to say that these rules are relevant to economically active persons only, since the personal scope of Regulation 883/2004 is not limited to the economically active population. Article 2 reads that this Regulation shall apply to nationals of

[1] This paper is partly based on the results of a large research project on accessing social rights by EU migrant citizens, which was part of the *bEUcitizen - All Rights Reserved? Barriers towards European Citizenship* project (under Grant Agreement number 320294, funded by the European Union Seventh Framework Programme for research, technological development and demonstration). The purpose of the project was to identify barriers, and their causes, for accessing social rights by EU migrant citizens.
[2] Regulation 883/2004 was published in OJ L 166/1 of 2004.

a Member State. However, the Coordination Regulation can be applied only in respect of benefits which are within its material scope [3] and benefits particularly important for economically non-active persons, such as public assistance, are excluded from this scope.
The term 'public assistance' is, however, to be interpreted narrowly: it refers exclusively to benefits guaranteeing a minimum income which are *not* linked to one of the risks mentioned in Article 3 of the Regulation.
In response to this narrow interpretation the EU legislature inserted rules on the so-called *special non-contributory benefits* in the Coordination Regulation. These rules provide that such benefits have to be paid regardless of the nationality of the EU national, but that they are not exportable. Since these benefits do not require a work or insurance record they are accessible for EU nationals arriving in a country who satisfy the conditions (e.g. being disabled for the disability special non-contributory benefit).
Since not all types of benefits or advantages fall under Regulation 883/2004, Regulation 492/2011 [4] may be useful in supplementing the non-discrimination rule of Regulation 883/2004. Persons who have entered the employment market may, on the basis of Article 7(2) of Regulation 492/2011, claim the same social and tax advantages as national workers. This is possible from the first day of work. Regulation 492/2011 is relevant only to workers and jobseekers; self-employed and non-active persons can therefore not rely on it. The Court of Justice ruled that the term 'worker' in Article 45 TFEU and Regulation 492/2011 has a Community meaning and, since it defines the scope of a fundamental freedom, this term must not be interpreted narrowly. The essential feature of an employment relationship is, according to the *Blum* judgment,[5] that a person performs work for a certain period of time for and under the direction of another person for which s/he receives remuneration. Any person who pursues activities which are effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. From this judgment it follows that also part-timers are workers for the purpose of the Regulation, provided that they perform activities which are effective and genuine. In the case law of the Court of Justice a student-trainee, - not a former worker - could not invoke Article 7(2) as his training (during which he performed work) was regarded as an obligatory part of his technical studies and thus ancillary to his status as a student.[6]
Thus the relevant criterion is whether activities are effective and genuine, and not marginal only. The Court does not give itself the decision whether activities satisfy this criterion or not.
Persons who have worked (even if only for a very short period) fall under Article 7 of Regulation 492/2011. This is the case even if persons have a very small job or work for a very short time, as was confirmed in the *Vatsouras* and *Koupatantze* judgment.[7] One of the applicants in this case worked for some months and received a low income, the other worked for barely more than one month. The Court ruled that neither the origin of the funds from which the remuneration is paid nor the limited amount of that remuneration can have any consequence as regards whether or not the person is a 'worker' for the purposes of Community law. Nor does the fact that the income from employment is lower than the minimum required for subsistence prevent the person in such employment from being

[3] These benefits are defined in Article 3, that provides that the Regulation applies to all legislation concerning the following branches of social security: sickness benefits; maternity and equivalent paternity benefits; invalidity benefits; old-age benefits; survivor's benefits; benefits in respect of accidents at work and occupational diseases; death grants; unemployment benefits; pre-retirement benefits; and family benefits.
[4] *OJ* 2011, *L* 141.
[5] Case 66/85, [1986] *ECR* 2121.
[6] Case 197/85, Brown [1988] *ECR* 3205.
[7] Cases C-22/08 and C-23/08, ECLI:EU:C:2009:344.

regarded as a 'worker' within the meaning of Article 45 TFEU, even if the person in question seeks to supplement that remuneration by other means of subsistence such as financial assistance drawn from the public funds of the State in which s/he resides. Furthermore, the fact that employment is of a short duration cannot, in itself, exclude that employment from the scope of Article 45 TFEU. Whether or not the person is a worker, has to be decided by the national court.[8]

The personal scope of Article 7(2) Regulation 492/2011 is limited, in principle, to persons actually performing work. Therefore Regulation 492/2011 does not cover persons seeking work, *i.e.* persons who never worked before.

In principle, once the employment relationship has ended, the person concerned as a rule loses his status of worker. This status may produce, however, certain effects after the relationship has ended if these effects are intrinsically linked with the recipient's objective status as worker.[9]

This case law draws a distinction between Member State nationals who have not yet entered into an employment relationship in the host Member State where they are looking for work and those who are already working in that State or who, having worked there but no longer being in an employment relationship, are nevertheless considered to be workers.[10]

3. The rules relevant to economically non-active persons

Article 20 TFEU and case law

The 1992 Maastricht Treaty introduced a provision, now Article 20 TFEU, that provides that *citizenship* of the Union is hereby established. Article 20(2) further provides that citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. Article 21 provides that every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.

Article 20 TFEU has, in relation to social advantages, been given a far-reaching meaning by connecting it to Article 18TFEU; this was done in the *Martínez Sala* judgment.[11] In this judgment the Court argued that Article 21 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 18 TFEU, not to suffer discrimination on grounds of nationality within the material scope of the Treaty. Since Ms Martínez Sala was a Spanish national lawfully residing in Germany for around twenty tears, she could invoke Article 18 TFEU in order to combat the refusal of child raising benefit. Before this decision by the Court of Justice on Article 18 TFEU she would have had no EU instrument for doing so, as the only other instruments were the mentioned Regulations, of which it was very uncertain that they applied to her. The material scope of Article 18 TFEU is the same as that of Regulation 492/2011, meaning that social rights, including subsistence benefits, are included.[12] Thus EU nationals could now claim equal treatment also in respect of social assistance in other Member States.[13]

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[8] In this case the national court reached the conclusion that the applicants were workers, they had retained the status of workers for at least six months and remained entitled to the German jobseekers' allowance during that period. After the expiry of that period the Member State, was no longer obliged to pay social assistance.

[9] Case 85/96, *Martínez Sala*, [1998] *ECR* I-2691. In most judgments it is decided that the national court has to investigate whether the conditions for being classified as a worker are fulfilled.

[10] See Case 39/86 *Lair* [1988] *ECR* 3161.

[11] Case 85/96, [1998] *ECR* I-2691.

[12] Case 456/02, *Trojani* [2004] *ECR* I-7573; Case 184/99, *Grzelczyk* [2001] *ECR* I-6193.

[13] This appeared in the *Grzelczyk* judgment, Case 184/99, [2001] *ECR* I-6193.

In later case law the Court accepted exceptions to the prohibition of discrimination. In the *Bidar* judgment[14] the Court decided that, as regards assistance covering the maintenance costs of students, that Member States are permitted to ensure that the grant of social assistance does not become an unreasonable burden upon them and that the grant of such assistance may be limited to students who have demonstrated 'a certain degree of integration'. The conditions to ascertain such degree must be appropriate and proportional.
So far this has been the topic of many cases, in which the Court decided on a case by case basis whether this condition is satisfied.

The Citizenship Directive
After the first case law on EU citizenship, a directive was adopted in order to regulate and ensure residence rights, Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.[15]
According to Article 6 of the Directive, Union citizens have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport. According to Article 7, Union citizens have the right of residence on the territory of another Member State for a period of longer than three months if they: (a) are workers or self-employed persons in the host Member State; or (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State (..). The directive has also rules on persons who do not work anymore.[16]
Article 24 of the Directive provides that the host Member State is not obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), i.e. the period the person concerned (who has not worked yet in that country) is seeking work. Nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

Preliminary Conclusions
Articles 20 and 21 TFEU neither define what is meant by EU citizen nor do they introduce a system of social rights for EU citizens. However, the concept of EU citizenship has been significantly developed in the case law of the Court of Justice, in particular by connecting citizenship with the non-discrimination provision of the Treaty. This development has, however, been amended by the Citizenship Directive, since for the first three months claims for social assistance can be refused, and applications for study grants can be rejected for the first five years. After five years of legal residence EU nationals, and also those who have not

[14] Case C-209/03 [2005] *ECR* I-2119
[15] *OJ* 2004 *L* 158/877.
[16] An EU citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances: (a) he/she is temporarily unable to work as the result of an illness or accident; (b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office; (c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months; (d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

been economically active in the host State, have the right to permanent residence and to equal treatment in relation to social rights. Thus, finally they will acquire full citizenship in the destination State.
During the five-year period Member States can require EU citizens to show a certain degree of integration in the host State by satisfying particular conditions before they are eligible for a social right. However, according to the case law of the Court of Justice, these conditions have to be adequate in relation to their purpose and be proportional (the lower the impact of the particular right on the budget, the less heavily the condition may weigh on the person).
Thus, we can see that gradually a concept of citizenship has been developed: an EU citizen has access to the social system of the host State if a certain degree of integration has been demonstrated ('the link approach' as mentioned in *Bidar*). Only in case of social assistance and student maintenance do Member States have the right to exclude EU citizens for a certain period (three months[17] and five years, respectively). After three months of residence the link approach applies, but, as we will see below, claiming social assistance can in some cases lead to expulsion.
For workers and self-employed persons the required link is already established by the very fact that they work in the host State; this link exists from the first day of work. [18] The link remains after they have stopped working (but for those who have worked for less than one year, the link is maintained for a minimum of six months only). So long as the link exists, equal treatment is required.
Thus EU citizens do not have the same rights as nationals from the first day of their stay in a host country; only those demonstrating a certain degree of integration with the host State have access to social rights. This approach is explained by the present situation of the EU: lack of harmonisation of welfare systems and large differences in wealth between countries. Simply excluding all persons from other Member States on the ground of nationality would make the right to free movement senseless. The idea that only after one has integrated into a particular society has one to be treated in the same way as the nationals of that country is a way to reconcile the protection of a system and the mobility of EU citizens. However, as we will below, some of the barriers are hard to overcome by EU citizens.

4. The Role of the directive in the case law of the Court

The Citizenship Directive has invoked several cases from the Court of Justice, and these have, remarkable enough, mainly to do with the interaction of the coordination regulation in so far as economically non-active persons are involved. As we saw in Section 2, also non-economically active persons can invoke the coordination regulation, and since they are not economically active, this is a relevant for them in particular for those benefits not meant in particular for economically non-active persons, such as the special non-contributory benefits. As we have seen these are not excluded from Regulation 883/2004 as social assistance. These benefits could enable economically non-active persons to make use of their right to free movement. However, the Court of Justice decided that these benefits are to be seen as social assistance for the Citizenship directive. The first judgment relevant to this question is the *Brey* judgment,[19] concerning Austrian compensatory supplement to invalidity pensions and care allowance, which supplement is a special non-contributory benefit. The Court considered that

[17] In case of jobseekers, the period lasts as long as they seek work.
[18] See also Case C-138/02, *Collins*, ECLI:EU:C:2004:172 and Case C-258/04, *Ioannidis*, ECLI:EU:C:2005:559).
[19] Case C-140/12, EU:C:2013:565. See also H. Verschueren, 'Special Non-contributory Benefits in Regulation 1408/71, Regulation 883/2004 and the Case Law of the ECJ', *European Journal of Social Security* 2009, p. 211 ff.

the question was whether Directive 2004/38 should be interpreted as precluding a compensatory supplement to a national of another Member State who is not economically active, on the grounds that, despite having been issued with a certificate of residence, he does not meet the necessary requirements for obtaining the legal right to reside on the territory of the first Member State for a period of longer than three months, since such a right of residence is conditional upon that national having sufficient resources not to apply for the benefit. Although compensatory supplement does indeed fall within the scope of Regulation 883/2004, but that fact cannot, in and of itself, be decisive for the purposes of interpreting Directive 2004/38, since the objectives pursued by Regulation 883/2004 are different to the objectives pursued by that directive. Regulation 883/2004 seeks to achieve the objective set out in Article 48 TFEU (the legal basis for the coordination Regulation) which concerns preventing the possible negative effects of the exercise of the freedom of movement. Although the aim of Directive 2004/38 is to facilitate and strengthen the exercise of the right to move, it is also intended to set out the conditions governing the exercise of that right. These conditions include that Union citizens who do not or no longer have worker status must have sufficient resources, which condition is meant for the protection of the public finances, the Court argued.
In those circumstances, the concept of 'social assistance system' as used in Article 7(1)(b) of Directive 2004/38 cannot be confined to those social assistance benefits which do not fall within the scope of the coordination regulation. The special non-contributory benefits can thus also be considered as public assistance. 'Social assistance system' must – according to the Court - be interpreted as covering all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State.
The Court added to this that claiming public assistance does not automatically mean that the person does not have sufficient resources to avoid becoming an unreasonable burden on the social assistance system of the host Member State. The national authorities cannot draw such conclusions without first carrying out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole, by reference to the personal circumstances characterising the individual situation of the person concerned.
Furthermore, in order to determine whether a person receiving social assistance has become an unreasonable burden on its social assistance system, the host Member State should, before adopting an expulsion measure, examine whether the person concerned is experiencing temporary difficulties and take into account the duration of residence of the person concerned, his personal circumstances, and the amount of aid which has been granted to him. This must not automatically lead to an expulsion measure.

Also the *Dano* case[20] concerned a special non-contributory benefit, and it attracted a lot of attention from lawyers concerned with EU law, but also from the general press. The case concerned a Romanian national, who had not worked in Germany or Romania and there was nothing to indicate that she had been looking for a job. The question was whether EU law allows Member State to exclude nationals of other Member States who are not economically

[20.] Case C-333/13, EU:C:2014:2358.

active from entitlement to certain special non-contributory cash benefits although those benefits are granted to nationals of the Member State concerned who are in the same situation. The Court of Justice answered this in the affirmative. A Union citizen can claim equal treatment with nationals of the host Member State in relation to benefit only if his/her residence in the territory of the host Member State complies with the conditions of Directive 2004/38. In the case of periods of residence of up to three months, Article 6 of Directive 2004/38 limits the conditions and formalities for the right of residence to the requirement to hold a valid identity card or passport and, under Article 14(2) of the directive, that right is retained as long as the Union citizen and his family members do not become an unreasonable burden on the social assistance system of the host Member State. A Member State must therefore have the possibility of refusing 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. Therefore, the financial situation of each person concerned should be examined specifically, without taking account of the social benefits claimed, in order to determine whether s/he meets the condition of having sufficient resources to qualify for a right of residence under Article 7(1)(b) of Directive 2004/38.
The referring court in this procedure had already given the information that the applicants (Ms Dano and her son) did not have sufficient resources and thus could not claim a right of residence in the host Member State under Directive 2004/38. Note that they had a right to permanent residence according to national law, but relevant here is they did not have a right to residence according to the Citizenship directive. Therefore, they could not invoke the principle of non-discrimination in Article 24(1) of the directive.[21]

So far the cases concerned special non-contributory benefits. The Court followed its approach, however, also in the case of family benefits in an infringement procedure against the UK.[22] The Court decided that 'the need to protect the finances of the host Member State justifies in principle the possibility of checking whether residence is lawful when a social benefit is granted in particular to persons from other Member States who are not economically active, as such grant could have consequences for the overall level of assistance which may be accorded by that State.' A relevant aspect, however, is that the checking of compliance with the conditions laid down by Directive 2004/38 for existence of a right of residence is not carried out systematically and consequently, the Court considered, is not contrary to the requirements of Article 14(2) of the directive. It is only in the event of doubt that the United Kingdom authorities effect the verification necessary to determine whether the claimant satisfies the conditions laid down by Directive 2004/38, in particular those set out in Article 7, and, therefore, whether he has a right to reside lawfully in United Kingdom territory, for the purposes of the directive.

5. **The Member States and the Citizenship directive**

5.1. General

[21] Case C-299/14. EU:C:2016:114. the Court continued this argument. The applicant was less than 3 months in Germany, and thus had a right to stay according to the Directive. The Court decided that he may base a right of residence on Article 6(1) of Directive 2004/38, but, in such a case, the host Member State may rely on the derogation in Article 24(2) of Directive 2004/38 in order to refuse to grant that citizen the social assistance sought.

[22] Case C-308/14, ECLI:EU:C:2016:436.

The present section is based on a study of the access of social rights by economically non-active persons in the UK, Netherlands, Poland, Denmark, Sweden, Spain and Estonia.[23]
There are important differences between Member States' regulations and practices that apply in relation to subsistence benefits for EU citizens. In some of the countries there are few or no specific rules or practices for EU citizens. In practice, in these countries few persons appear to claim public assistance; a reason may be that benefit rates are very low and do not really guarantee a subsistence level. Another reason may be that in practice persons are deterred by the benefit administration from claiming benefit.
Another issue is that some countries have many types of subsistence benefits and income supplements, whereas other have few of these benefits and even no wage supplements. If tax credits, housing benefits and other subsidies are available to supplement the income from work, and this plays a large role since income from work is, for many workers, not high enough to live on. Persons from other Member States working in such a State can claim these supplements if they are workers in the sense of EU law. The fear is, then, that this also attracts migrant workers with few prospects on the labour market, who can only survive with an income supplement.

5.2. Conditions in national legislation restricting eligibility of EU citizens for subsistence benefits

(a). The (interpretation of the) condition of sufficient resources

A common condition in all the countries of our study is that one is eligible for social assistance only when one is legally residing in that country. This condition is in principle consistent with EU law, but whether this is really the case depends on how the term 'legally residing' is defined.
During the first five years of their stay, EU citizens must have sufficient resources not to become a burden on the public assistance system. A major factor of uncertainty is therefore what is meant by 'sufficient resources'. There is no general definition of this requirement and most countries do not have general and hard rules on this issue. They consider this issue on a case-by-case basis. This can create legal uncertainty that seriously affects the legal position of EU citizens.
This is more relevant now the Court of Justice has connected in the *Brey*[24] and *Dano*[25] judgments the applicability of the non-discrimination rule of the Treaty and of the Citizenship Directive to the right to stay in the sense of the Citizenship Directive. Thus, where Ms. Dano had the right to legally stay in Germany according to her German residence permit, she did not have the right to legal stay according to the Citizenship Directive and therefore she could not invoke Article 24 - the equal treatment rule - of the Directive in order to claim unemployment benefit.
Moreover, the Court has extended in *Brey* and *Dano* the meaning of the term 'social assistance' of the Directive to special non-contributory benefits, even though these were not considered social assistance under Regulation 883/2004.

The relevance of this criterion may appear saliently in the situation of homeless persons in sheltered accommodation. According to Danish law, sheltered accommodation, which is

[23] bEUcitizen project, see http://beucitizen.eu/.
[24] Case C-140/12, ECLI:EU:C:2013:565.
[25] Case C-333/13, ECLI:EU:C:2014:2358.

partly State funded, shall only accept persons who are legally residing in the country. In practice, lawful residence has in this respect been interpreted restrictively, since persons who do not have a registration certificate, a residence card or a Danish health card, are excluded. The authorities' underlying rationale is that such persons are not lawfully residing in Denmark since they are requesting public support by using sheltered accommodation. This also prevents them from showing, after five years, that they have been legally residing in the country for that period.
In other words, when does one not have sufficient resources? Is it when one actually claims social assistance? Or is it sufficient when one cannot show that one has a particular income even when one does not claim social assistance? There is a lot of uncertainty about this and there is no clear answer to this in the case law or the Directive.

(b). The condition of habitually residing in the country

For some countries it is not sufficient to be merely living in the country but a certain degree of *permanent* residency is required. In the UK this is called the 'habitual residency test'. The test has changed over time in response to policy changes and case law, and is a question of fact to be decided in the individual case. Relevant factors include taking into account one's possessions in the UK, durable ties there and bringing family members there. The period of residence required for it to be 'habitual' varies from case to case, but it has to be 'an appreciable period'. The legal uncertainty on how the test is applied is a major problem.
Requiring a certain degree of integration is not uncommon in other countries either, but there are variations in the tests applied and the level of legal uncertainty involved.

(c). The condition of a minimum period of residence in a particular community (region/municipality)

In several countries the legislation contains the condition that one *must have resided for a particular period in the community* (country, municipality, region) concerned. This condition creates a suspicion of indirect discrimination, since the condition can be more easily satisfied by country nationals than foreigners. Therefore it has to be investigated whether there is an objective justification for this requirement. For labour market schemes, such as jobseekers' allowances and for study grant schemes, the Court of Justice accepted that Member States can impose conditions requiring a real link between the jobseeker and the community, which may take the form of a condition on the duration of residence.
In the case of social assistance, however, such a link has not been the subject of case law yet. Whether such a link (i.e. requiring a period of residence of more than three months) with the host country can be required in the case of social assistance is unclear. After all, the Citizenship Directive mentions a period of three months during which EU citizens can be excluded; a longer exclusion period is therefore not consistent with this provision.
The condition that one must have resided *in a particular area* (autonomous region, or municipality) is even more problematic, since it may affect persons who have already been in the country for a longer period, but did not stay in the same region or where not able to prove that they resided in a particular community. Where national citizens can then still return to a community where they previously stayed, non-nationals have no such opportunity in the State of destination. The condition of having stayed in a particular community is often explained by the fact that the social right concerned is financed by the community concerned. However, this does not take away the fact that this is not consistent with the conditions of the Citizenship Directive, since that takes staying in the whole area of the Member State into account.

(d). The condition of being registered in a population register

Registration as resident in a register is a very important condition in order to have access to social rights in Sweden and in Denmark. These registers have specific criteria such as that one has a specific address.[26] This condition sets higher requirements than the Citizenship Directive, since the Directive 'solely' requires that one is legally resident and not an unreasonable burden on the host State.[27]

The requirement that one must be registered in the Population Register may also be a problem for a person who has already been in Sweden for considerable time, without having relied on social assistance, but who was not admitted to the Population Register and therefore cannot prove that s/he has stayed there according to the Swedish rules.

This condition is particularly relevant to the group that is often at the core of discussions in Sweden, i.e. persons belonging to the Roma community from other EU Member States, such as Romania and Bulgaria, who have moved to Sweden. These persons often do not find (registered) work in Sweden and sometimes move from municipality to municipality. As a result, they do not satisfy the conditions to be registered in the Population Register. This means that also after a considerable period of actually staying in Sweden, even after five years, they do not have the right to of permanent residence.

In Denmark access to social rights depends on a CPR (civil registration number) number. A CPR number can only be obtained upon proof of residence in Denmark in addition to showing a registration certificate or residence card. One has to document 'permanent' residence, by, for example, showing a letter from the landlord, a tenancy agreement, or utility bills. This implies that one has to reside at a certain address. Such conditions cannot be found in the Citizenship Directive and it may be assumed that EU citizens often have more difficulties in fulfilling these conditions than nationals. This condition may also affect persons who have not settled yet (e.g. those in temporary accommodation), even if they are already working or have been in Denmark for a longer period.

(e). The condition that registration depends on the prospect of legally staying for at least one year in the country

One is registered in the Swedish Population register only if one has the prospect of legally residing in Sweden for at least one year. This may be difficult to prove in some situations, since one has to prove that one will also have sufficient resources in the coming year.

The condition that one has the prospect of staying at least one year in Sweden may also be problematic for workers. Workers on short-term contracts or without the guarantee of future work (on-call workers) have difficulties meeting the condition or cannot meet it. This leads to problems with Regulation 492/2011, which requires equal treatment of foreign workers with Swedish nationals from the beginning of their work. Due to this condition, equal treatment is not guaranteed for persons on a contract of less than one year. Even if authorities deviate from this rule in individual cases, national law makes the legal position of the persons concerned

[26] This is not only relevant to social assistance, but also to other residence schemes (health care) and some facilities, such as opening a bank account. Thus, also workers on short-term contracts may also have problems with this condition.

[27] This discrepancy is even more problematic for social rights other than subsistence benefits, such as health care, since for non-public assistance there is not the condition that one must not become an unreasonable burden.

uncertain and it depends to a very large extent on the official who assesses the situation and decides. This leads to considerable legal uncertainty.

6. **Analysis and Recommendations**

The social rights discussed in this paper are very important for economically non-active persons, and in practice also for workers with a low income who want to make use of their right to free movement. Therefore, they are essential to realising EU citizenship. Since the concept of EU citizen was introduced precisely to include economically non-active persons within the sphere of the EU Treaty and to award them explicitly the right to free movement, discussion of their access to social rights is not far-fetched, but essential to learn more about the concept of the EU citizen. In addition, access to social rights by economically inactive persons and workers in small jobs has become highly controversial in some countries; it was, for instance, one of the hot issues in the negotiations between the UK and the European Council designed to avoid Brexit.[28]

We can conclude from the foregoing that there are several factors that impede the free movement of economically active persons.

Some sets of factors lie in the domain of EU law. We saw that the Citizenship directive may have given more rights to those who have the means to settle in another Member State and to those who have legally stayed for a longer period in a Member State. It is understandable that the directive does not EU citizens immediate access to social assistance in the host State. However, it is remarkable that the directive has even reduced the rights of some economically non-active persons, by allowing Member States to require them to be staying legally in their territory, and more precisely *legally in the sense of the Directive*. This is remarkable, since the Directive does not give a definition of legality as such, but only requires for a right to stay in the host State that persons have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence. So this requirement is defined not as a definition of legality, but as a condition for the right to stay to the extent that they will not claim social assistance. The Court has broadened this considerably by using it as a condition for legality also for benefits other than public assistance. This is not only true for benefits that have similarities with public assistance, but also to other non-contributory benefits, such as family benefits (e.g. case C308/2014). So the rights of these persons with respect to these benefits has even been *reduced*, which is a remarkable effect of the directive.
A further problem with this condition is that the requirement of 'sufficient resources' is not clear, as we have seen. It does not suffice that one does not claim public assistance, but some Member States require persons to have a particular amount of money. Also making use of some provisions, such as shelter for the homeless, may be taken into account. This leads to considerable legal uncertainty.
Since this seriously infringes free movement it is recommended that the EU legislature adopts a definition of legality. A possibility is that the coordination regulation provides that a person is legally staying in a Member State for the regulation as long as there is not an expel notice. This is certainly adequate when we consider benefits like family benefits or health care, which have traditionally been meant for the whole population residing in a country. In case of

[28] See EUCO 1/16.

special non-contributory benefits Member States could have fears of benefit tourism, since these benefits show a particular form of solidarity with a certain group of society. A first remark is that Member States should start by protecting their system better by applying the rules correctly. Why excluding Ms Dano because of being not legally staying in Germany (while she had a national right to stay) instead of (assuming that the claim is correct) excluding from this benefit her on the ground that she was not seeking work? And in case of special non-contributory disability or old age benefits, why not design, if that is really necessary, a system of compensation of costs between the Member State of origin and the host Member State? There is now already such a rule in Regulation 883/2004 for unemployment benefits for frontier workers. If the burden is deemed to be too high for the host State, it is better to have a compensation system than excluding persons completely from protection.

A second set of problems concerns the definition of who is a worker. This causes problems also for persons who are in work, if it is a small job. By setting a threshold EU citizens are withheld the protection of being a worker and are treated as an economically non-active person. Moreover they are also withheld additional advantages to realize their right to free movement, such as access to health care and opening a bank account. There is also considerable legal uncertainty as a result. A possible solution is to define the term worker in Regulation 492/2011, e.g. by requiring that they work at least an x number of working hours a month. Most probably this will lead to a higher threshold than the criteria used by the Court of Justice, and that may be seen as a disadvantage. However, if a definition is used it means in any case that there is legal certainty and that Member States may not use higher criteria. The criteria may, of course, not be defined in such a way that Article 45 TFEU is deprived of effect for many workers; it is certainly not allowed to treat only full-time workers as workers.

A third set of problems concerns the additional requirements set by Member States for access to social rights. One example is the condition that to access a subsistence benefit one has to have legally resided during *a particular period in a particular community* (country, municipality, region). The condition that residence is defined by being registered in a register is also problematic, in particular if this entails additional requirements, such as that one has the prospect of staying for at least a year legally in the country, or that a person has a postal address, employment or family members in the country. This requirement can even be problematic for persons working in the country concerned or for persons who have already been in the country for considerable time. For some people, it may be difficult to prove their residence even after more than five years of being in the country.

This is also an issue for the European legislature to deal with. It should be sufficient for a registry that one stays in a country and one should only be removed in case of a notice for expulsion. Thus the registration is neutral in the sense that registration does not itself constitute a particular right and one does not have immediately a right to all types of social rights, but the period of the registration can be defined much more easy.

These changes may make it easier to make use of the right to free movement and try to build a new future in the host State.