

SOCIAL BENEFITS AND MIGRATION

**A CONTESTED RELATIONSHIP
AND POLICY CHALLENGE IN THE EU**



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**CENTRE FOR
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BRUSSELS**

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FOREWORD

The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures [...].

Article 3(2) TEU

A recent Eurobarometer poll showed once again that, of all the rights associated with European citizenship, respondents are most familiar with their right to free movement: 88% are aware that a citizen of the European Union has the right to reside in any member state of the Union (subject to certain conditions). Almost the same number of people (82%) were also aware that if such citizens live in another EU country, they have the right to be treated in the same way as nationals of that state.¹

Given that many EU citizens will also admit to feeling that they do not know much about the EU and how it works, such a level of awareness is impressive but it also raises a number of questions. If this is common knowledge, why is it often so difficult for people who want to exercise this right to be able to do so? Why do so many people administering systems at the local level seem to know so little – not even that equal treatment is the basic principle?

The contributions to this publication will answer some of these questions and raise a number of others. Comprehension is made difficult by a range of legislation which does not knit together easily and can therefore be confusing; there are some member states which are manipulating the rules in such a way as to make life very difficult for individuals, their family and their employers in cross-border situations. Kees Groenendijk's Chapters 1 ("Access for Migrants to Social Assistance") and 2 ("Social Assistance and Social Security for Lawfully Resident Third-Country Nationals") demonstrate this very clearly.

¹ Flash Eurobarometer 365, 2013.

For those coming to the EU from non-EU (third) countries as migrants or those seeking international protection, life can also be complicated when trying to negotiate issues of entitlement to particular benefits, not least because there is an element of discretion applying to member states in the EU Directives, as Madeline Garlick's contribution (Chapter 5) concerning asylum seekers and those in need of international protection shows.

The *Your Europe* advice service currently handles some 17,000 questions per year that are becoming increasingly complicated and often involve the 'Free Movement Directive' 2004/38/EC.² The service estimates that about 15% of these queries should really lead to infringement proceedings and an EU Rights Clinic has recently been set up to help citizens present their cases, in co-operation with a number of non-governmental organisations around the EU.

I have been involved in this area since arriving in the European Parliament in 1999. I was endowed with the Green Group's legacy of working on Parliament's position on the modernisation and simplification of Council Regulation 1408/71 on the coordination of social security between member states.³ The legal base had just changed post-Maastricht Treaty and was now to be decided on the basis of unanimity between member states and co-decision with the European Parliament; co-decision was the new element.

Like the majority of EU citizens, I had never heard of the Regulation but I soon came to appreciate its complexities and importance in people's everyday lives. I was also a member of the European Parliament's Petitions Committee and we would regularly hear from people experiencing difficulties – those who had been waiting for months, if not years, to have a question settled relating to their pension rights after having lived in more than one EU country, or who felt they had been denied unemployment benefit having moved from one country to another to be with their spouse, to name just two examples. This combination meant that I was seeing real

² 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.

³ Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons, and to members of their families moving within the Community.

examples of how the system should work but was actually failing for many. It also meant that we as Parliamentarians could see gaps between systems but could do nothing about them as the rules were about national systems side-by-side and those nations did not want to build bridges between their systems so that people could move easily from one to another. In many ways, this is still the case.

Fortunately, the new Regulation 883/2004 on the coordination of social security is accompanied by an implementing Regulation 987/2009, which includes provision for the electronic exchange of information.⁴ There were those who thought this meant the Commission would be running the whole coordination system, but that was maybe wishful thinking! At least we should now be able to move away from quite so many pieces of paper in unintelligible handwriting that have to be interpreted before healthcare bills can be reimbursed cross-border – just one of the more credible reasons put forward for delays in payment. The European Health Insurance Card (EHIC) has also been a useful innovation, providing standard information in a standardised format, which is much easier to use than the old E-111 form.

Primarily, the EHIC is for use for “urgent and necessary” treatment on the same basis as nationals in the state where treatment is carried out. This sometimes leads to its own confusions as EU citizens frequently expect that treatment will happen on the same basis as in their own member state. In some cases, this comes as a nasty shock if you are used to treatment free at the point of delivery, or may deter people from treatment if they expect to pay but don’t have to. Rulings of the Court of Justice of the European Union have also clarified the situation regarding those who might want or need to seek care abroad due to the urgency of their medical situation and who cannot be treated within a satisfactory time from a medical point of view in their member state of origin. Such requests should not be turned down and costs should be carried by the country where the individual is insured in the national system. We now have an additional Directive on Cross-Border Healthcare clarifying the reimbursement situation for those who simply choose to seek treatment in another EU member state when

⁴ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems and Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004.

they could be satisfactorily be treated in their insuring country: they will only be reimbursed up to the cost of treatment in their insuring state.⁵

Access to healthcare is crucial for individuals but it is a contested right in many of the negotiations between the Council and the Parliament in setting legislation, and on the ground when people need care.

In the negotiations concerning those seeking international protection, we have seen some member states argue that only the need for urgent and emergency care should be guaranteed in legislation. When discussing the so-called Qualifications Directive, for which I was Parliament's rapporteur, we found ourselves in arguments over the wording about issues of mental health. There were those who only wanted care guaranteed in cases where it could be demonstrated that any mental health problem resulted from the trauma of their experience related to the protection claim.⁶ We know that in some member states, mental healthcare provision is under stress, but should not the priority be medical need rather than migration status or the root causes of a demonstrable problem? Also, how can we justify people with mental health problems being viewed as vulnerable in terms of reception needs and then finding they cannot get treatment when status has been awarded? I hope we found a satisfactory outcome, but it was a frustrating debate with the Council.

Member states will often argue over the issue of costs, but will rarely bring figures to the table. Even some of the governments that argue for the possibility of restrictions actually deliver quite comprehensive care; they appear to want the flexibility to roll back from that position if they so choose.

Even among groups of third-country nationals, we can see differences in entitlements. Chapter 4 on "Social Security Rights of Third-Country Nationals under the Euro Mediterranean Association Agreements", by Anja Wiesbrock, spells out the consequences of certain bilateral EU arrangements and the problems of trying to bring those up-to-date while

⁵ Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare.

⁶ 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.

still maintaining the acquired rights of individuals, as does Paul Minderhoud in Chapter 3 on “The Significance of Decision 3/80 of the EEC-Turkey Association Council”. In recent legislation on migration, some of us in the European Parliament have been trying to ensure that all third-country nationals have access to social security on the same basis as nationals, in line with the European Council’s 1999 Tampere Conclusions. Regulation 883/2004 has provided the definition of what is meant by core social security rights. In most EU member states, third-country nationals working in a cross-border situation are today covered by the Regulation 1231/2010, except in the UK which is keeping the earlier Regulation 859/2003⁷, applying to employed and self-employed persons, as well as their family members.⁸ Denmark is not covered by either Regulation. The fact that the UK and Ireland have a variable opt-in/out attitude to EU legislation concerning those in need of international protection and also concerning non-EU nationals with regard to social security matters provides a further layer of complexity. We have yet to see national systems work easily for family and partners of EU nationals coming from outside the EU; there is a certain irony, and sadness, in some couples being told that they have a better chance of living together as a couple in another member state rather than in the country of origin of the EU national.

We are also seeing an interplay developing between access to healthcare under the state system and the Free Movement Directive. In 2007, when transposing Directive 2004/38/EC, France removed the right for non-economically active residents from other EU member states to state healthcare, not only for new residents but existing ones. The latter complained to the Commission and the European Parliament about this change in their situation. The French government argued that they had the right to do this in order to stop these individuals being a “burden” on their system in accordance with the Directive. Following the outcry, the French

⁷ Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on grounds of their nationality.

⁸ Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the grounds of their nationality.

government reinstated the right to state care for those who had previously been covered.

In the UK, we are now seeing that students who are EU citizens, for example, and who have relied on the National Health Service in the UK to provide their health cover under Regulation 883/2004 are finding that this is used as a reason to deny them permanent residence under Directive 2004/38/EC, as they are seen as having been a “burden on the state” as they did not have private insurance cover. There is no definition of “burden” in any quantitative or qualitative sense. Such actions could be seen as unreasonable and the Commission is likely to act on this issue, which will be welcomed by Parliament. In a recent report on the “Impact of the crisis on access to care for vulnerable groups”, for which I am rapporteur, the Parliament is asking the Commission to look at the interplay between Regulation 883/2004 and Directive 2004/38/EC in order to clarify where member states are not facilitating the right to free movement, but are instead obstructing it.

Given that the recent Eurobarometer poll shows a majority of citizens in all EU nations consider that the free movement of people within the EU has economic benefits for their country, it is a pity that some of our national governments seem to want to construct increasing barriers.

This is currently being seen in the actions of four member states – the UK, Germany, Austria and the Netherlands – in their stated concern to tackle “abuses” of national welfare systems by the social welfare “tourists” in a recent letter to the Irish Presidency.⁹ Those of us who have been active in the immigration and asylum field will recognise this sort of language, especially coming from these countries. This time it is coming on the back of the ending of transition periods towards full free movement for those countries that have most recently joined the EU.

The letter does not come from the ministers responsible for social welfare benefits, but from those responsible for immigration matters – the Federal Ministers of the Interior of Austria and Germany, the Minister for Immigration from the Netherlands and the Secretary of State for the Home Department of the UK. The ministers state that: “We are fully committed to the common European right to the freedom of movement. We will always

⁹ Letter to Mr. Alan Shatter, Minister for Justice and Equality (Republic of Ireland), President of the European Council for Justice and Home Affairs, May 2013.

welcome EU citizens who move to another EU country to work or to take up professional training or university studies.”¹⁰

It is therefore clear that there are other citizens who are not so welcome. However, the ministers claim that a number of local authorities in the EU are under “a considerable strain by certain immigrants (sic) from other member states. These immigrants avail themselves of the opportunities that freedom of movement provides, without, however, fulfilling the requirements for exercising this right.”¹¹

The ministers then go on to argue that remedies to deal with this situation are inadequate and that Article 35 of Directive 2004/38/EC does not spell out what measures might be taken or how failure to comply might be sanctioned. They wish to work with the Commission to look at actions that might be taken: “The sanctions to be discussed in this context include expulsion and bans on re-entry for appropriate periods.”¹²

I hope these ministers will read the two chapters by Kees Groenendijk and Chapter 7 by Corrado Giulietti and Martin Kahanec in this book, in particular the findings concerning figures and their assessment of the empirical evidence showing there is no evidence supporting the hypothesis that welfare is a strong magnet for immigrants. When trying to track down the basis for some of these claims about pressure and abuse in Germany and the UK, my own political group (Greens/EFA) has also found it difficult to find substantive examples. This has also been my experience when negotiating legislation with member states: the issues of potential abuse and costs are frequently there in the Council’s arguments but are rarely substantiated with any figures or research. If people are not entitled to certain benefits, they should not get them – we are back to the issue of the quality of administration, the clarity of guidance and the training of the individuals involved. As we have seen, many citizens are poorly served but that does not seem to concern ministers to the same degree.

When we read further into the letter, it becomes clear that general changes are being sought to deal with a specific group of EU citizens: “We call upon the member states of origin to permanently improve the local living conditions of those concerned. We also call upon them to make sure

¹⁰ Ibid., p. 1.

¹¹ Ibid., p. 2.

¹² Ibid., p. 3.

that the EU funds which have already been set aside for these purposes are actually used to benefit those concerned.”¹³

I would deduce that this letter primarily concerns EU citizens of Roma descent, although that is not explicitly stated. In that case, most would agree with the sentiments voiced above; no-one should feel they need to leave their country of origin due to discrimination and poverty. Certainly, the European Parliament is very concerned that money allocated is well spent and should help tackle the many problems experienced by this group of citizens. Parliament also wants existing legislation, such as the Directive implementing the principle of equal treatment on grounds of race or ethnic origin, to be fully implemented and upheld.¹⁴ However, I think it is essential that those of us concerned with the right to free movement are alert to measures to amend it that could introduce draconian penalties in order to solve a specific problem which is not the result of the legislation itself. The Commission and member states’ governments might do better to turn their attention to how to amend the Roma strategy to make it more effective and to look at how member states can co-operate to address the issues positively. It could be argued that some of the member states identifying this as a free movement problem could do much more to tackle the racist attitudes in their own countries towards Roma and improve the social conditions for that group, which would reduce some of the difficulties.¹⁵

However, in terms of social security benefits, movement is not only one-way. A number of benefits can be exported from the state responsible for insurance when an individual moves elsewhere in the European Union. Increased worker mobility is embraced as an idea by all member states and job-seekers can take their unemployment benefits with them for a period of time – at least three months – but this may not be long enough to find work and an extension is being considered. Those entitled to a state pension have exported these pension rights, assisting many older EU citizens to live in warmer climates or move to be nearer their children, such as the estimated

¹³ Ibid.

¹⁴ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

¹⁵ B. Foster and P. Norton (2012), “Educational Equality for Gypsy, Roma and Traveller Children and Young People in the UK”, *Equal Rights Review*, Vol. 8, pp. 85-112.

500,000 UK state pensioners living elsewhere in the EU. For the European Parliament, the opportunity for people with disabilities to exercise their free movement possibilities has long been an issue of concern. We have therefore welcomed the Commission's action on special non-contributory benefits, as explained in Chapter 6 by Rob Cornelissen, who has done so much to develop the whole field of free movement through his work at the Commission.

This excellent book demonstrates that legislation concerning free movement is still an area of complexity, developing as social security, welfare benefits and social rights shift and change within the EU. The priority has to be ensuring that it works for people and not against them. This requires better administration and willingness on the part of national governments to tackle problems effectively rather than trying to reduce the scope of existing rights. We would do well to remember that the EU Charter of Fundamental Rights starts with the statement:

Human dignity is inviolable. It must be respected and protected.

Jean Lambert
Member of the European Parliament

PREFACE

As the financial crisis deepens in a number of member states, the stresses on national budgets from increasing social benefit costs are also rising. As tax revenues diminish with the rise in unemployment, the capacities of national treasuries to fulfil their obligations to the unemployed and others receiving social benefits has become a matter of contestation. At times such as these, it is common for public debate to emerge over who should be entitled to social benefits and who should be excluded. These discussions are often set out in terms of whether the social benefits system should change in nature from being based on a needs assessment to one where there is also an assessment of whether the individual deserves public support. In addition or as an extension to this public discussion, we find that the re-categorisation of people on grounds other than need for the purposes of the social benefits system also encourages reflection on whether non-citizens should be entitled to social benefits in the host state. It is this aspect of the debate that we aim to analyse in this volume.

The political and legal debate often takes place around questions of whether non-citizens have worked in the host state. Have they paid contributions and taxes to the contributory and non-contributory social benefits system such that they should have access to insurance against risk, or should they go 'home'? If they are encouraged to go to their country of nationality, should they be entitled to take with them their social benefits from the host state on the basis that they have accumulated contributions which are designed to pay for benefits? Or should any benefits paid to non-citizens in their country of origin be assessed on the basis of the cost of living in that country? And if so, should only an amount equivalent to the percentage of average income which they would have earned in the host state (had they been permitted to stay there) be paid?

The collection of essays contained in this book examines the main policy controversies that have emerged in the EU regarding linkages between welfare and migration. Does migration constitute in fact a disproportionate burden to member states' domestic labour markets and

welfare systems? Should non-citizens be entitled to social benefits in the state where they live? Is there objective evidence and statistical data indicating abuse of social benefits and increasing financial burdens by non-citizens, 'social welfare tourism' or the so-called 'welfare magnet' hypothesis, whereby migrants are attracted to countries that provide more generous welfare?

There are five main categories of non-citizens who are captured by EU law and policy for the purposes of social benefits: EU citizens living in a member state other than that of their nationality; third-country nationals (non EU-nationals) who are lawfully resident in the EU; Turkish nationals; third-country nationals covered under Association (Euro-Mediterranean) Agreements; and asylum seekers and refugees. For each of these groups of non-citizens, the book analyses the main debates and the uses of data, information and knowledge on their reliance on social benefits. The volume concludes with a synthesis of the cross-cutting research findings delineating the relationship between migration and social benefits in the EU, and a set of policy recommendations addressed to policy-makers.

Prof. Elspeth Guild and Dr. Sergio Carrera
Brussels

1. ACCESS FOR MIGRANTS TO SOCIAL ASSISTANCE: CLOSING THE FRONTIERS OR REDUCING CITIZENSHIP?

*KEES GROENENDIJK**

1. Historical alternatives in dealing with the exception to the 'natural' case

Rules on access to social assistance have always functioned as an instrument to distinguish between those who 'belong to us' and for whose needs 'we' feel responsible, and the 'others' who belong elsewhere, for whom we do not feel responsible and who we can remove from 'our' society if they become destitute. Under the 19th century Poor Laws, the poor were to be relieved by their own parish or community. Migrants presented a problem to this system. Generally, three alternatives were available: equal treatment of the migrant poor; removal of the migrant poor from the community; or insisting on the community of origin paying for relief. "[B]y the late 18th century and early 19th centuries, many parishes in the UK allowed non-resident relief. In other words, a migrant's home parish would send money to relieve a pauper who would not then be forced to return 'home'. In the UK in 1802-3, there were nearly 200,000 individuals being relieved by parishes to which they did not belong."¹ Within developing nations, birth, religion, residence or settlement were,

* The author wished to express his gratitude to Gisbert Brinkmann, Johannes Proksch, Simon Roberts and Bernard Ryan for their kind assistance in obtaining access to statistical data and other information on Germany and the UK.

¹ D. Feldman (2006), "The boundaries of welfare", *History in Focus*, Institute of Historical Research, University of London (www.history.ac.uk/ihr/Focus/Migration/articles/feldman.html), referring to PP 1803-4 xiii, *Abstract of Answers and Returns... Relative to the Expense and Maintenance of the Poor in England*, 715.

and to a certain extent still are, markers for ‘entitlement’ to assistance. For most of the 19th century, that assistance was considered a favour rather than a right. “Internal migrants in England under both the Old and the New Poor Law posed local authorities problems that were structurally similar to those presented to central governments by international migrants in the 20th and 21st centuries.”² On the continent during the 19th and early 20th centuries, states concluded agreements to deal with the payment for relief granted to their destitute nationals living in other states or with the expulsion, return and re-admission of those poor nationals.

In the developing post-1945 welfare states in Western Europe, the right to social security benefits was primarily linked to the status of a worker, being resident in the state, or to the ‘need’ for the service (in the UK’s National Health Service). In his famous essay on “Citizenship and Social Class”, T.H. Marshall argued that social rights (equal rights to a minimum income and other social services) were the third element of citizenship. But who is considered to be and be treated as a citizen? Social assistance was awarded to nationals only; non-nationals without permission to be on the territory were excluded and were granted social assistance in exceptional situations and for a short time only. But to what extent should non-nationals with lawful residence be treated as citizens? An early and not very generous answer to this question can be found in one of the first conventions concluded within the Council of Europe, the 1953 European Convention on Medical and Social Assistance (no. 14). The Convention provided for reciprocal equal treatment of the nationals of the State Parties and for a restriction to expel them after five or ten years of residence on the grounds that they received social assistance.³ The Convention left the State Parties free to expel non-nationals only on the grounds that they had applied for social assistance before the end of the five years. The scope of the relevant rules was extended by Article 13(4) of the 1961 European Social Charter to nationals of all State Parties to the Charter and the same Article in the 1996 Revised European Social Charter.⁴ Most EU member states have ratified one or both versions of the Charter.

² Ibid.

³ Article 1 and Articles 6 to 10 of the European Convention on Medical and Social Assistance (CoE Treaty No. 14) concluded on 11 December 1953. Article 4 provides that the cost of assistance to a national of any of the Contracting Parties shall be borne by the Contracting Party which has granted the assistance.

⁴ See also the Appendix to the Revised European Social Charter.

2. Social assistance for EU nationals: Becoming and remaining citizens

The first rules on free movement of workers in the EEC provided for equal treatment with regard to contributory social security benefits, but these rules generally did not cover access to non-contributory social assistance for workers or other economically active persons or their family members. Only after the case law of the Court of Justice on the definition of ‘worker’ ruling that part-time workers earning less than the minimum wage or receiving supplementary benefits were also covered (*Levin* [1982] and *Hoeckx* [1985]) and the extensive interpretation of the equal treatment clause with regard to social benefits in Article 7(2) of Council Regulation 1612/68, were the first steps taken to allow EU migrants (partial) access to social benefits.⁵ In many member states, the gradual establishment of the internal market and the abolition of controls at internal borders foreseen for 1992 raised fears that migrants from other member states would come and (mis)use “their honeypot”. Of course, each of the then 12 member states considered its own honey pot to be the most attractive.

The first Directive providing the right of residence for economically non-active nationals of other member states granted that right under the condition that they themselves and the members of their families “have sufficient resources to avoid becoming a burden on the social assistance system of the host member state during their period of residence”. The resources were deemed to be sufficient “where they are higher than the level of resources below which the host member state may grant social assistance to its nationals”.⁶ Thus, their right of residence was dependent on them not making use of the social assistance system. The Maastricht Treaty in 1992 introduced the concept of EU citizenship. Six years later in 1998, the Court in *Martínez Sala* held that all lawfully resident EU citizens were eligible for equal treatment in social assistance, irrespective of

⁵ Case 53/81 *Levin* [1982] ECR 1035 and Case 49/83 *Hoeckx* [1985] ECR 973; Council Regulation (EEC) No 1612/68 of 15 October 1968 on the freedom of movement for workers within the Community and the workers’ families.

⁶ Article 1(1) of Council Directive 90/364/EEC of 28 June 1990 on the right of residence and Article 1(1) of Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity. The latter was replaced by Council Directive 93/96/EEC of the Council of 29 October 1993 on the right of residence for students.

whether their right of residence was based on national or on EU law. In 2001, the Court in the *Grzelczyk* judgement, relying on the provisions on EU citizenship on the prohibition of nationality discrimination and the clause in the preamble of the 1990-1993 Directives that “beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host member state”, held that a member state could not terminate the right of residence of a student of another member state who, in his final year for the first time, temporarily received social benefits.⁷ Three years later, the member states unanimously codified this case law in the 2004/38/EC Directive on free movement of EU citizens. This Directive introduced two relevant innovations: the principle of equal treatment was extended to social assistance, and the possibilities to remove EU nationals for being in need of social assistance were limited. Except for the first three months, during the first five years EU citizens and their family members with a right of residence are entitled to equal treatment in terms of social assistance as long as they do not become an unreasonable burden on the social assistance system of the host member state. After five years of residence, EU nationals and their third-country national family members acquire a permanent right of residence that can no longer be terminated in case of reliance on social assistance.⁸ The same five-year period was already present in the above-mentioned Convention signed by 14 member states of the Council of Europe in 1953.

3. Citizens of other member states and “our honey pot”: Stories and facts

The focus of the recent public debate on access for immigrants to social assistance in certain member states is not on migrants from third countries but on migrants from other member states. This is nothing new; fears of ‘welfare tourism’ were expressed in many (but not all) member states at each accession of new member states. Before the UK accession, this fear was expressed on both sides of the channel. In the UK, it concerned

⁷ Case C-85/96 *Martínez Sala* [1998] ECR I-2691 and Case C-148/99 *Grzelczyk* [2001] ECR I-6193.

⁸ Articles 24, 14 and 16 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the European Union and their family members to move and reside freely within the territory of the member states.

“French and Dutch who are not Europeans” from the former colonies and in the Netherlands, the focus was on black Britons.⁹ When Greece acceded to the EEC in 1981, the term ‘welfare tourism’ was used again. The establishment of the Internal Market in 1992 and the related abolition of controls at the internal borders in the Schengen area again aroused the fear in several member states that the nationals of other member states or third-country nationals living there would come and draw on “their honeypot”. In section 3.1 below, we focus on the main features of the debates in three member states (Germany, the Netherlands and the UK) and then, in section 3.2, we present the publicly available facts on the actual use of social assistance by nationals of other member states in the same three member states.

3.1 Public and political debate on social assistance for migrants

The enlargement of the EU in 2004 and 2007 again created the fear that unlimited labour migration would cause serious problems (e.g. wage dumping) for labour markets and potential ‘welfare tourism’ by EU-10 nationals to the ‘old’ member states. Apart from the considerable extension of the personal and territorial scope for free movement within the EU, there were two additional sources of fear. First, the 2004 Free Movement Directive extended the rights of residence of unemployed EU citizens, either as jobseekers or after earlier employment, and the Directive explicitly granted nationals of other member states access to social assistance. Second, the banking crisis and the resulting economic downturn after 2009 created political pressure for a reduction of the budget for social benefits, justified by the liberal ideology of withdrawal of the state and responsibility and self-reliance of the individual. How did those three changes (enlargement, Directive 2004/38/EC, and the economic climate) affect the debate on access for migrants to social assistance in three member states – Germany, the Netherlands and the UK? The policy of these three member states regarding the transitional regime varied. In Germany, the restrictions of the transitional regime for EU-8 workers ended in May 2011, in the Netherlands it ended in May 2007, while the UK granted free access to EU-8 workers immediately in May 2004, subject only to an obligation for the worker to register with the Home Office. All three member states have restricted the free movement of workers from Bulgaria and Rumania (EU-

⁹ W.R. Böhring (1972), *The Migration of Workers in the United Kingdom and the European Community*, London: Oxford University Press, p. 7 and pp. 152-158.

2) under the transitional regime starting in 2007 until its very end in January 2014.

Germany

The use of transitional measures for the full seven years with regard to workers from the EU-8 and EU-2 may have been inspired primarily by the wish to avoid a large-scale migration of workers from those countries, or may have been a response to hostile feelings in part of the population about immigration. It has severely reduced the possibilities for EU-8 nationals to apply for social benefits in Germany until 2011; for EU-2 nationals this will apply until 2014. The derogatory term '*soziale Hängematte*' ('social hammock') was used by the press and by right-wing politicians in Germany, though not exclusively in relation to foreigners receiving social benefits. Repeated publications by academics concluding that the feared 'welfare tourism' by EU-8 workers other EU member states, especially in the UK and Sweden, did not materialise in real life¹⁰ may have reduced these fears in Germany. The debate appears to have focused on the rights of jobseekers and unemployed workers from other member states to basic jobseekers' income support as a form of social assistance.¹¹ The debate was triggered by case law of the Court of Justice in *Collins* (2004) and in *Vatsouras* (2009) confirming the right of non-discrimination for jobseekers with regard to any "benefit of a financial nature intended to facilitate access to employment in the labour market of a member state".¹² After the Federal

¹⁰ For instance, K. Brenke and K.F. Zimmermann (2007), "Zuwanderung aus Mittel- und Osteuropa trotz Arbeitsmarktbarrieren deutlich gestiegen", *DIW Wochenbericht* Vol. 74, No. 44, pp. 645-653; A. Zaiceva and K.F. Zimmermann (2008), "Scale, Diversity, and Determinants of Labor Migration in Europe", *Oxford Review of Economic Policy*, Vol. 24, No. 3, pp. 428-452; K.F. Zimmermann (2009), "Labor Mobility and the Integration of European Labor Markets", *DIW Berlin Discussion Papers* No. 862; T.E. Cherkeh, M. Steinhardt and T. Straubhaar (2006), "Did the European Free Movement of Persons Residence Directive Change Migration Patterns within the EU?", *CESinfo DICE Report*, No. 4, pp. 14-19.

¹¹ For an analysis of this issue in several member states, see F. Wollenschläger and J. Ricketts (2012), "The Situation of Jobseekers under EU Law on Free Movement: Residence Rights of Jobseekers and 'Vatsouras' Benefits – National Practices and Legislation", *Report for the European Network on Free Movement of Workers*.

¹² Case C-138/02 *Collins* [2004] ECR I-2703 and Cases C-22/08 and 23/08 *Vatsouras* [2009] ECR I-4585.

Social Court (*Bundessozialgericht*) had ruled that the exclusion of jobseekers from other member states was contrary to the equal treatment clause in the 1953 European Convention on Social and Medical Assistance, Germany filed a declaration in December 2011 with the Council of Europe in order to exclude certain forms of social assistance from the scope of that Convention. The aim of this declaration by the German government was to avoid nationals from EU member states that were also party to the old Council of Europe Convention claiming equal treatment under the Convention and the right of residence in Germany under Directive 2004/38/EC. The declaration mentioned two forms of social assistance: the basic income support for jobseekers regulated in Book Two of the Social Code (SGB), and the social assistance of Book Twelve of the Social Code.¹³ A few months later, the press reported that jobseekers from other member states were still entitled to a form of social assistance not covered by the declaration shortly after arrival in Germany.¹⁴ The real debate on so-called *Armutseinwanderung* (poverty immigration) from Bulgaria and Romania in the serious press started only in early 2013.¹⁵ A leading Dutch newspaper reported on this debate under the headline: “German politicians see poor Roma everywhere”.¹⁶

The Netherlands

Since the accession of the EU-10 to the EU, Dutch politicians of all main parties have voiced worries about workers from those countries applying for unemployment benefits or social assistance. In the political debate on

¹³ Declaration in a letter from the German Permanent Representative of 15 December 2011 (<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=014&CM=8&DF=30/12/2012&CL=ENG&VL=1>).

¹⁴ S. Von Borstel and M. Hollstein (2012), “EU-Ausländer mit Anspruch auf deutsche Sozialhilfe”, *Die Welt*, 4 May.

¹⁵ With headlines such as “Association of Municipalities expresses concerns on poverty immigration” and “Federal Minister of Interior Friedrich takes problems with poverty immigration very serious” in the *Frankfurter Allgemeine Zeitung* of 14 and 16 February 2013, see also W. Frenz (2013), “‘Armutseinwanderung’ zwischen EU-Freizügigkeit und Menschenwürde”, *Neue Juristische Wochenschrift*, Vol. 66, No. 17, pp. 1210-1212.

¹⁶ F. Vermeulen (2013), “Duitse politici zien overal arme Roma”, *NRC-Handelsblad*, 22 March.

the introduction or extension of the transitional regime for workers, this issue was highlighted as one of the negative effects of introducing free movement. From the reports commissioned by the Ministry of Social Affairs, almost every other year since 2005, it appeared that the actual number of EU-8 nationals receiving benefits was rather small, both in absolute and relative terms. In 2004, nationals from EU-8 states accounted for 0.2% of all persons receiving unemployment benefits and 0.3% of those receiving social assistance in the Netherlands.¹⁷ The Minister of Social Affairs then began to stress that the number of applicants for benefits was growing without relating the increase to the rapid growth in the number of EU-8 workers and other residents from those countries in the Netherlands. The most recent official statistical data on the use of benefits by persons from other EU countries are based on their country of birth, not their nationality. The numbers again are higher, partly because Dutch nationals born elsewhere in the EU and naturalised EU migrants are now included. Among the Dutch population, this issue apparently draws less attention: most of the 40,000-plus complaints registered on the internet hotline for complaints about EU-10 nationals run by Geert Wilders' PVV party in 2012 related to other issues: "nuisance, drunkenness or noise" (60%), "they take away our jobs or houses" (16%) and "criminality" (14%).¹⁸

Since 2004, subsequent Dutch governments have proposed or introduced policy measures reducing or ending the export of social security benefits for third-country nationals returning to their home country and reducing or excluding EU-10 workers, especially Polish and EU-2 workers, from unemployment benefits and social assistance. The following measures were proposed in 2010-12 by members of the minority government that relied on the votes of Geert Wilders' party: amending Regulation 883/2004 so that periods of employment in another member state no longer have to be taken into account for the right of EU workers to unemployment benefits; introducing a special check by the immigration authorities on the rights of residence of EU nationals applying for social assistance; stricter rules on the expulsion of all non-nationals applying for social assistance;

¹⁷ Ph.J. Muus (1992) "Nederland: Internationale migratie, arbeidsmarkt en sociale zekerheid", in Ph. J. Muus, C.A. Groenendijk and P.E. Minderhoud (eds), *Migratie, Arbeidsmarkt en Sociale Zekerheid*, The Hague: SER, p. 33.

¹⁸ "40.000 klachten bij PVV-meldpunt over Polen", *Trouw*, 13 December 2012. The large majority of entries at the hotline voiced criticism on the existence of the hotline.

limiting the right of residence of EU jobseekers to three months; and introducing the requirement that applicants for social assistance pass a Dutch language test.¹⁹ The language test returned in the October 2012 coalition agreement of the current conservative (VVD) and social-democratic (*PvdA*) government, supplemented by a seven-year residence requirement for nationals of other member states and third countries applying for social assistance. This residence requirement is incompatible with Directive 2004/38/EC and Directive 2003/109/EC, since both Directives provide for national treatment and a permanent right of residence after five years.²⁰ This proposal would thus require an amendment to both Directives, illustrating the highly symbolic character of the policy intentions. The Dutch language requirement for social assistance, according to the coalition agreement, should apply “equally for nationals of third countries, EU nationals and Dutch nationals.” With regard to nationals of other member states and long-term resident third-country nationals, the language requirement would be a clear example of indirect discrimination on the basis of nationality. If the language test were not strictly applied to Dutch nationals too, excluding illiterate Dutch nationals from social assistance, it would even be direct discrimination on the basis of nationality. Moreover, the new language test would primarily be a barrier for Dutch nationals of immigrant origin, who make up a large share of the actual recipients of social assistance, and would come at the time when the government has ended the payment for their language courses.

The United Kingdom

Apart from occasional stories in the popular media about housing benefits paid to migrants from outside the EU, who often turn out to be refugees, the focus is on migrants from the new member states. In March 2004, the then UK Home Secretary David Blunkett set the tone of the policy and the debate on migrants from the EU-8 with the statement that while “hard working immigrants are welcome. Benefit tourists are not. [...] That is why the Government is putting in place a package of measures to prevent

¹⁹ See letters of the Minister of Social Affairs to the Parliament of 14 April 2011 and 17 April 2012, Tweede Kamer 29407, nos. 118 and 147.

²⁰ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

people who are not working from accessing benefits.”²¹ The UK government organised an information campaign that, according to the minister, communicated a simple message: “You can come to the UK to work, if you register, but you cannot claim benefits.”²² This policy sends the message to the British public that many EU-8 nationals intended to come to the UK to claim benefits rather than to work. It ignores that EU-workers pay taxes and national insurance contributions in the UK and are entitled under EU law to social benefits if they happen to lose a job and are unable to find a new one immediately.

After 2004, Polish and other EU-8 workers no longer needed a work permit in the UK, but they had to register with the Home Office Worker Registration Scheme to be issued with a certificate that allowed them to work legally. Employers had to carry out identity checks and it was a criminal offence to employ an EU-8 worker who had not registered. In 1994, the UK introduced a habitual residence test for several income-based benefits (subsequently extended to new means-tested benefits), requiring a claimant to prove that they have genuine links with the UK. On the day of the accession of the EU-8 countries, the UK introduced a further test for income-related benefits: a claimant also has to have a “right to reside” in the UK or Ireland under UK or EU law. The aim of the new test is to “safeguard the UK’s social system from exploitation by people who wish to come to the UK not to work but to live off benefits”²³ The effect of this test is that an EU-8 worker who is obliged to register under the Worker Registration Scheme and loses his or her job due to any reason, even illness or involuntary unemployment, also loses the right to reside in the UK and thus is no longer entitled to income-based benefits, such as Jobseeker’s Allowance, Housing Benefit or Council Tax Benefit, until he or she has completed five years of lawful residence in the UK and has acquired a permanent right of residence under Directive 2004/38/EC.²⁴

²¹ Quoted by S. Roberts (2008) “Pracowici imigranci mile widziani: zabezpieczenie społeczne polskich pracowników w zjednoczonym królestwie wielkiej brytanii i irlandii”, *Polityka Społeczna*, Special Edition, December (S. Roberts (2008), “‘Hard working immigrants welcome’: Social security for Polish migrants in the UK”, *Polityka Społeczna*, Special Edition, December.)

²² Ibid., as quoted by Roberts (2008).

²³ Ibid.

²⁴ Philip Larkin published three articles on this new test and its effects: P. Larkin (2005), “The Limits to European Social Citizenship in the United Kingdom”,

When in 2011 the European Commission started an infringement procedure against the UK because it held the new right to reside test to be in violation of Directive 2004/38/EC, the UK government reacted vehemently with efforts to mobilise other member states in protest against the Commission's action. Work and Pensions Secretary Iain Duncan Smith called the Commission's decision "provocative" because it could mean "the British taxpayer paying out over £2 billion extra a year in benefits to people who have no connection to our country and who have never paid in a penny in tax."²⁵ A year later, the minister stated that the likely cost to UK taxpayers of allowing more foreigners to claim benefits would be 92% lower than previously claimed (£155 million rather than £2 billion), a figure he still described as "enormous."²⁶ The Commission's infringement procedure against the UK probably forced the minister to have a more serious look at the scope of the issue. In a recent speech on the immigration system, the UK Home Secretary Theresa May said: "We can be smarter about the benefits and services we provide for foreign nationals."²⁷ Apparently, there is little debate in the media or among leading politicians about improving access to benefits to those non-nationals who actually are excluded.

3.2 Data on actual reliance on social assistance by non-nationals in Germany, the Netherlands and the UK

Data on the actual use of social assistance by non-national residents are scant and not easily accessible. Moreover, comparisons between the

Modern Law Review, Vol. 68, No. 3, pp. 435-447; P. Larkin (2007), "Migrants, social security, and the 'right to reside': a licence to discriminate?", *Journal of Social Security Law*, Vol. 14, No. 2, pp. 61-85; P. Larkin (2009), "A policy of inconsistency and hypocrisy: United Kingdom social security policy and European citizenship" *Journal of Social Welfare and Family Law*, Vol. 31, No. 1, pp. 33-45.

²⁵ I. Duncan Smith (2011), "Brussels poses serious threat to our welfare reforms", *Daily Telegraph*, 30 September 2011; and D. Martin (2011), "Revolt over EU benefits diktat: 12 nations join UK fight to curb welfare tourism free-for-all", *Daily Mail*, 1 October.

²⁶ B. Wheeler (2012), "Iain Duncan Smith's £2bn benefit tourism estimate cut by 92%", *BBC News UK politics*, 14 September 2012.

²⁷ T. May (2012) "An immigration system that works in the national interest", speech delivered on 12 December 2012 (www.homeoffice.gov.uk/media-centre/speeches).

member states are hampered by differences in the criteria on which the statistics are based and in the social systems. For example, in the UK income-related support is granted through tax relief more often than in the other two member states. Nevertheless, some conclusions can be drawn from the data presented below.

Germany

Table 1. Social assistance (Sozialhilfe) for non-nationals in Germany on 31 December 2011

| | Basic security benefits (Grundsicherung) | | Supplementary welfare allowance (Hilfe zum Lebensunterhalt) | |
|-------------------------|---|------|--|-------|
| Total recipients | 844,030 | 100% | 331,758 | 100% |
| German nationals | 715,955 | 85% | 310,124 | 93.5% |
| Non-nationals | 128,075 | 15% | 21,634 | 6.5% |
| EU-26 nationals | 17,091 | 2% | 4,631 | 1.5% |
| Third-country nationals | 110,984 | 13% | 17,003 | 5% |

Source: Our calculations on the basis of the German Federal Statistical Office (Statistisches Bundesamt), Basic security at old age and at reduced earning capacity (Grundsicherung im Alter und bei Erwerbsminderung) (Tabellen G1 und G10_2011_D) and supplementary welfare allowance (Hilfe zum Lebensunterhalt) (Tabellen E_01.1_2011_D bis E_01.3_2011_D).

The legal and political discussion in member states tends to focus on the use of social assistance by nationals of other EU member states. In Germany, the absolute number of third-country nationals receiving social assistance is more than five times higher than the number of EU nationals receiving assistance. EU nationals account for almost 40% of the total foreign population in Germany. The percentage of all non-national residents receiving social assistance is almost twice as high as among Germans. In 2010, 1.1% of German nationals and 1.9% of the non-German population received social assistance. But only 0.4% of the resident nationals of the other 26 member states received social assistance, i.e. almost three times fewer than German nationals. In 2011, non-nationals accounted for 8.5% of the total population and almost 15% of the persons receiving social assistance. Both differences are related to the overrepresentation of third-country nationals in the lower income groups. From the data of the *Statistisches Bundesamt* (Federal Statistics Agency) it appears

that in 2011, three quarters of the third-country nationals receiving social assistance were 65 years or older, whilst the proportion of older people among beneficiaries of social assistance was considerably lower among EU nationals receiving assistance (65%) and among German nationals (40%).²⁸ These differences can be explained by the (generally) lower income of immigrants and the fact that due to their age at entry to Germany, many migrants are not entitled to full old-age pensions.²⁹ The total number of non-German recipients of social assistance in the form of *Grundsicherung* doubled between 2003 and 2011, from 64,000 to 128,000.

The Netherlands

Table 2. Social assistance (bijstand) for non-nationals in the Netherlands, 31 December 2009

| | Recipients of social assistance | | Population of the Netherlands | | User ratio |
|-------------------|--|------|--------------------------------------|-------|-------------------|
| Total | 316,570 | 100% | 16,575,000 | 100% | |
| Dutch nationals | 266,800 | 84% | 15,840,000 | 95.5% | 1:60 |
| Non-nationals | 49,770 | 16% | 735,000 | 4.5% | 1:14 |
| EU-26 nationals | 4,460 | 1.5% | 311,000 | 2% | 1:70 |
| EU-14 nationals | 3,770 | | | | |
| EU-10 nationals | 530 | | | | |
| EU-2 nationals | 160 | | | | |
| Turkish nationals | 7,690 | 2.5% | 91,000 | 0.5% | 1:12 |
| Other TCN | 37,630 | 12% | 333,000 | 2% | 1:9 |

Source: Author's calculations on the basis of data from the Centraal Bureau voor de Statistiek (CBS).

In comparison with the same data for 2006, the proportion of total recipients made up of resident nationals from the other 26 member states

²⁸ For detailed data on 2009, see Statistisches Bundesamt (2012), "Sozialleistungen, Empfänger und Empfängerinnen von Hilfe zum Lebensunterhalt und Grundsicherung im Alter und bei Erwerbsminderung", Wiesbaden, p. 9.

²⁹ J. Proksch (2012), "Soziale Mindestsicherung in Deutschland", Wiesbaden (Statistische Ämter des Bundes und der Länder), p. 27.

increased from 1.1% to 1.5% in 2009 and the absolute number increased from 3,720 to 4,460. Less than half of this increase can be attributed to EU-10 and EU-2 nationals. From the above data on the Netherlands, clear similarities with the German situation are apparent. The share of non-nationals among beneficiaries of assistance is comparable (15% in Germany and 12% in the Netherlands), and the share of EU nationals among social assistance recipients is very small (between 1% and 2%) in both, and is far lower than the share of third-country nationals. Both in the Netherlands and in Germany, the percentage of social assistance recipients among resident nationals from the other 26 member states is lower than among Dutch or German nationals, respectively. The ratio of reliance on social assistance among Turkish nationals is five times higher, and even six times higher among other third-country nationals, than among Dutch nationals. The proportion of social assistance recipients made up of non-nationals has gradually increased over the recent decades: in the late 1980s, around 8% of the recipients of social assistance and 12% of the recipients of non-contributory assistance to unemployed workers (*Rijksgroepsregeling Werkloze Werknemers - RWW*) were non-nationals.³⁰ This increase is partly due to the admission of refugees.

In the recently published data on recipients of Dutch social assistance at the end of 2011 of persons born abroad (the so-called first generation *allochtonen*), the absolute number and the share of persons born in the other 26 member states is considerably higher (11,040 and 3%).³¹ The 2011 data include Dutch nationals born in other member states and naturalised migrants from other member states. This new way of counting is one of the reasons why the absolute number and the share of recipients born in EU-12 member states are four times higher in the 2011 data (3,360 and 0.8%) than in the 2009 data on recipients with EU-12 nationality (690 and 0.2%). From the data on 2011, some interesting features do appear. More than half of the social assistance recipients born elsewhere in the EU were born in four (neighbouring) member states (Germany, Poland, Belgium and the UK). Only 7.5% of the recipients of social assistance born in the EU-26 had a registered residence in the Netherlands for less than five years; 92.5% had a long residence and thus a permanent right of residence under EU law, and 60% had more than ten years of residence in the Netherlands. The share of

³⁰ Muus (1992), *op. cit.*

³¹ CBS (2012), "Nederlandse uitkeringen naar herkomst en woonland, fase 2", The Hague: CBS Centrum voor Beleidsstatistiek, December, Tables 1a and 1b.

those with less than five years of residence among persons born in the EU-12 was 15%, the large majority having three to five years of residence in the Netherlands. Even though these numbers also include Dutch nationals born in those states, this is a good indication that the large majority of nationals of other member states receiving social assistance in the Netherlands are protected against expulsion on those grounds by their permanent right of residence and the equal treatment clause in Directive 2004/38/EC. Far fewer than 10% of the nationals of other member states in the Netherlands could be expelled on the grounds of receiving social assistance without violation of that Directive.

Finally, the data on the country of birth of recipients of social assistance in 2011 indicate that Dutch nationals born outside the EU, many of them having come as refugees, make up a large share of the recipients of social assistance. The majority have resided in the Netherlands for more than ten years. Their right to social assistance will be particularly affected by the new Dutch language requirement proposed in the 2012 coalition agreement of the current Dutch government. Since indigenous Dutch nationals will hardly ever be affected by the new test, the implementation of this proposal may well be incompatible with the prohibition of racial discrimination in the Dutch constitution and in the UN Convention against racial discrimination (CERD).

The United Kingdom

At present, systematic data on the nationality of persons receiving social assistance benefits in the UK are not available. The official explanation of the Department for Work and Pensions (DWP) is: "The Department's benefit payment systems do not record nationality of people receiving benefits. For contributory benefits nationality is not a qualifying factor, as eligibility is determined by the National Insurance contributions that the claimant has made. For other benefits where residency conditions apply we do need to check nationality to ensure that the claimant is lawfully in the country. Therefore for these benefits nationality is established as part of the claiming process, but since it [is] not required for further processing the claim, it is not recorded on our computer systems."³² In 2011, the Department stated that: "Work is underway to consider the development

³² Freedom of information request 2959/2011 published on 22 December 2011 (<http://www.dwp.gov.uk/docs/foi-2959-2011.pdf>).

and publication of new statistics on the nationality of DWP benefit claimants.”³³ What is recorded and published in the National Statistics is the number of National Insurance numbers (NINo) allocated to adult overseas nationals (i.e. non-UK nationals) entering the UK. NINo registration occurs when a person enters the labour market for the first time; that date may well be later than the date of first entry in the UK. NINo registration data have been merged with DWP benefits data to show numbers and proportions of adult overseas nationals claiming benefits within six months of registering for a NINo and to estimate the number of benefit claimants who were non-UK nationals at the time of the NINo registration. On this basis, the total numbers of adult non-UK nationals who claimed (read ‘received’) certain benefits within six months of registration is known and published (see Table 3).

Table 3, unlike Tables 1 and 2 for Germany and the Netherlands, does not present the total number of non-nationals receiving social assistance benefits, but only the politically sensitive number of overseas nationals claiming and receiving unemployment benefits. The UK figures include both contributory and non-contributory means-tested out-of-work benefits (working-age benefits). Recipients of Employment and Support Allowance (ESA) and Income Support are not expected to be available to the labour market due to disability or single parenthood of a young child. The Jobseeker’s Allowance is non-contributory. Table 3 does not include tax credits, which are in fact also benefits.

Table 3. Adult overseas nationals in the UK claiming an out-of-work benefit within six months of registration, by year of registration (in thousands)

| | 2002-03 | 2007-08 | 2008-09 | 2009-10 | 2010-11 |
|-----------------------------|---------|---------|---------|---------|---------|
| All | 43,14 | 21,16 | 25,50 | 26,48 | 46,22 |
| Jobseeker’s Allowance | 32,53 | 15,28 | 19,87 | 21,48 | 38,48 |
| ESA or IB/SDA ³⁴ | 3,37 | 2,57 | 2,40 | 2,28 | 4,15 |
| Income support | 7,24 | 3,31 | 2,23 | 2,72 | 3,59 |
| % all out work claimants | 12.5% | 2.9% | 3.7% | 4.6% | 6.6% |

Source: National Statistics, Statistical Bulletin 30 August 2012.

³³ Ibid.

³⁴ Employment and Support Allowance or Incapacity Benefit/Severe Disablement Allowance.

The bottom row in Table 3 represents the proportion of all adult non-UK nationals claiming an out-of-work benefit within six months of registration, as a percentage of the total number of NINOs issued to adult non-UK nationals in that fiscal year. This table shows that the absolute number of claimants in 2010-11 reached the level of 2002-03, but the proportion of benefit claimants out of the total number of adult overseas nationals issued with a NINO in 2010-11 (6.6%) was only half that of 2002-03 (12.5%), i.e. prior to the enlargements of the EU in 2004 and 2007. More than four-fifths of the claimants received Jobseeker's Allowance. The average share across the four fiscal years from 2007-08 to 2010-11 of those receiving benefits within six months was 4.4%. In other words, 95% of adult overseas immigrants did not make such a claim.

Moreover, it is estimated that in February 2012, of all claimants of DWP working-age benefits, 6.4% were non-UK nationals at the time they first registered for a NINO. These statistics do not take account of non-UK nationals who have subsequently been granted British citizenship. From a sample exercise to match data on non-EU/EEA claimants who were non-nationals at their first NINO registration with data from the UK Border Agency, it appears that in 54% of the cases where a match between data of both agencies was possible, the claimant had in the meantime acquired British nationality, another 29% had been granted indefinite leave to remain (ILR) after many years of lawful residence, and 10% held refugee status.³⁵ Consequently, the share of non-UK nationals among the claimants of DWP benefits in February 2011 must have been (considerably) lower than the 6.4% just mentioned.

Of the claimants who were not UK nationals at the time of their NINO registration, 25% were nationals of another EU member state (one-third from the EU-10 and two-thirds from the 'old' member states), the top four countries of origin being Poland, the Netherlands, France and Italy. The share of working UK nationals claiming DWP working-age benefits (16.6%) was considerably higher than among non-nationals at the time of first registration (6.6%). The difference would be even greater if claimants who acquired British nationality after NINO registration were deducted from the latter group and added to the former. For the reasons mentioned above, the

³⁵ Nationality at point of National Insurance number registration of DWP benefit claimants: February 2011 working age benefits, DWP January 2012, p. 4 and 11, accessed on 5 January 2023 at http://statistics.dwp.gov.uk/asd/asd1/adhoc_analysis/2012/nat_nino_regs.pdf.

data on the UK in Table 3 are different from those in the tables on Germany and the Netherlands. The share of non-UK nationals among the total of those receiving working-age benefits was 6.4%. The share of non-nationals among recipients of social assistance in Germany was 15% in 2011, and 16% in the Netherlands in 2009. In Germany and the Netherlands, non-nationals receive social assistance more often than nationals of the host country. Comparable data for the UK are not available. The difference might partly be explained by the restriction of the UK data to working-age benefits; in Germany and the Netherlands, a large part of social assistance benefits are paid to persons of 65 years or older. However, the differences are too big to be accounted for by this one explanation.

The decision not to register the nationality of persons claiming social benefits has not only administrative but clearly also political dimensions. This applies all the more to the decision to produce and publish data on those international migrants receiving an out-of-work benefit within six months of being allocated a national insurance number. Apart from lacking relevance for the processing of claims, I can see at least three other reasons for not having data on the nationality of non-nationals receiving social assistance: a preference not to know facts that could possibly be perceived as politically unwelcome, the wish to avoid providing additional ammunition to the campaigns of anti-immigration organisations, and a desire to be free to voice political speculations (until the European Commission compels the British government to become rational). In any case, the absence of reliable data makes it hard to verify claims and statements of politicians and other actors in the public discussion on this issue. The sheer existence of such data in Germany and the Netherlands did not provoke large-scale publicity, but such data were produced and used by the Dutch government to further its political aim of mobilising support for measures restricting the rights to social assistance of immigrants from certain member states in Central Europe that acceded to the EU in 2004 and 2007.

4. Conclusions

The right to social assistance of EU nationals working or living in another member state developed slowly over six decades. At first, it depended on the 1953 Convention on Social and Medical Assistance and, after 1968, on general non-discrimination clauses in Community law. The right was developed in the case law of the Court of Justice after 1982, which was codified by the member states in Directive 2004/38/EC, and, since 2009, is

supported by Article 1 (human dignity) and Article 34 (social security and social assistance) of the EU Charter.³⁶ In practice, this right is disputed in many member states until a national of another member states has acquired the permanent right of residence after five years of lawful residence.

The political and public debate on social assistance for non-nationals tends to focus on the expected or actual use or misuse of social benefits by migrants from other member states. Each extension of the geographic or personal scope of the rules on free movement appears to provoke the same debate and fears. From the data on the three member states discussed in this paper, it appears that EU migrants apply for or receive social assistance far less often than third-country nationals, even less often than the nationals of the host member state themselves. In Germany and the Netherlands, nationals of other member states account for only between 1% and 2% of the total number recipients of social assistance. In the UK, this is estimated at fewer than 1.6% (25% of a total of fewer than 6.4%) of those receiving DWP working-age benefits, keeping in mind that the UK data are not fully comparable, as explained above.

The second mismatch between the political debate and the reality of social claims relates to the categories of migrants. The political and public debate in all three member states focuses on (young) jobseekers moving between member states with the aim of applying as soon as possible for jobseeker's allowances rather than genuinely searching for employment. From the Dutch and German data, it appears that a large majority of those actually receiving social assistance (either nationals of other member states or third-country nationals) are long-term residents with more than five or ten years of residence in the host member state, or are 65 years or older. From the first sample exercise in the UK, it appeared that more than half of DWP working-age claimants who were non-UK nationals when they started to work in the UK had acquired British nationality, and another 29% had permanent residence status (ILR). While the fear is over young migrants with short-term residence only, the reality points to the opposite – older migrants and migrants with long residence. Most migrants with short-term residence are apparently aware of the risk that claiming benefits may result in them losing their rights of resident. Non-nationals are clearly

³⁶ See W. Frenz (2013), “‘Armutseinwanderung’ zwischen EU-Freizügigkeit und Menschenwürde”, *Neue Juristische Wochenschrift*, Vol. 66, No. 17, pp. 1210-1212, which in this context stresses the relevance of the guarantee of human dignity in Article 1 of the Charter and Article 1 of the German Constitution (*Grundgesetz*).

over-represented among the persons receiving social assistance in Germany and the Netherlands. Obviously, this is related to the over-representation of migrants in low-income groups and in jobs with little security of employment. Moreover, migrants are rarely entitled to full old-age pensions because they started to build up pension rights at a much later age or have had more interruptions between jobs than nationals who have lived and worked all their life in the country. Social assistance for non-nationals often supplements old-age pensions that, notwithstanding coordination on the basis of Regulation 883/2004, may end up below the social minimum level.

This double mismatch between political debate and reality raises the question of the function of this issue in the political debate. Is the focus by politicians on this issue an expression of a real fear of “a fundamental challenge to the UK’s social contract” (Iain Duncan Smith in 2011) or a fatal blow to the solidarity on which our system of social security and social benefits is built? And if so, why do responsible politicians not feel a need to underpin their statements with reliable figures? Why is there resistance to the publication of data on the nationality of recipients of social assistance benefits in the UK, while those data are available in Germany and the Netherlands? And why did the Dutch government first ask the national statistical agency to provide data on the number of nationals of other member states receiving social assistance and then, after it appears that those numbers were relatively small, commission the agency to provide data on the number of persons born in other member states who are receiving social assistance, numbers that obviously will be higher because they also include Dutch nationals born in those countries? In Directive 2004/38/EC, the member states intentionally restricted the rights of economically non-active EU citizens to social assistance in other member states in order to prevent that those rights could become a serious financial burden threatening their social welfare systems. W. Frenz rightly concludes: “Den Sozialstaat sprengt die ‘Armutseinwanderung’ daher nicht.” (“‘Poverty immigration’ will not blow up the social welfare state”).³⁷

I suggest that the real function of the political debate on this issue is to justify the protective function of the nation state, to send the message to the voters that “the state is still able to protect its citizens and their social capital against unwanted attacks from abroad. We may have considerably

³⁷ Ibid.

reduced our defence capacity, we have agreed to an enlargement of the European Union, to a further extension of free movement of nationals of other member states or the abolition of controls at the internal borders (Schengen countries) and we may have given up our national currency (EU-17), but the state is still able to protect you and your capital effectively against the plague of ‘welfare tourists’, the others, invading our country from abroad.” That these fears were expressed by politicians at each enlargement of the Union since 1971 and before the establishment of the Internal Market in 1992, that the fears almost always focused on specific groups of black sheep among the EU citizens (black Britons, non-European French or Dutch, Poles, Roma or Bulgarian nationals of Turkish origin) and that the fears hardly ever materialised on any significant scale once the fatal date had passed, makes me think that the honeypot of “our” social assistance each time acted as a substitute or a focal point for our own identity that was seen as being under threat.

If politicians are interested in a rational debate on immigration, they should base their statements on facts rather than on guesses producing unfounded fears, avoiding unnecessary unrest and resentment against immigrants and avoiding the shameful need to correct previously incorrect statements. This issue will remain with us because migration and fear of migration will always be with us. Fact-based statements require the collection and publication of reliable data and an explanation of their limitations, context and meaning.³⁸ It behoves us to know what we are talking about.

³⁸ See Proksch (2012), op. cit.

2. SOCIAL ASSISTANCE AND SOCIAL SECURITY FOR LAWFULLY RESIDENT THIRD-COUNTRY NATIONALS: ON THE ROAD TO CITIZENSHIP?

KEES GROENENDIJK

1. Social assistance in the new EU migration Directives on migrants from third countries

Between 2003 and 2012, six Directives on legal migration defining the admission and rights of different categories of third-country nationals were adopted on the basis of the new competence granted to the European Union in the Treaty of Amsterdam: the Family Reunification Directive 2003/86/EC,¹ the Long-Term Residents' Directive 2003/109/EC,² the Students' Directive 2004/114/EC,³ the Scientists' Directive 2005/71/EC,⁴ the Blue Card Directive 2009/50/EC on highly qualified workers,⁵ and the Single Permit Directive 2011/98/EU also known as the Framework

¹ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

² Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

³ Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service.

⁴ Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research.

⁵ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

Directive on labour migration.⁶ At the end of 2012, proposals for two more directives were under negotiation between the Council and the Parliament: the Directive on seasonal workers, and the Directive on intra-corporate transfers.⁷ These two proposals are not included in this analysis, since they do not contain provisions on social assistance. The explanatory memorandum to the Commission's proposal on seasonal labour nevertheless states that it "observes the principles recognised by the Charter of Fundamental Rights of the European Union, with particular regard to [...] Article 34 on social security and *social assistance*" (italics added).⁸ The six Directives concerned are applicable in 24 member states. Denmark and the UK are not bound by any of these Directives and Ireland is only bound by Directive 2005/71/EC on scientists.

Public debate in member states on these new EU migration Directives focused on restrictions through national policies on admission of third-country nationals, rather than on the rights granted to lawfully resident third-country nationals by these Directives or their access to social assistance or social security. Before the acquisition of a permanent residence status in the host member state, third-country nationals – with the exception of asylum seekers or refugees – will apply for social assistance in exceptional cases only. Most of them will, without ever having read the text of the relevant Directives, be aware or afraid that such an application as a rule will result in the loss of their right of residence in the member state. That fear is indeed well founded.

In the six Directives mentioned above, three types of rules regarding social assistance can be found:

- (a) Admission depends on fulfilling an income requirement that refers to social assistance.

⁶ 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.

⁷ European Commission, Proposal for a directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, COM(2010) 378, 13.7.2010; European Commission, Proposal for a directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM(2010) 379, 13.7.2010.

⁸ Ibid., COM(2010) 379, 13.7.2010, p. 4.

- (b) Receiving or applying for social assistance is grounds for withdrawing the residence permit.
- (c) Equal treatment with respect to social assistance with nationals of the state of residence or (explicit or implicit) exclusion from social assistance.

An income requirement explicitly referring to social assistance (“without recourse to the social assistance system of the member state concerned”) is present in three Directives, those on family reunification, on long-term residence and on scientists.⁹ This requirement was clearly copied from the 1990 Directives on rights of residence of economically non-active EU nationals. The Court of Justice, in its *Chakroun* judgement, held that the concept of ‘social assistance’ in Article 7(1)(c) of the Family Reunification Directive must be interpreted “as referring to assistance which compensates for a lack of stable, regular and sufficient resources, and not as referring to assistance which enables exceptional or unforeseen needs to be addressed”.¹⁰ The income requirements in the Directive on highly qualified workers and in the Directive on students do not refer to social assistance. The first refers to salary levels clearly higher than social assistance levels, and the second refers to the costs of living, study and return that may be below that level.¹¹ The Single Permit Directive does not define the requirements for admission, the decision on admission for employment remains in the remit of the member states. The Directive only provides procedural rules and rights after admission of third-country nationals admitted for employment or entitled to work.

Actual use of the social assistance system is grounds for withdrawal or non-renewal of the residence permit of admitted third-country family members, highly qualified workers and long-term resident nationals from a third country who have acquired that status in one member state and then moved to another member state. The Blue Card Directive on highly qualified third-country nationals even goes one step further – completing an application for social assistance may already result in withdrawal or non-renewal of the residence permit of a highly qualified worker provided

⁹ Article 7(1)(c) of Council Directive 2003/86/EC, Articles 5(1)(a) and 14(2)(a) of Council Directive 2003/109/EC and Article 6(2) of Council Directive 2005/71/EC.

¹⁰ Case C-578/08 *Chakroun* [2010] ECR I-1839.

¹¹ Article 5(3) and (2) of Council Directive 2009/50/EC and Articles 7(1)(b) and 10(b) of Council Directive 2004/114/EC.

that the appropriate written information has been provided to that person in advance by the member state concerned.¹² On the other hand, once a third-country national has, after at least five years of lawful residence, acquired the long-term residence status in a member state, his residence status can no longer be withdrawn on the grounds that he receives social assistance.¹³ In this respect, the residence status equals the permanent right of residence of EU nationals under Directive 2004/38/EC.

The Long-Term Residents' Directive is the only migration Directive granting third-country nationals equal treatment with respect to social assistance after they have acquired that status in the relevant member state. All other Directives are either silent on the issue or explicitly leave the right to social assistance to the national law of the member state. However, even the equal treatment of long-term resident third-country nationals may be restricted to persons residing in the member states and to 'core benefits', i.e. minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care.¹⁴ According to the Commission's report in 2011, only Greece had restricted access to social assistance to core benefits.¹⁵ Full equal treatment with regard to access to social assistance is only granted to refugees under the Qualification Directive discussed by Madeline Garlick in this volume.

The equal treatment provisions in the Scientists' Directive and the Single Permit Directive only cover social security, not social assistance. The Blue Card Directive and the Single Permit Directive provide that the equal treatment clause does "not cover measures in the field of vocational training which are covered under social assistance schemes".¹⁶ The explicit exclusion of the rather unlikely event that a highly qualified worker would apply for vocational training under a social assistance scheme reflects the obsession of certain member states with the possibility of third-country nationals having access to any form of social assistance.

¹² Article 9(3)(d) of Council Directive 2009/50/EC.

¹³ Article 9 of Council Directive 2003/109/EC.

¹⁴ Article 11(1)(d), (2) and (4) of Council Directive 2003/109/EC.

¹⁵ Report on the application of Council Directive 2003/109/EC in member states, COM(2011)585, 28.9.2011, p. 6.

¹⁶ Article 14(1)(e) of Council Directive 2009/50/EC, Article 12(1)(e) and Recital 27 of Directive 2011/98/EU.

2. A role for the EU Charter of Fundamental Rights?

Article 34(2) of the EU Charter provides: “Everyone residing and moving within the European Union is entitled to social security benefits and social benefits in accordance with EU law and national laws and practices.” According to the official explanatory notes, Article 34(2) “is based on Articles 12(4) and 13(4) of the European Social Charter and point 2 of the Community Charter of the Fundamental Social Rights of Workers and reflects the rules arising from Regulation (EEC) No 1408/71 and Regulation (EEC) No 1612/68.” Under Article 34(3) of the EU Charter, the Union – and thus the member states when they are implementing European Union law – “in order to combat social exclusion and poverty [...] recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by European Union law and national laws and practices.” The personal scope of these provisions of the EU Charter is not limited to EU citizens, they also cover lawfully resident third-country nationals. The reference to “national law and practices” appears to grant member states the freedom to fully exclude third-country nationals from social assistance, unless they are obliged to provide that assistance under international or national law or, exceptionally, under secondary EU law. The Court of Justice, when interpreting the provisions in the migration Directives on social assistance, will no doubt be guided by Article 34 of the EU Charter being binding primary EU law. In its recent judgement in *Kamberaj* on the relevance of the equal treatment clause in Article 11 of Directive 2003/109/EC for the entitlement of a third-country national to housing benefits under regional legislation in Italy, the Court of Justice held that “in so far as the housing benefit in regional Italian legislation fulfils the purpose set out in Article 34 of the Charter, under European Union law, it is part of core benefits within the meaning of Article 11(4) of Directive 2003/109.”¹⁷ Thus, Italian legislation may not exclude housing benefit from the scope of the equal treatment clause.

From the above, it appears that the system prevalent in the immigration law of many member states is reflected in the new EU migration Directives. First, the prospect of reliance on social assistance is grounds for refusal of admission. Second, applying for or actually receiving

¹⁷ Case C-571/10 *Kamberaj* [2012], judgement of 24 April 2012, not yet reported, para. 92; see also paras. 80-81.

social assistance is grounds for withdrawal or non-renewal of the right of residence. The scope of access to, or exclusion from, social assistance depends mainly on national law, unless international treaties provided for that access. Generally, access is only granted to third-country nationals with a permanent residence status, to refugees and to beneficiaries of other forms of international or national protection. In this light, it is refreshing to read that the Commission considers that one of the four areas which merit further action to be paid from the European Integration Fund is “improving local integration of third-country nationals in housing, schools, *social assistance*, health, education” (*italics added*).¹⁸

3. Access to (contributive) social security for third-country migrants in the new EU migration Directives

Two of the six migration Directives, those on family reunification and on admission of students, do not contain rules on the access to social security benefits. The other four Directives contain rules on the right to (contributive) social security benefits in case of unemployment, illness, invalidity, old age or child benefits. The Blue Card Directive and the Directive on admission of scientists both have a clause granting highly qualified workers the same treatment as nationals of the host member state.¹⁹ The non-discrimination principle applies also to persons coming to a member state directly from a third country. With regard to third-country nationals who have migrated between member states, neither Directive confers more rights than those already provided in existing Community legislation in the field of social security. The relevant clauses all refer to the rules on coordination of the national social security legislation in the old Regulation 1408/71 (replaced by Regulation 883/2004) and in the old Regulation 859/2003 extending Regulation 1408/71 to third-country nationals who moved from one member state to another. The Blue Card Directive allows a member state to withdraw the EU Blue Card in case of unemployment for three consecutive months or if the worker is unemployed twice during the validity of his EU Blue Card, and thus de

¹⁸ In its December 2011 report on the implementation of the European Integration Fund, COM(2011) 847, 5.12.2011 p. 28.

¹⁹ Article 12(c) of Council Directive 2005/71/EC and Article 14(1)(e) of Council Directive 2009/50/EC.

facto to restrict unemployment benefits to three months.²⁰ Both Directives furthermore do not grant rights to family members residing in a third country, because that situation is deemed to lie “outside the scope of Community legislation.”²¹

The Single Permit Directive follows the same principle. Equal treatment of lawfully employed nationals of third countries in the branches of social security is covered by Regulation 883/2004, but it allows for several restrictions: persons must actually be in employment or registered as unemployed after having worked for more than six months, excluding family members residing in third countries and with regard to family benefits.²² Further, it is stipulated that the right to equal treatment with regard to social security benefits does not restrict the right of member states to end the rights of residence of those entitled to social security benefits under the equal treatment clause.²³ 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.²⁴ Thus, returning migrant workers or their family members can see their acquired rights to old age, widows or invalidity pensions reduced because a member state reduces those pensions in the far less common case of a national migrating outside the European Union.

A real right to national treatment with respect to social security is granted only to third-country nationals once they have acquired, after at least five years of lawful residence in a member state, long-term resident status. But member states may still restrict equal treatment to long-term residents and their family members residing in the member state concerned.²⁵

²⁰ Article 13 of Council Directive 2009/50/EC.

²¹ Recital 16 of Council Directive 2005/71/EC and Recital 18 of Council Directive 2009/50/EC.

²² Article 12(1)(e) and (2)(b) and Recitals 24-25 of Directive 2011/98/EU; see G. Brinkmann (2012), “Opinion of Germany on the Single Permit Proposal”, *European Journal of Migration and Law*, Vol. 14, No. 4, pp. 351-366.

²³ On the origin of this restriction in the negotiations in the Council, see *ibid.*, p. 361.

²⁴ Article 12(3) and (4) of Directive 2011/98/EU.

²⁵ Article 11(1)(d) and (2) of Council Directive 2003/109/EC.

The access to (contributory) social security benefits under the equal treatment clauses in the four migration Directives are below the level of the more general (and less restrictive) equal treatment clauses in Article 6 of the 1949 ILO Convention no. 97 on migration for employment and the ILO Convention no. 118 on social security of migrant workers.²⁶ The Commission stated during the early stages of the negotiations that these Conventions “had been taken into account” when drafting the proposal,²⁷ but that statement did not apply to later amendments inserted by the Council. If member states are bound by these Conventions²⁸, third-country workers can rely on the more favourable rules in these Conventions or in the national law.

4. Conclusions

From our analysis, it appears that the new EU migration Directives only provide for equal access for third-country nationals to social assistance after they have been lawfully resident in a member state for more than five years or once they are granted refugee status. Receiving or even claiming social assistance before a secure residence status has been acquired may well result in the loss of a person’s right of residence and in a requirement to leave the country. Third-country nationals who are likely to claim social assistance will be refused admission on the grounds they do not meet the income requirement. The position of refugees and other categories of protected persons is the exception to the general rule. On this point, the six EU migration Directives adopted between 2003 and 2011 reflect, to a large extent, the national law in member states and even in some member states the position of EU citizens using their free movement rights under Directive 2004/38/EC.

Our conclusion that the access to (contributory) social security benefits under the equal treatment clauses in the four recent EU migration Directives is below the level of the 1949 ILO Convention no. 97 on migration for employment or the ILO Convention no. 118 on social security of migrant workers is a clear indication that the EU lawmakers were half-

²⁶ For the discussions on this issue inside and outside the Council, see G. Brinkmann (2012), *op. cit.*

²⁷ Council document 10807/10, fn. 42 and 56.

²⁸ Nine member states are bound by ILO Convention no. 97: Belgium, Cyprus, France, Germany, Italy, Netherlands, Slovenia, Spain and the UK.

hearted at best. In some cases, the provisions of the Directives are clearly intended to support the integration of the migrants concerned; the migrants are seen as and treated as future citizens. However, provisions on social security or assistance reflect the image of the immigrant as a temporary phenomenon that may be unavoidable or even useful for the time being, but will involve costs for the public purse.

3. THE SIGNIFICANCE OF DECISION 3/80 OF THE EEC-TURKEY ASSOCIATION COUNCIL

PAUL MINDERHOUD

1. Introduction

This chapter deals with the significance of Decision 3/80 of the EEC-Turkey Association Council and its recent developments.¹ Decision 3/80 established social security measures for workers of Turkish nationality moving within the Community (now European Union) and members of their family living with them. To my knowledge, Decision 3/80 has mainly had an impact in two member states: the Netherlands and Germany. In this chapter, I will limit myself to the Netherlands where the social security system has become based much more on territoriality since 2000. The importance attached to residence in the design of the Dutch social security system showcases the revitalisation of nation-state approaches to the delivery of welfare at a time when EU rules are interfering more and more in the daily life of EU citizens. The second part of this chapter describes the current developments at the EU level, where Decision 3/80 is being replaced by a new Decision.

2. Background

In 1963, the EEC entered into an association agreement with Turkey (the Ankara Agreement) that was intended to pave the way for Turkish

¹ Decision No 3/80 of the EEC-Turkey Association Council of 19 September 1980 on the application of the social security schemes of the member states to Turkish workers and members of their families.

membership of the EEC.² Article 12 of the Ankara Agreement committed the Contracting Parties to “progressively securing freedom of movement of workers between them.” The Ankara Agreement was supplemented, in 1970, by an Additional Protocol that required the Association Council (a body comprising representatives of Turkey, the member states and the Commission) to adopt social security measures for workers of Turkish nationality moving within the Community and members of their family living with them.³ These measures were to provide for:

- the aggregation of periods of insurance or employment completed in individual member states for the purpose of determining entitlement to health care and to old age pensions, death benefits and invalidity pensions;
- the payment of family allowances in respect of family members resident within the Community; and
- the export of old-age pensions, death benefits and invalidity pensions.

In 1980, the Association Council adopted Decision 3/80 which established more detailed rules for implementing the social security measures outlined in the Additional Protocol. This Decision, however, required a further implementing regulation which the Commission proposed in 1983 but which was never adopted. Decision 3/80 refers specifically to, and was a kind of copy of, the first version of Council Regulation 1408/71 on the coordination of social security schemes to employed EU persons and their families moving within the Community.⁴

For a long time, the legal meaning of Decision 3/80 remained unclear. In 1996, however, the Court of Justice of the European Union (CJEU) ruled in the *Taflan-Met* case that, in the absence of any provision on the Decision’s

² Agreement establishing an Association between the European Economic Community and Turkey (“Ankara Agreement”) signed at Ankara on 12 September 1963, OJ C 113, 24 December 1973, p. 1.

³ Additional Protocol and Financial Protocol signed at Brussels on 23 November 1970, annexed to the Agreement establishing the Association between the European Economic Community and Turkey and on measures to be taken for their entry into force, OJ L 293, 29 December 1972, p. 3.

⁴ Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons, and to members of their families moving within the Community.

entry into force, it follows from the binding character which the Ankara Agreement attaches to Decision 3/80 that it entered into force on the date on which it was adopted (namely 19 September 1980) and that the Contracting Parties have been bound by the Decision since that date.⁵ But the Court of Justice also concluded that the provisions in question (Articles 12 and 13 of Decision 3/80) could not have direct effect as long as the Council had not taken the necessary measures to implement Decision 3/80.⁶

In its judgement of 4 May 1999 in the *Sürül* case, the CJEU ruled for a second time on the scope of Decision 3/80.⁷ This time, the case specifically dealt with the principle of non-discrimination on the grounds of nationality, based on Article 3 of Decision 3/80.⁸ The wording of this Article was identical to Article 3(1) of Council Regulation 1408/71. As this provision contains a clear and precise obligation which is not subject in its implementation or effects to the adoption of any subsequent measure, it has direct effect according to the CJEU.⁹ Turkish nationals covered by Decision 3/80 must be treated in the same way as nationals of the host member state, which means that the legislation of the member state cannot impose upon such Turkish nationals more or stricter conditions than those applicable to its own nationals. The CJEU confirmed this obligation for equal treatment of Turkish nationals covered by Decision 3/80 in the cases of *Kocak and Örs*¹⁰ and *Öztürk*.¹¹ Based on this case law, one could expect

⁵ Case C-277/94 *Taflan-Met* [1996] ECR I-4085, paras. 17-21. This was a case against the Dutch Social Insurance Bank.

⁶ Article 12 concerns the conditions of entitlement to invalidity benefits when subject to legislation of two or more member states. Article 13 deals with the same issue regarding old-age and survivors' pensions. See also H. Verschueren (2009), "Social Security Co-ordination in the Agreements between the EU and Mediterranean Countries, in particular Turkey and the Maghreb Countries", in D. Pieters and P. Schoukens (eds), *The Social Security Co-Ordination Between the EU and Non-EU Countries*, Antwerp: Intersentia, pp. 19-34.

⁷ Case C-262/96 *Sürül* [1999] ECR I-2685. This was a case against the German Federal Labour Agency, which dealt with the entitlement of family allowances.

⁸ For details, see H. Verschueren (2009), *op. cit.*, pp. 25-30.

⁹ Case C-262/96 *Sürül* [1999] ECR I-2685, paras. 60-63.

¹⁰ Cases C-102/98 and C-211/98 *Kocak and Örs* [2000] ECR I-1287. This was a case against a German social security agency responsible for old age pensions.

that Article 6 Decision 3/80 would also satisfy the conditions imposed for direct effect. This Article contains the principle of exportability of benefits in the same wording as Article 10 of Council Regulation 1408/71. As we will later see, it would take until 2011 before the CJEU was able to provide clarity on this issue.

3. Influence on the Dutch social security system

Until 2000, the Dutch social security system could be characterised as very liberal. The right to almost all social security benefits – unemployment benefits being the important exception – was related to the beneficiary and not to the territory where the beneficiary was living. This meant that every Dutch or non-Dutch citizen could export his or her social security benefits to any other country in the world. This did not count for social assistance benefits, which were linked to territory. Turkish beneficiaries could therefore keep their social security benefits when they moved permanently to Turkey.

This system changed drastically in 2000 when the Act Restricting Export of Benefits entered into force,¹² introducing the so-called territoriality principle for all social security benefits. From then on, only when a bilateral social security agreement was concluded which established the right of portability of benefits (which can vary by country and by benefit) was it possible to export the benefit to that specific country. These agreements had to include special rules authorising the Dutch government to control compliance. With Turkey, such a bilateral agreement had already existed since 1972 but had to be adapted to these new authorisation demands. The possibility of export of social security benefits within the EU did not change, due to Article 10 of Council Regulation 1408/71 (now Article 7 Regulation 883/2004).

For some non-contributory benefits, however, the possibility of export was abolished completely by this Act. This especially affected the Supplementary Benefits Act (*Toeslagenwet*), which supplements the amount of (amongst others) a low invalidity benefit up to the minimum subsistence level, to a maximum of 30% of the minimum wage. In this context, it is seen

¹¹ Case C-373/02 *Öztürk* [2004] ECR I-3605. This was case against an Austrian social security agency responsible for old age pensions.

¹² See P. Minderhoud (2003), "Ontwikkelingen inzake de Wet Beperking Export Uitkeringen", *Migrantenrecht*, pp. 308-317.

as a supplementary invalidity benefit. By inscribing this Act on Annex IIa of Council Regulation 1408/71 (now Annex X of Regulation 883/2004), this supplementary benefit was rendered not exportable within the EU as well.

The non-exportability of this supplementary benefit triggered a range of court cases in the Netherlands, cumulating in 2007 in a case before the highest social security court (The Central Appeals Tribunal), which had to decide whether this absolute restriction was in line with Article 6 of Decision 3/80.

Article 6 Decision 3/80 reads: "Save as otherwise provided in this Decision, invalidity, old-age or survivors' cash benefits and pensions for accidents at work or occupational diseases, acquired under the legislation of one or more member states, shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in Turkey or in the territory of a member state other than that in which the institution responsible for payment is situated."

This was the first time in Dutch case law, and to my knowledge in any case law, that Article 6 Decision 3/80 was invoked. The Dutch Court did not decide directly on the case itself, but asked the CJEU for a preliminary ruling on the issue. It took the CJEU more than three years to come to a decision, but the result was well worth waiting for. The CJEU ruled in *Akdas* on 26 May 2011 that Article 6 was directly applicable and that Turkish nationals who, after having worked in an EU member state (*in casu* the Netherlands), have returned to Turkey can rely on Article 6 of Decision 3/80 of the EEC-Turkey Association Council to claim this supplement to an invalidity benefit. This application of Article 6 of Decision 3/80 led to a situation in which Turkish nationals enjoyed a right that was denied to EU citizens. As it was questionable whether this differential treatment was compatible with Article 59 Additional Protocol which stipulates that "Turkey shall not receive more favourable treatment than that which member states grant to one another pursuant to the EC Treaty", the CJEU had to provide an answer.¹³ After all, this supplementary benefit was not exportable within the EU for EU nationals who had moved to another member state.

¹³ See K. Eisele and A.P. van der Mei (2012), "Portability of Social Benefits and Reverse Discrimination of EU Citizens vis-à-vis Turkish Nationals: Comment on *Akdas*", *European Law Review*, Vol. 37, No. 2, pp. 204-212.

First, the Court used the argument that extending the rules of Council Regulation 1408/71 on the non-exportability of special non-contributory benefits to Decision 3/80 would constitute an amendment of this Decision and the power for this was exclusively reserved to the Association Council.¹⁴ Second, a Turkish national who has participated in the labour force of a member state has no right under Decision 1/80 to remain in the territory of that state following an accident at work rendering him permanently incapacitated for work. According to the CJEU, such persons cannot be said to have left the territory of the host member state of their own volition without legitimate reason. Accordingly, the situation of former Turkish migrant workers such as *Akdas et al.* cannot, for the purposes of applying Article 59 Additional Protocol, usefully be compared to that of EU citizens inasmuch as the latter, who retain their right of residence in the member state which awarded the benefit in question, first, can choose to leave the territory of that state and thus lose that benefit and, second, have the right to return at any time to the member state concerned.¹⁵

4. New restrictions in the Netherlands

A next step towards more restrictions in the Netherlands was the introduction in 2011 of the so-called “residence principle” in the Dutch Child Benefit Act. According to this principle, the amount of child benefit paid for children living outside the EU (and of course only in a country with which a bilateral agreement has been concluded) will be based on the cost of living in the country where that child lives. This same residence principle has been introduced for survivor’s pensions under the Dutch General Survivors Act and for disability benefit under the Dutch Partially Disabled Act (*Wet Gedeeltelijk Arbeidsongeschikten - WGA*). For Turkey, this means that beneficiaries of a survivor’s pension or disability benefit will only receive 60% of the amount they would receive if they stayed in the Netherlands. For children living in Turkey, 60% of the amount of the child benefit allowance is also granted. Although various bilateral social security agreements explicitly prohibit the Netherlands from reducing the amount of the relevant benefits in case of export (especially for the survivor’s pension and disability benefits), both Chambers of Parliament approved

¹⁴ Case C-485/07 *Akdas* [2011] ECR I-04499, para. 91.

¹⁵ Case C-485/07 *Akdas* [2011] ECR I-04499, paras. 92-95.

this Act. According to the (then) Minister of Social Affairs, there was no question of a reduction in the amount of the benefit but only of differentiation, depending on the cost of living. However, that there is no real differentiation is evident from the fact that the benefit cannot exceed 100%, even if the cost of living in the country in question is higher than in the Netherlands.¹⁶

After the adoption of the Act, a complaint was filed by a Turkish NGO with the European Commission stating that this Act was in breach of Articles 3 and 6 Decision 3/80. In an answer of 16 November 2012, the Commission partially agreed with the plaintiffs.¹⁷ The introduction of the residence principle is not allowed under Article 6 Decision 3/80, which waives this kind of residence clauses. Regarding the export of child benefits, however, the Commission concluded that Decision 3/80 cannot be used for the protection of this right. Child benefits do not fall under the material scope of Article 6 and neither do they fall under the personal scope of the equal treatment clause of Article 3 Decision 3/80. Only Turkish children living in the territory of one of the EU member states are covered. As this Act, introducing this residence principle, only fully entered into force as of 1 January 2013, there is no case law yet.

A further step taken by the Dutch government in 2012 was the introduction of a bill aiming at the complete cessation of the export of child benefits for children living outside the EU.¹⁸ In order to achieve this goal, more than 20 bilateral social security agreements will have to be adapted. At the moment, it is not clear whether this Bill will become an Act. Although it was adopted without any problems in the Second Chamber, the First Chamber questioned the legal consistency of the Bill in light of international agreements and, in December 2012, asked the State Council for further advice. Decision 3/80 is not applicable in this situation, because child benefits do not fall under the material scope of Article 6 Decision 3/80 (waiving the residence clauses) and children living outside the EU (i.e. in Turkey) do not fall under the personal scope of the equal treatment clause of Article 3 Decision 3/80. But this leaves unanswered the question of whether this cessation is in breach of Article 9 of the Ankara Agreement,

¹⁶ See P. Minderhoud (2012), "Houdt het woonlandbeginsel in de sociale zekerheid bij de rechter stand?", *Tijdschrift Recht en Arbeid*, Vol. 4, No. 8/9, pp. 16-19.

¹⁷ Letter of 11 November 2012, ref.no. 3757/12/EMPL (on file with the author).

¹⁸ *Kamerstukken II*, 2012/2013, 33612.

which provides that within the scope of the Agreement any discrimination on grounds of nationality shall be prohibited. As this Act will affect Turkish citizens much more than Dutch citizens, its discriminatory nature is beyond doubt. In the *Akdas* judgement, the CJEU left open the possibility of applying Article 9 Ankara Agreement.¹⁹ The argument that (in this case) Turkish children cannot always come to or return to the Netherlands, while Dutch children can, could be valid. In 2011, Dutch child benefit allowances were paid for 2,100 children living in Turkey. Based on the advice of the State Council, which was published in July 2013, the Minister of Social Affairs has announced his intention to proceed with the contested Bill.²⁰

5. New initiative from the Commission

The *Akdas* decision resulted in an initiative by the Commission to adapt Decision 3/80. The Commission had already been reconsidering this because Decision 3/80 was outdated; the new Regulations which coordinate the social security schemes within the EU for EU citizens (Regulation 883/2004) and for third-country nationals (Regulation 1231/2010) have been drastically changed over the last few years, while for Decision 3/80 the text established in 1980 is still applicable.²¹

In March 2012, the Commission published, as a replacement for Decision 3/80, a proposal for a Council Decision on the position to be taken on behalf of the European Union within the Association Council set up by the Agreement establishing an association between the EEC and Turkey with regard to the provisions on the coordination of social security systems.²²

¹⁹ Case C-485/07 *Akdas* [2011] ECR I-04499, paras. 97-101.

²⁰ *Kamerstukken I*, 2012/2013, 33162, no. G.

²¹ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems; Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004.

²² European Commission, Proposal for a Council Decision on the position to be taken on behalf of the European Union within the Association Council set up by the Agreement establishing an association between the European Economic Community and Turkey with regard to the provisions on the coordination of social security systems, COM(2012) 152, 30.3.2012.

This draft Decision was announced as part of a package of four proposals including similar proposals with regard to Albania, Montenegro and San Marino,²³ which are largely based on the decisions adopted by the Council in October 2010 with regard to Algeria, Croatia, the Former Yugoslav Republic of Macedonia, Israel, Morocco and Tunisia.²⁴

Although the four proposals might look similar, there are some differences.

The equal treatment clause of the proposal for Turkey and San Marino covers all benefits, mentioned in Article 3 of Regulation 883/2004.²⁵ These benefits are:

- (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

The proposals for Montenegro and Albania cover a more limited list of benefits, namely old-age pensions, survivors' pensions, pensions in respect of accidents at work and occupational diseases, invalidity pensions related to accidents at work and occupational diseases, and family allowances. Another difference is the legal basis for the Turkish proposal, which is based on Article 48 TFEU, and for the other three, which are based on Article 79(2) TFEU. I will discuss this later.

A main difference between the new Decision with Turkey and the old Decision 3/80 concerns the non-exportability of the special non-contributory benefits. But in this regard, it is fully in line with Regulation

²³ See European Commission, COM(2012) 158 for Albania, COM(2012) 156 for Montenegro and COM(2012) 157 for San Marino, 30.3.2012.

²⁴ See the various Council Decisions of 21 October 2010 with regard to the adoption of provisions on the coordination of social security systems, OJ L 306 of 23 November 2010, respectively p. 14, p. 35, p. 28, p. 21, p. 1 and p. 8.

²⁵ See Article 1(1)(h) of both proposals, COM(2012) 152, 30.3.2012 for Turkey and COM(2012) 157 for San Marino, 30.3.2012.

883/2004, which excludes these benefits (which are placed on Annex X to this Regulation) for export as well.²⁶ Another important difference concerns the fact that the exportability based on this Decision is now limited to Turkey and not to other EU member states as well, as under Article 6 Decision 3/80.²⁷ Under the new regime, the export of social security benefits for Turkish beneficiaries who move within the EU is covered by Regulation 1231/2010, as for all third-country nationals.

6. Questions in the European Parliament

The *Akdas* judgement and the Commission proposal led to questions being asked in the European Parliament by Emine Bozkurt.²⁸ She asked what the Commission will do to ensure that all EU member states respect the provisions of Decision No 3/80, which are an integral part of the EU *acquis*, as ruled by the CJEU in *Akdas*. She also enquired whether the Commission intended to circumvent the judgement of the CJEU by introducing the new proposal, stripping Turkish workers of their acquired rights. On 31 May 2012, Commissioner Andor answered that the Commission proposal fully respects the right of Turkish workers to equal treatment to that of EU citizens in matters of social security and to payment of certain categories of pensions in Turkey without reduction in line with the judgements of the Court of Justice in *Sürül* and *Akdas*. The CJEU's judgement in *Akdas* recognises that benefits falling within the category of special non-contributory cash benefits (benefits that top up income to a minimum level) should be paid in Turkey in very restricted circumstances. The Commission proposes that such benefits, which have not been exportable from one EU member state to another for EU citizens since 1992, should not be payable in Turkey either. Furthermore, the rules applicable to the EU and Turkey should be brought into line with those applicable under nine other association agreements. Commissioner Andor stressed that the

²⁶ See Article 70(4) Regulation 883/2004.

²⁷ Article 4(i) of the new Decision reads: "Exportable benefits within the meaning of Article 1(1)(i) to which the persons as referred to in Article 2(a) and (c) are entitled shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the beneficiary is residing, (i) for the purpose of a benefit under the legislation of a member state, within the territory of Turkey"

²⁸ Parliamentary question posed by Emine Bozkurt on 13 April 2012 on the "exportability of social security benefits to Turkey for Turkish workers working, or having worked, in one or more member states" (E-003882/2012).

Commission's aim is not to circumvent the Court's judgement in *Akdas*, but to enhance the legal certainty of the rules governing social security coordination between the EU and Turkey. The proposal contains a transitional provision to protect the rights of persons in Turkey to whom special non-contributory cash benefits are provided at the date of entry into force of the proposed Association Council Decision.

7. Current situation

The EU Council agreed upon this new Decision on 6 December 2012 and the new Decision has already been published in the Official Journal.²⁹ However, it can only enter into force after adoption by the EU-Turkey Association Council and this adoption has to take place unanimously. At this moment, it is unclear whether the Turkish government will vote in favour of it. Until then, the old Decision 3/80 is still applicable.³⁰

Another unsolved problem concerns the legal basis for the new Decision with Turkey. As mentioned above, this Decision was a part of a package of four proposals (now Decisions³¹), including also Albania, Montenegro and San Marino, which are largely based on the Decisions adopted by the Council in 2010 with regard to Algeria, Croatia, the Former Yugoslav Republic of Macedonia, Israel, Morocco and Tunisia.³²

Unlike for all these other Decisions, the legal basis proposed by the Commission for the Decision concerning Turkey is Article 48 TFEU, which provides for the adoption of "such measures in the field of social security as are necessary to provide freedom of movement for workers". For all the other decisions, the legal basis is Article 79(2) TFEU, which provides for the

²⁹ Council Decision of 6 December 2012 on the position to be taken on behalf of the European Union within the Association Council set up by the Agreement establishing an association between the European Economic Community and Turkey, with regard to the adoption of provisions on the coordination of social security systems (2012/776/EU), OJ L 340, 13 December 2012, p. 19.

³⁰ For this discussion, see <http://www.habermontor.com/en/haber/detay/mep-emine-bozkurt-holds-rights-on-the-agenda/29542/> (last visited 25 January 2013).

³¹ See Council Decisions OJ L 340, 13 December 2012, p. 1 for Albania OJ L 340, 13 December 2012, p. 7 for Montenegro and OJ L 340, 13 December 2012, p. 13 for San Marino.

³² Council Decisions OJ L 306, 23 November 2010, respectively p. 14, p. 35, p. 28, p. 21, p. 1 and p. 8.

adoption of measures defining the rights of third-country nationals residing legally in a member state, including the conditions governing freedom of movement and residence in other member states. The content of all of these Decisions is very similar. Besides the legal basis, the main differences between them are the scope of the equal treatment clause (in the case of Turkey, it concerns all social security benefits) and the scope of the provisions on exportable benefits, in particular with regard to invalidity benefits.³³

Ireland, the Netherlands and the UK did not accept Article 48 TFEU as a legal basis for measures intended to apply to persons other than employed or self-employed member state nationals and their dependents moving within the EU. Only Article 79(2) TFEU, by its express terms, provides the power to confer rights upon third-country nationals residing legally within the EU, according to the three member states. The reason behind the interest of Ireland and the UK in this respect is obvious – if the Decision were to be based on Article 79(2) rather than on Article 48 TFEU, they would not be bound unless they opt in. This would be rather curious, as both member states are today bound by Decision 3/80. The reason for the Netherlands' concern over the legal basis is less obvious, as it would be bound by the Decision either way.

To solve this problem for the moment, the new Decision was in the end adopted in the Council with a statement that the Council recalls cases C-431/11 and C-656/11 pending before the Court of Justice, where the Court is examining the same question of the correct legal basis for adopting.³⁴ It concerns, respectively, Council Decision 2011/407/EU of 6 June 2011 on the position to be taken by the European Union within the EEA Joint Committee concerning an amendment to Annex VI (social security) and Protocol 37 to the EEA Agreement, and Council Decision 2011/863/EU of 16 December 2011 on the position to be taken by the European Union in the Joint Committee established under the Agreement between the European Community and its member states, and the Swiss

³³ See Council of the European Union, Proposal for a Council Decision on the position to be taken on behalf of the European Union within the Association Council set up by the Agreement establishing an association between the European Economic Community and Turkey with regard to the provisions on the coordination of social security systems of 13 November 2012, document number: 16127/12, point 8.

³⁴ *Ibid.*, see Annex to this Council Document.

Confederation, on the free movement of persons as regards the replacement of Annex II to that Agreement on the coordination of social security schemes.³⁵

As the proposed legal basis for the Decision of the Council establishing an association between the European Economic Community and Turkey is the same as for these two Decisions above, the EU will accept a Decision to be adopted by the Association Council only after the judgement of the Court of Justice is issued on these two cases.

It is interesting to note that given the structure of the new Decision, the EU has chosen to treat Turkish nationals the same as third-country nationals, but at the same time underlines that Turkish nationals are comparable to EEA and Swiss nationals for the coordination of social security given the chosen legal basis.

In the meantime, the Dutch Central Appeals Tribunal is in the process of asking new preliminary questions to the CJEU on the significance of Article 6 Decision 3/80 in a case in which the beneficiary of the contested supplementary benefit not only has Turkish nationality, but Dutch nationality as well.

Must Article 6(1) of Decision No 3/80, having regard to Article 59 of the Additional Protocol, be interpreted as precluding a legislative provision of a member state, such as Article 4a of the Toeslagenwet (TW), which withdraws the supplementary benefit awarded on the basis of national legislation if the persons in receipt of that benefit no longer live in the territory of that state, even if those persons, while retaining Turkish nationality, have acquired the nationality of the host member state?

If, in answering the first question, the Court of Justice concludes that the persons concerned may rely on Article 6(1) of Decision No 3/80, but that such reliance is restricted by the effect of Article 59 of the Additional Protocol, must Article 59 of the Additional Protocol be interpreted as precluding continuation of entitlement to the supplementary benefit for Turkish nationals, such as the persons concerned, as from the point in time at which EU nationals can no longer claim entitlement to that benefit on the

³⁵ In February 2013, the UK filed an action for annulment of the new Council Decision before the CJEU, see Case C-81/13: Action brought on 15 February 2013 — *United Kingdom of Great Britain and Northern Ireland vs. Council of the European Union*.

basis of EU law, even if EU nationals retained that benefit for a longer period of time on the basis of national law?³⁶

In light of the judgement in *Kahveci & Inan*, this will not be an easy task for the Court of Justice.³⁷ In that case, the Court decided that Article 7 of Decision No 1/80 of 19 September 1980 must be interpreted as meaning that the members of the family of a Turkish worker duly registered as belonging to the labour force of a member state can still invoke that provision once that worker has acquired the nationality of the host member state while retaining his Turkish nationality.

³⁶ Case C-171/13: Request for a preliminary ruling from the Centrale Raad van Beroep (Netherlands), lodged on 8 April 2013 — *Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen (Uwv) vs. M.S. Demirci and Others*.

³⁷ Joined Cases C-7/10 & C-9/10 *Kahveci and Inan* [2012], judgement of 29 March 2012, not yet reported; see also K. Eisele (2013), "Meer Turks of toch meer Europees?", *Over de grens*, Vol. 4, No. 6, pp. 3-5.

4. SOCIAL SECURITY RIGHTS OF THIRD-COUNTRY NATIONALS UNDER THE EURO-MEDITERRANEAN ASSOCIATION AGREEMENTS

ANJA WIESBROCK

1. Introduction

In the late 1970s, the European Community concluded a series of bilateral Cooperation Agreements with some Mediterranean countries, including Algeria, Tunisia and Morocco. Under the framework of the 1995 Barcelona process,¹ this first set of cooperation agreements was replaced with the Euro-Mediterranean Association Agreements (EMAAs). Between 1998 and 2005, the EU concluded EMAAs with seven countries in the southern Mediterranean, namely Algeria, Egypt, Jordan, Israel, Lebanon, Morocco and Tunisia. All seven Agreements contain some provisions on social benefits, but the nature of the rights granted varies significantly. The EMAAs concluded with Israel,² Tunisia,³ Morocco⁴ and Algeria⁵ contain the most far-reaching social security rights, most notably the right to equal treatment with nationals in the field of social security.

The social security provisions in the EMAAs have been subject to litigation before the European Courts. Migrant workers from the Maghreb states and their family members have invoked their social security rights before national courts, giving the CJEU the opportunity to reaffirm and

¹ See the Final Declaration of the Barcelona Euro-Mediterranean Ministerial Conference of 27 and 28 November 1995 and its work programme.

² Decision 2000/384/EC, OJ L 147, 21.6.2000.

³ Decision 98/238/EC, OJ L 97/1, 30.3.1998.

⁴ Decision 2000/204/EC, OJ L 70/1, 18.3.2000.

⁵ Decision 2005/690/EC, OJ L 265/1, 10.10.2005.

develop them. It is likely, however, that the few cases that have reached the CJEU represent only the tip of the iceberg. It is only if a judge becomes doubtful whether a refusal to equal treatment is in compliance with EU law and can be persuaded to raise a preliminary question that the European Courts become involved. Besides, considering the limited number of cases that have been decided by the CJEU since the adoption of the EMAAs in the 1970s, one might question the visibility of the rights contained in the EMAAs amongst migrant workers and their family members.

Nonetheless, the cases that have been decided by the EU Court provide a good illustration of the key controversies surrounding the scope of application of the right to equal treatment in social security for workers and their families as contained in the EMAAs. In particular, it highlights the proactive role of the CJEU in interpreting those rights vis-à-vis a more restrictive reading of the EMAAs by the member states. Over the years, the member states have developed different arguments in order to try and limit the impact of the Association Agreements with the Maghreb states on their social security systems. First, they have tried to argue on various occasions that the equal treatment provisions contained in the Agreements are not capable of having direct effect in the EU. Another approach has been to attempt to limit the personal and material scope of the equal treatment provisions.

It is notable that the case law is dominated by the frequent reoccurrence of some member states, namely Belgium, France and the Netherlands.⁶ There are several possible explanations for this concentration of case law on three member states. First, all three countries received a rather large number of guest workers from the southern Mediterranean, whereas in other member states, such as Germany, migrant workers are mostly of Turkish origin. It is also possible that, in comparison with other member states, Belgium and the Netherlands have a relatively developed network of immigration lawyers who inform migrant workers of their rights and who have the necessary knowledge and experience to plead cases before the courts and to argue successfully for a preliminary reference procedure.

⁶ Other member states, such as Germany and the UK, have been subject to rulings before the CJEU in relation to other provisions in the EMAAs, such as the right to equal treatment as regards working conditions, remuneration and dismissal. See, for example, Case C-416/96 *El-Yassini* [1999] ECR I-1209; Case C-97/05 *Gattoussi* [2006] ECR I-11917.

After presenting an overview of the social security rights contained in the different EMAAs, this chapter discusses the major controversies regarding the enforcement of social security rights contained in the EMAAs as they have come to the fore in the case law. It concludes that the CJEU has been reluctant to accept any arguments from the side of the member states trying to limit the scope of the right to non-discrimination in the field of social security. To the contrary, it has interpreted the social security rights contained in the EMAAs extensively and has decided in favour of the migrant workers and their family members in the large majority of cases. In its case law on the EMAAs, the Court of Justice has vigorously defended the rights of migrant workers and has pursued a maximalist approach to enforcement that has parallels with the approach to internal EU law.⁷ Where it has departed from internal EU reasoning and has refrained from relying on internal market case law, this has been done to the benefit of the migrant workers concerned. The combination of an expansive interpretation of the non-discrimination clauses and the increasing regulation of migrants' admission conditions in other EU secondary legislation, such as the Directives on students⁸ and family reunification,⁹ has limited the ability of member states to control access by third-country nationals to their social security systems.

2. Social security rights in the Euro-Mediterranean Association Agreements

The EMAAs concluded with Tunisia,¹⁰ Morocco¹¹ and Algeria¹² provide that nationals of these three countries legally employed in a member states

⁷ For a more general argument of (international) Treaty enforcement by the CJEU, see M. Mendez (2010), "The Legal Effects of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques", *The European Journal of International Law*, Vol. 21, No. 1, pp. 83-104.

⁸ Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service.

⁹ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

¹⁰ Decision 98/238/EC, OJ L 97/1, 30. 3.1998.

¹¹ Decision 2000/204/EC, OJ L 70/1, 18.3.2000.

¹² Decision 2005/690/EC, OJ L 265/1, 10.10.2005.

and their legally residing family members shall enjoy, in the field of social security, treatment free of any discrimination based on nationality relative to the nationals of the host country in which they are employed.¹³ The right to equality of treatment covers the following social security benefits: sickness and maternity benefits, invalidity, old-age and survivor's benefits, industrial accident and occupational disease benefits, death, unemployment and family benefits. The Association Councils recently adopted new provisions to implement the principles on the coordination of social security systems contained in the EMAAs,¹⁴ which contain a new equal treatment clause and refer to all benefits contained in Regulation 883/2004, including paternity and pre-retirement benefits. The Agreement with Israel¹⁵ has only recently been supplemented with an equal treatment clause.¹⁶ Since the entry into force of a Decision of the Association Council on the coordination of social security systems in 2010, Israeli workers and their family members have enjoyed equal treatment with nationals of their country of employment as regards the same types of social security benefits listed above.

Furthermore, all four EMAAs provide that periods of insurance, residence or employment completed in the different member states in respect of old-age, invalidity and survivor's benefits, family, sickness and maternity benefits and medical care shall be aggregated.¹⁷ Workers from Tunisia, Morocco, Algeria and Israel also have the right to receive family allowances for family members residing in the host state. The Agreements further provide for the transfer to the workers' home states of all their pensions and allowances for old-age, survivor's, accident at work, occupational illness or invalidity benefits, with the exception of non-contributory payments. The recent Association Council decisions contain a waiving of residence clauses, implying that any exportable benefits listed

¹³ See Article 68 of the EMAA with Algeria and Article 65 of the EMAAs with Morocco and Tunisia.

¹⁴ Council Decision 2010/697/EU, OJ L 306/1, 23.11.2010; Council Decision 2010/698/EU, OJ L 306/8, 23.11.2010; Council Decision 2010/699/EU, OJ L 306/14, 23.11.2010.

¹⁵ Decision 2000/384/EC, OJ L 147, 21.6.2000.

¹⁶ Council Decision 2010/700/EU, OJ L 306/21, 23.11.2010.

¹⁷ Article 68 of the EMAA with Algeria; Article 65 of the EMAAs with Morocco and Tunisia; Article 64 of the EMAA with Israel.

shall not be subject to any reduction, modification, suspension, withdrawal or confiscation on grounds of a change of residence to the worker's country of origin.

The rights regarding social security benefits in the remaining EMAAs are much more limited. The Agreements with Egypt and Lebanon go no further than a vague reference to the fair treatment of Egyptian/Lebanese workers and an agreement to initiate talks on social security rights at the request of one of the parties.¹⁸ The references to social benefits in the Agreement with Jordan are even more limited. It merely envisages the establishment of a dialogue on all social issues of mutual interest as a means to foster the movement of workers and the equal treatment and social integration of legal residents in their respective host countries.¹⁹ Similar clauses on dialogue in social matters of mutual interest can be found in the Agreements with the other Mediterranean states.

3. Key controversies in the enforcement of social security rights contained in the EMAAs

3.1 *The direct effect and immediate applicability of the non-discrimination provisions*

As mentioned above, on the basis of Articles 65 and 68 of the respective Association Agreements, Moroccan, Tunisian and Algerian workers and their family members living in a host state enjoy equal treatment with nationals with respect to social security benefits. The same applies to Israeli workers on the basis of the Decision of the Association Council. The Court held for the first time in 1991 in *Kziber*²⁰ that Article 41(1) (now Art. 65(1)) of the Cooperation Agreement with Morocco had direct effect. The national authorities argued that Article 41(1) did not have direct effect, since its application was subject to action by the Association Council. The CJEU did not accept this argument and found that even though Article 42(1) foresaw Association Council implementing measures, the non-discrimination provision was directly applicable and not subordinated in its execution or effects to any further implementing measures. It was thus sufficiently

¹⁸ Article 62 of the EMAA with Egypt; Joint Declaration relating to workers (Article 65 of the Agreement) of the EMAA with Lebanon.

¹⁹ Article 80 of the EMAA with Jordan.

²⁰ Case C-18/90 *Onem vs. Kziber* [1991] ECR I-199.

precise and unconditional to have direct effect. Moreover, the foreseen adoption of Council implementing measures did not call into question the immediate applicability of the principle of non-discrimination.²¹

The national authorities further argued that the purpose and nature of the agreement, which was essentially intended to promote the economic development of Morocco and did not refer to Morocco's association with or future accession to the EU, prevented the provision from being directly applicable. The CJEU equally rejected this as an argument liable to prevent certain provisions of the Agreement from having direct effect. It emphasised the overall objective of the Cooperation Agreement, namely the promotion of cooperation between the Contracting Parties.²²

The CJEU has applied the same reasoning to the identically worded non-discrimination provisions contained in the Agreement with Algeria and Tunisia. In *Krid*, it held that the non-discrimination provision in the Cooperation Agreement with Algeria had direct effect. It stressed the similarities in content and objectives of the Moroccan and the Algerian Agreements and underlined their objective of promoting economic and social relations between the Contracting Parties.²³

After the Cooperation Agreements were replaced with the second generation of Euro-Mediterranean Association Agreement, it was challenged whether the relevant case law was still applicable. The Court of Justice swiftly addressed this question in *Echouikh*, finding that the non-discrimination clauses in the new Agreements were formulated in identical terms and that the new Agreements furthermore had complementing objectives. The reasoning on direct effect of the non-discrimination provisions was thus directly transposable to the new Association Agreements.²⁴

Hence, the CJEU has firmly rejected any attempts by the member states to contest the direct effect of the right to non-discrimination in the field of social security of Moroccan, Algerian and Tunisian migrant workers and their family members. Undoubtedly, the same reasoning

²¹ Ibid., para. 19.

²² Ibid., paras. 20 and 21.

²³ Case C-103/94 *Krid* [1995] ECR I-719, para. 22 ff.; see also Case C-113/97 *Babahenini* [1998] ECR I-183.

²⁴ Case C-336/05 *Echouikh* [2006] ECR I-5223, para. 40.

applies to the identical provision contained in the implementation decision of the Association Council on the Agreement with Israel.

3.2 *The material and personal scope of the non-discrimination provisions*

The member states have tried to limit the access to social security benefits of workers and family members from the Maghreb states by interpreting the scope *ratione materiae* and *ratione personae* of the non-discrimination provisions restrictively. The CJEU has turned a deaf ear to any such arguments. It underlined in cases such as *Echouik*²⁵ and *El Youssfi*²⁶ that the principle of non-discrimination implied a right to claim social security benefits “on the same basis as nationals of the host member state”, barring member states from imposing additional or stricter conditions for migrant workers than those applicable to nationals of that state. Nonetheless, national authorities have now and again stirred controversies and raised objections in front of the European Courts as regards the material scope of the provision (i.e. the types of social security benefits covered) and its personal scope (i.e. the categories of persons who can rely on the right to non-discrimination before the national courts).

Regarding the scope *ratione materiae* of the non-discrimination provisions, the CJEU has consistently held that the term ‘social security’ must be interpreted by analogy with the same concept in the Regulation on the coordination of social security systems as applicable in the member states of the EU (now Regulation 883/2004).²⁷ This means that all kinds of social security benefits covered by Regulation 883/2004 must also be guaranteed to migrant workers and their family members on the same basis as to nationals of the host state. The EMAAs contain an explicit list of social security benefits covered in conformity with Article 4 of the previously applicable Council Regulation 1408/71 and the relevant case law. These include sickness and maternity benefits, invalidity, old-age and survivor’s benefits, industrial accident and occupational disease benefits and death, unemployment and family benefits. Since the recently adopted implementation decisions of the Association Councils explicitly refer to

²⁵ Ibid., paras. 55–58.

²⁶ Case C-276/06 *El Youssfi* [2007] ECR I-2851, paras. 51–56.

²⁷ Case C-126/95 *Hallouzi-Choho* [1996] ECR I-4807, para. 25; Case C-113/97 *Babahenini* [1998] ECR I-183, para. 26.

Regulation 883/2004 as the relevant frame of reference,²⁸ the right to non-discrimination must also cover paternity and pre-retirement benefits, which were newly added under this Regulation.

3.3 *The reframing of what is social security and social assistance*

Be that as it may, the member states have continuously questioned whether certain types of benefits fall under the notion of social security and are covered by the right to non-discrimination under the EMAAs. A particular challenge in this context has been the need to distinguish between social security and social assistance, which is not covered by the equal treatment clause. National benefits that have been investigated by the Court of Justice as regards their categorisation as social security benefits for the purpose of the EMAAs include guaranteed income for elderly persons, allowances for disabled persons and unemployed young workers and armed forces invalidity pensions, as well as supplementary pension allowances from a national solidarity fund and seniority supplements to unemployment benefits. The CJEU has consistently rejected the exclusion of certain types of benefits from the notion of social security that also demonstrate some characteristics of a social assistance measure.

In *El Youssfi*,²⁹ the Moroccan widow of a migrant worker living in Belgium applied for the Guaranteed Income for Elderly Persons on the same basis as Belgian nationals. According to the national authorities, she was not eligible to receive such benefits. They argued that a guaranteed income for elderly persons, which is aimed at ensuring their minimum means of subsistence, should be categorised as social assistance, falling outside the scope of Article 65(1) of the Association Agreement with Morocco. The CJEU came to a different conclusion. It held that there was no doubt that a guaranteed minimum income for elderly persons that is aimed at ensuring a minimum level of subsistence falls within the concept of social security under Article 65(1) of the Association Agreement, in spite of the fact that it might also possess some characteristics of a social assistance measure.³⁰

²⁸ Article 1(b) of the Decision of the Association Council.

²⁹ Case C-276/06, *El Youssfi* [2007] ECR I-2851, paras. 51–56.

³⁰ *Ibid.*, para. 60.

The CJEU has also made clear that special non-contributory benefits,³¹ such as social minimum benefits, which fall in the grey area between social security and social assistance, fall under the scope of the Association Agreements. In *Krid*,³² the widow of an Algerian worker, who received a survivor's pension, was refused a supplementary allowance from the National Solidarity Fund paid to the recipients of old-age or invalidity pensions who have insufficient means of their own. The CJEU found that the right to such supplementary benefits was designed to increase the amount of pensions paid by way of social security, without any assessment of individual needs or circumstances, which is a characteristic of social assistance. Hence, even though the same law provided for certain advantages which could be classified as assistance, this did not alter the social security character of a benefit linked to an invalidity, old-age or survivor's pension.³³

In some early cases, the member states tried to argue that certain benefits, such as disability or unemployment benefits, did not fall under the concept of social security of the Association Agreements, because they were not explicitly mentioned in Council Regulation 1408/71 or because they were not listed as a type of benefit to which the aggregation of insurance or employment periods applies. The CJEU made clear in cases such as *Yousfi* and *Alami* that certain benefits not listed in one or other provisions were not necessarily excluded from the scope of the non-discrimination provision, in particular where such benefits were traditionally regarded as a branch of social security and had been treated as such in the case law. In *Yousfi*, the CJEU held that disability benefits fell within the scope of Article 41(1) of the Association Agreement with Morocco. Even though such benefits were not specifically mentioned in Council Regulation 1408/71 (before its amendment), the CJEU had always included disability benefits within the scope of the Regulation under the concept of invalidity

³¹ These are non-contributory benefits that provide supplementary, substitute or ancillary cover against the classic social security risks covered by Regulation 1408/71 and guarantee the person concerned a minimum subsistence income, or solely specific protection for the disabled. Such benefits are included in the material scope of Regulation 1408/71 but are confined to the territory of the competent state and cannot be exported. They are also excluded from the free transfer of benefits to the home country under the Association Agreements.

³² Case C-103/94 *Krid* [1995] ECR I-719.

³³ *Ibid.*, paras. 34 and 35.

benefits.³⁴ Hence, Mr Yousfi, a Moroccan worker suffering permanent incapacity for work following an industrial accident, had to be granted a disability benefit on the same terms as nationals (provided that the applicable period of residence of five years was fulfilled). In *Alami*, it was held that unemployment benefits must be considered as falling under the concept of social security. Since unemployment benefits have traditionally been regarded as a branch of social security and are listed as such under Regulation 1408/71, a seniority supplement to unemployment benefits had to be regarded as falling within the scope of the non-discrimination clause. It was irrelevant in this context that unemployment benefits were not mentioned under Article 41(2) of the Association Agreement as a type of benefit to which the aggregation of insurance or employment periods applies.³⁵

Furthermore, even benefits that are granted purely on the basis of residence, rather than on the basis of contributions made, may fall within the scope of the concept of social security under the Association Agreements. This was held in *Hallouzi-Choho*,³⁶ which concerned the spouse of a Moroccan worker who had to be granted a transitional benefit under a national old-age insurance scheme. She was denied such benefits, granted on the basis of a transitional arrangement for the years prior to the entry into force of the General Law on Age Insurance, solely on grounds of her nationality. The national authorities emphasised the special nature of the transitional arrangement, consisting of the fact that the periods prior to the entry into force of the new law were not actual periods of insurance, since the beneficiary did not have to pay any contributions and mere residence in the Netherlands was sufficient for insurance purposes. The CJEU did not accept this reasoning, emphasising that the refusal to grant social security benefits was solely based on the fact that the claimant did not have Dutch nationality, running counter to her right to be treated, in the field of social security, as if she were a national of the member state concerned.³⁷

³⁴ Case C-58/93 *Yousfi* [1994] ECR I-199, para. 25.

³⁵ Case C-23/02 *Alami* [2003] ECR I-1399, paras. 24-26.

³⁶ Case C-126/95 *Hallouzi-Choho* [1996] ECR I-4807.

³⁷ *Ibid.*, paras. 33-35.

3.4 *The requirement of applying the same conditions to migrant workers and nationals*

The CJEU has also ruled out any possibility to subject migrant workers to additional criteria not applied to nationals of the host state in order to benefit from social security benefits. For instance, in the previously mentioned *Alami* case,³⁸ a Moroccan worker could not be denied a seniority supplement to an unemployment benefit on the grounds that he was previously working in another member state, since no such condition was imposed on national workers. At the same time, member states are free to alter their social security systems, provided that the same rules apply to nationals and migrant workers. In *Fahmi*,³⁹ the CJEU found that member states were permitted to abolish a dependent child's allowance in respect of students aged between 18 and 27 years and replace it with a right to study finance. It emphasised that the member states were free to organise their own social security systems, in particular by determining the conditions for entitlements to benefits, provided that they do not infringe EU law. Since the dependent child allowance in respect of students aged between 18 and 27 was abolished without regard to their nationality, no discrimination based on nationality could be established.⁴⁰

3.5 *An inclusive notion of 'worker'?*

Next to their attempts to limit the material scope of the non-discrimination clause, the member states have tried to exclude certain types of workers or certain types of family members from the right to non-discrimination in the field of social security. The non-discrimination provisions apply to workers of Moroccan, Algerian, Tunisian or Israeli nationality as well as to family members residing with the worker in the member state of employment. In *Kziber*, the CJEU made clear that not only active workers benefit from the provision, but also those who have reached retirement age or who have become entitled to allowances under one of the other social security branches, such as an invalidity pension.⁴¹ It emphasised in particular that matters such as old-age or invalidity pensions and annuities enjoyed by

³⁸ Case C-23/02 *Alami* [2003] ECR I-1399.

³⁹ Case C-33/99 *Fahmi* [2001] ECR I-2415.

⁴⁰ *Ibid.*, para. 30.

⁴¹ See Case C-18/90 *Onem vs. Kziber* [1991] ECR I-199, para. 27; see also Case C-58/93, *Yousfi vs. Belgian State* [1994] ECR I-1353, para. 21.

retired workers are mentioned as regards the benefit of aggregation and the possibility of transferring benefits to Morocco in Article 41(2) and (4) of the Agreement. The same does not apply, however, to unemployed nationals of the Maghreb states and their family members. In *Haddad*,⁴² the Court concluded that an unemployed Moroccan student married to an unemployed Moroccan national could not rely on Article 41(1) of the Cooperation Agreement with Morocco, since she could not be considered to be a family member of a Moroccan worker.⁴³ In spite of the fact that the couple was insured voluntarily under the national sickness insurance scheme, Ms Haddad could not prove that she had a close family relationship with a Moroccan worker and therefore could not benefit from the equal treatment clause. Thus, even though the concept of worker for the purpose of the EMAAs appears to be rather inclusive, rights are strictly limited to nationals of the southern Mediterranean states who have acquired social security rights in an EU member state on the basis of their status of worker or family member.

3.6 *Equal rights of migrant workers' family members*

The concept of family members under Articles 65 and 68 of the EMAAs has been interpreted broadly by the CJEU. It includes not only the spouse and minor children of the migrant worker, but also other close relatives, such as relatives in the ascending line. According to the Court of Justice in *Mesbah*,⁴⁴ it follows from the very wording of that provision that the rule of equal treatment is not exclusively for the benefit of the migrant worker's spouse and children. The more general expression of family members is capable of covering other relatives, including those in the ascending line. In addition, the CJEU emphasised that the term 'family members' was not confined to members of the same blood as the worker, but could also cover persons related to him by marriage, provided that they were living under the same roof. Consequently, the mother of a migrant worker's spouse who had been resident in the household of her son-in-law had to be considered

⁴² Case C-358/02 *Haddad* [2004] ECR I-1563.

⁴³ If the person concerned had qualified as the family member of a Maghreb worker, however, he/she had had the right to unemployment benefits or similar allowances provided for young persons in search of employment. See Case C-18/90 *Onem vs. Kziber* [1991] ECR I-199, para. 29.

⁴⁴ See Case C-179/98 *Mesbah* [1999] ECR I-7955.

to be a member of the family of that worker.⁴⁵ Similarly, in *El Youssfi*, the CJEU held that in addition to being the widow of a migrant worker, the applicant could be covered by Article 65(1) of the Association Agreement if she resided with her son in Belgium and the latter was both a worker and of Moroccan nationality.⁴⁶ The same reasoning can be applied to other close family members residing in the household of the migrant worker whether related to him by blood or marriage, such as siblings of the worker or his spouse.

Furthermore, the CJEU has consistently rejected all attempts by national authorities to make a distinction between the rights enjoyed by the migrant worker himself and his/her family members. In cases such as *Hallouzi-Choho* and *Babahenini*, the member states argued that certain types of rights, such as the old-age transitional benefit in *Hallouzi-Choho*,⁴⁷ could not be relied upon by family members of the migrant workers, since the right to such benefits was intended by the relevant legislation to be a personal right and not a derived right acquired through the status of family member of a migrant worker. The CJEU concluded that no distinction could be made between personal rights and derived rights for the purpose of applying the non-discrimination provisions contained in the Association Agreements. Interestingly, it departed (to the benefit of the applicant) from a parallel interpretation of the right to non-discrimination in the EMAAs and the internal EU social security Regulation 1408/71. According to the CJEU, the family members covered by the non-discrimination clause were not the same as those covered by Article 2 of Regulation 1408/71, so that the case law distinguishing between derived rights and personal rights could not be applied.⁴⁸

Similarly, in *Babahenini*,⁴⁹ the Belgian authorities argued that the family member of an Algerian migrant worker could not rely on the non-discrimination clause for the purpose of receiving a disability allowance, since such a benefit was treated as a personal and not a derived right under national law. The CJEU reiterated that the case law on derived rights and personal rights given in the context of Regulation 1408/71 was not

⁴⁵ Ibid., paras. 44-47.

⁴⁶ Case C-276/06 *El Youssfi* [2007] ECR I-2851, para. 70.

⁴⁷ Case C-126/95 *Hallouzi-Choho* [1996] ECR I-4807.

⁴⁸ Ibid., para. 30.

⁴⁹ Case C-113/97 *Babahenini* [1998] ECR I-183.

applicable to the case at hand and that the applicant fell within the personal scope of the non-discrimination clause, irrespective of whether the benefit for which she had applied was awarded as a personal right or in her capacity as the family member of an Algerian migrant worker.⁵⁰ It follows from this case law not only that no distinction may be made between personal rights and derived rights within the context of the right to non-discrimination in social security matters, it can also be concluded that the CJEU is willing to depart from the case law on EU social security legislation, in spite of an explicit reference in the Decisions of the Association Council to the concept of family member as defined in Article 1(i) of Regulation 883/2004.⁵¹

4. Conclusions

The right to social security benefits on the same terms as nationals of the host state and the possibility to aggregate and export certain entitlements are key elements of promoting labour migration and ensuring the successful integration of third-country nationals in the EU. This is increasingly recognised by the EU institutions. The European Commission, in particular, has emphasised the merits of more effective social security coordination with third countries as a way to facilitate labour mobility.⁵²

The preceding analysis has shown that the social security rights contained in the EMAAs, in particular the application and interpretation of the right to non-discrimination in social security matters, have not been free from controversy. The defendant and intervening member states have tried to argue for a restrictive interpretation of the non-discrimination clause, challenging its direct effect and direct applicability and arguing for a limited material and personal scope of application. The CJEU has confirmed the broad scope of the principle of non-discrimination laid down

⁵⁰ Ibid., para. 25.

⁵¹ See Article 1(f) of Council Decision 2010/697/EU.

⁵² See European Commission Communication, *The External Dimension of EU Social Security Coordination*, COM(2012) 153 final, 30.03.2012. In addition, the right to non-discrimination in the field of social security can be found as a standard clause in the recently adopted or scheduled directives on labour migration. See Directive 2011/98/EU on a single application procedure for a single permit, Directive 2009/50/EC on highly qualified workers, Directive 2005/71/EC on researchers, Proposal for a Directive on seasonal workers, COM(2010) 379 final, Proposal for a Directive on intra-corporate transferees, COM(2010) 378 final.

in EMAAs, thereby strengthening the social security rights of workers from the Mediterranean countries in the EU. It has repeatedly confirmed the direct effect of said provisions and has rejected any attempts by national authorities to exclude certain types of social security benefits or certain categories of persons from the scope of the right to non-discrimination. It is crucial to note that the concepts of 'social security', 'worker' and 'family member' in the EMAAs are open, meaning that they do not have a restricted or fixed meaning on the basis of one or other legal or policy document. In spite of the fact that both the EMAAs themselves and EU social security legislation contain specific references to the meaning of these concepts, it is clear from the case law that these references are in no way binding to the CJEU. To the contrary, the relevant concepts are to be interpreted dynamically and may cover more benefits or a wider range of persons than indicated in the relevant legislation. Even social benefits that possess certain characteristics of social assistance or that are not granted on the basis of contributions but on grounds of residence are covered by the non-discrimination clause. The same applies to family members in the broad sense of the word, going beyond the nuclear family of spouse and children.

In spite of the fact that the social protection of migrant workers from the Mediterranean still leaves much to be desired,⁵³ the extensive interpretation of the non-discrimination provisions by the CJEU has provided them and their family members with a solid right to enjoy access to a wide range of social benefits on the same terms as nationals of their host state. In fact, it appears that the CJEU has interpreted the social security provisions in the EMAAs in a manner that shares parallels with the 'maximalist treaty enforcement logic' that it applies to internal EU law.⁵⁴

At the same time, the cases discussed above illustrate the tensions and inconsistencies between the different governmental departments and the need for a more integrated, comprehensive approach to migration management. The Association Agreements were concluded in the 1970s (and renewed in the 1990s and 2000s) against the background of a wider foreign affairs agenda to foster cooperation between the EU and the

⁵³ See A. Boudahrain (2000), "The Insecure Social Protection of Migrant Workers from the Maghreb", *International Social Security Review*, Vol. 53, pp. 47-73.

⁵⁴ M. Mendez (2010), *op. cit.*; see also C. Eckes (2010), "International law as law of the EU: The role of the Court of Justice", CLEER Working Papers No. 2010/6, Asser Institute, The Hague.

countries of the southern Mediterranean. The objective of promoting cooperation between the Contracting Parties has been a crucial element in the CJEU's teleological interpretation of the social security clause in the EMAAs, which justifies an expansive approach to the application of individual rights.

At first sight, it may not seem that surprising that the application of the Association Agreements that were agreed upon by the representatives of national foreign ministries in the European Council has been challenged by the interior ministries. Whilst the former pursue a broader agenda and often grant rights to migrant workers from third countries as part of a 'package' that includes closer economic and trade cooperation, interior ministers are inherently eager to defend national sovereignty and are concerned about 'losing control' over who is admitted and who is a beneficiary of social benefits. As a consequence of CJEU case law, the possibilities of the member states to restrict access to their social security systems for migrant workers from the Mediterranean states are limited. In addition, it has to be underlined that the Association Agreements interact with the legislation applicable to third-country nationals in general. As the EU increasingly regulates the admission of third-country nationals, be it as family members, students, researchers, highly qualified workers, intra-corporate transferees or seasonal workers, national interior ministries lose more and more control in respect of who is admitted to their territory.⁵⁵ As soon as the person is residing legally on their territory and becomes employed, the equal treatment provisions apply. This occurs regardless of whether the persons concerned have previously been admitted as workers or in a different capacity, such as students or family members.⁵⁶ Hence, the dynamics of a non-discrimination provision may go further than desired by the interior ministries of the member states, as CJEU case law and newly adopted secondary legislation provide for an extended scope of rights.

At the same time, it should not be forgotten that Association Agreements are so-called mixed agreements that were not only agreed

⁵⁵ Moreover, migrant workers from the Mediterranean may be able to enjoy the benefits granted under Regulation (EC) No 883/2004 and implementing Regulation (EC) No 987/2009, once they find themselves in a cross-border situation and are not already covered by these Regulations solely on grounds of their nationality. Regulation (EU) No 1231/2010 of 24 November 2010, OJ L 344/1, 29.12.2010.

⁵⁶ And, by analogy, Turkish workers. See Case C-294/06 *Payir* [2008] ECR I-203.

upon in the Council but that also had to undergo a lengthy ratification process by the national parliaments of the member states. At least at this stage, an intensive national debate should have taken place so as to ensure consistency between the policy objectives and strategies of the various national ministries. It seems, however, that the interior ministries of the member states are hesitant to apply the rights granted in the EMAAs and intend to limit their scope by applying a restrictive reading to the social security provisions. Within the context of the further development of the EMAAs, not least in the application of the recently adopted implementation decisions of the Association Councils, it is crucial to ensure greater consistency between national ministries and to guarantee that broad international relations policy objectives do not become compromised by a restrictive interpretation of rights.

The case of the EMAAs reveals the limited extent to which the social security rights of migrant workers from the southern Mediterranean are subject to national discussions and debate. At the same time, this means that migrant workers are often not sufficiently informed about their social security rights under EU law. It is individuals who keep those rights visible, by exercising them and invoking them before courts and other national authorities. A lack of knowledge and information about their existence and scope means that the social security rights are not as frequently invoked as they could be. In order to allow for a greater reliance upon the rights contained in the agreements, it is crucial to ensure that information is available to national immigration officials, judges and, most importantly, individual migrants.

5. ASYLUM-SEEKERS AND PEOPLE IN NEED OF INTERNATIONAL PROTECTION

MADELINE GARLICK*

1. EU legal basis for support for asylum-seekers and protection holders

The rights of asylum-seekers and people found to be in need of international protection in the European Union to social benefits in member states¹ are governed by EU Directives, and national laws adopted there under. These measures have been the subject of considerable public and political debate, particularly in member states experiencing economic difficulties in recent years, where they have been perceived by at least some observers to place considerable financial burdens on the societies and governments hosting those seeking or in need of protection.

Asylum-seekers are entitled, under *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers* (the Reception Conditions Directive), to “material reception conditions to ensure a standard of living adequate for the health of applicants [for protection] and capable of ensuring their subsistence”.² They also have defined rights to housing, the means of subsistence, health care, education

* The views expressed in this chapter are the author’s personal opinion and do not necessarily reflect the position of the United Nations or UNHCR.

¹ Unless otherwise specified, the terms ‘social benefits’, ‘social welfare’, ‘social assistance’ and ‘material reception conditions’ will be used to refer to various forms of State support, direct and indirect, financial or otherwise, to asylum-seekers and international protection beneficiaries in the EU, in accordance with the respective instruments laying down these entitlements.

² Article 13(2) of the Reception Conditions Directive; see also Recital 7 of the Reception Conditions Directive.

and support to address special needs.³ These entitlements are expressed in the Directive, which was the subject of a recast proposal issued by the European Commission in 2009⁴ and subsequently revised in June 2011.⁵ Agreement on the recast Directive is expected in early 2013. The debates around the recast proposals have cast into sharp relief the sensitivities and concerns about the perceived high cost of social welfare and other entitlements of asylum-seekers, the majority of whom are expected not to qualify for protection. The question of whether EU member states' citizens are ready to support extensive and costly assistance schemes for such people played a significant role in the political discussions on these changes. At the same time, the degree of leadership that governments and EU institutions have been ready to show in calling for solidarity and a humanitarian approach in this context has also influenced the negotiations in important ways.

People in need of international protection in the EU – including those qualifying as refugees and those entitled to subsidiary protection – are defined⁶ by criteria laid out in *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), known as the Qualification Directive. This instrument, which repeals and replaces a 2004 Directive⁷ on the same subject, also sets out the entitlements

³ Articles 10, 13, 14, 15, 20 of the Reception Conditions Directive; amended provisions related to similar areas are expected to be adopted in the recast Qualification Directive in 2013.

⁴ European Commission, Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast), COM(2008) 815, 3.12.2008.

⁵ European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards for the reception of asylum-seekers, COM(2011)320, 1.6.2011.

⁶ Qualification Directive, Article 2(d) on definition of a refugee; Article 2(f) defining a person eligible for subsidiary protection, and related articles.

⁷ Council Directive 2004/83/EC on minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304/12, 30.9.2004 (2004 Qualification Directive).

of refugees and subsidiary protection beneficiaries to social benefits and other forms of support in the member state which has granted them protection.⁸ The entitlements of refugees to social benefits and other support under EU law broadly reflect the obligations in the 1951 Convention on the Status of Refugees, to which all EU member states are signatories, and have been relatively undisputed in political discussions on the issue in recent years. The rights of subsidiary protection beneficiaries, by contrast, were extensively debated in the course of negotiations on the original 2004 Directive, as well as the 2011 recast, in ways that suggest member states see subsidiary protection needs as less compelling, or less durable, than those of refugees.

This chapter aims to explore briefly the main debates around entitlements of asylum-seekers, refugees and subsidiary protection beneficiaries in the EU. It will examine some of the key assumptions and premises underlying these discussions in light of the limited data available on the cost of state-funded benefits. It concludes by proposing that further research and analysis is needed, based on empirical data on the financial demands placed by asylum-seekers and protection beneficiaries on public funds and also in light of the contributions they could potentially make to their host societies.

2. Reliance on social benefits: available research and data

2.1 Social benefits and support to asylum-seekers

Several public reports have sought to assess the implementation of the Reception Conditions Directive in practice, including in relation to its provisions on material support and other social benefits. The first in-depth analysis of the application of the Directive, published in a 2006 synthesis report by the Odysseus Academic Network⁹ under contract for the European Commission, contained a qualitative assessment of the adequacy of the support provided. It did not, however, set out the monetary sums provided or total support budgets for asylum-seekers in the member states.

⁸ Article 29, Qualification Directive.

⁹ Odysseus (2006), *Comparative overview of the implementation of the Directive 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum-seekers in the EU member states*, Odysseus Reception Study, Academic Network for Legal Studies on Immigration and Asylum in Europe. The report was made public via the internet some time after its submission to the European Commission.

The Odysseus Network reached several key conclusions on the provision of 'material support'. First, where material reception conditions were provided exclusively or mostly in kind (rather than in the form of cash grants), and solely or mostly in state-supported collective reception centres in the member states, they were "generally deemed adequate."¹⁰ However, the study observed that no or insufficient provision was made for asylum-seekers' clothing in support provided by some member states¹¹, and the material conditions in some reception centres¹² were inadequate.

Second, the study concluded that where social benefits were provided in the form of financial allowances (the practice for all applicants in some member states, but only for applicants for whom no state-provided accommodation was available in others), those allowances were "inadequate to ensure the health and/or subsistence of asylum-seekers."¹³

The Odysseus Reception study also found that at the time of the research, asylum-seekers in several member states were entitled to benefits that were lower (in some cases far lower) than those available to that member states' nationals,¹⁴ an approach which at least one state considered as justified on the grounds that protection was seen as 'temporary.'¹⁵ Other states provided assistance which was similar or equivalent to the levels enjoyed by nationals, being considered the minimum required to allow a person to live in dignity.

Since 2009, the European Migration Network (EMN) has gathered data from EU member states and others in western Europe from responses to questions including the level and form of benefits offered to asylum-seekers. This has offered an updated – if often partial – picture of the costs

¹⁰ Odysseus (2006), *op. cit.*, Analysis of findings on question 12B, p. 28.

¹¹ Cyprus, Czech Republic, Lithuania, Poland, Slovakia and Slovenia.

¹² Problematic conditions were observed in closed reception centres in Belgium, Greece, Hungary, Italy, Lithuania, Malta and Slovenia, and in open centres in Lithuania and Greece.

¹³ Odysseus (2006), *op. cit.*, p. 29: Austria, Cyprus, France, the Netherlands (policy/attitude), Portugal, Spain, Slovenia and the UK (delays), p. 31.

¹⁴ Austria, France, Germany, Lithuania Luxembourg, Sweden and the UK.

¹⁵ German authorities based their position on Administrative Court jurisprudence (Odysseus (2006), *op. cit.*, p 31). However, this view disregards the fact that even during a potentially 'temporary' stay for the purposes of seeking or receiving protection, immediate material needs of the protected individual must be met.

to member states of support drawn by those seeking protection. The results are incomplete in some cases because of the limited number of states that have replied or agreed to disclosure of their responses. The data is also limited in that states often appear to provide information that is not in a comparable form, because it is calculated in different ways or takes into account different forms of support and omits others. A sample of some interesting findings and published data is set out below.

In October 2009, in response to an ad hoc query submitted via the EMN, 19 states¹⁶ answered several questions on the amount of benefits paid to asylum-seekers living in reception centres, and what factors determined or affected their entitlements. As an illustration of the range of entitlements available, Belgium reported that accommodation, food, clothing, medical, social and psychological help, interpretation and legal representation, training and voluntary return were provided free of charge. In addition, asylum-seekers receiving this support were provided with 'pocket-money' totalling €6.50 per week for each adult or child at school below 12, with €5 for unaccompanied minors. The amount could be increased if the asylum-seeker performed community services.

In Cyprus, by contrast, it was reported that single asylum-seekers in the limited available state-provided accommodation could receive €85.43 per month. Germany provided support in kind to those in state accommodation, plus an allowance of €40 per week for those above 14 years of age. Those living in other accommodation could receive €184 (for the head of the household), with €158 for other adults and €117 for children under seven.

In Slovenia, all benefits were supposedly provided in kind, including for minor expenses such as bus fares. Additional money could only be obtained by performing jobs "in connection with the maintenance of the centre."

According to the EMN data, Spain took a different approach, providing support for those lacking economic resources based on item-by-item requests, with a fixed scale for different forms of support (e.g. €175 for the purchase of clothing/footwear; €175 connected with the birth of a child; and €49.80 for a single adult's "personal and transportation expense").

¹⁶ Austria and Finland provided responses but did not consent to their publication on-line.

In case of a change in circumstances, the October 2009 survey results indicated that several states withdrew financial allowances after a negative asylum decision – including in cases where an appeal was lodged and a decision pending from the courts.

An EMN report of October 2010 compiled information relating to the “daily reception cost per person” for asylum-seekers in 2009, based on a query from Sweden. With 17 respondents (most of whom agreed to publication of their information)¹⁷, it was noted that the daily cost to the state – calculated by dividing the sum of all officially-recorded costs (including provision of accommodation in reception centres, specialised care, salaries and administration for state authorities) by the number of applicants drawing from the services – varied significantly across the EU and its near neighbours. For instance, Belgium calculated that the average cost per day was €43, close to the cost of the preceding two years. In Cyprus, taking into account salaries, financial allowances for residents, food and expenses such as transportation, the average emerged at around €27 per day. Estonia did not provide a figure, simply saying the costs had ‘increased’ over recent years. Poland presented the comparatively high figure of €280 per person per day, but this included costs of building construction/maintenance and vehicle maintenance in connection with transport costs which were apparently not taken into account in the calculations of some other states.

In 2012, several queries in relation to the costs of supporting asylum-seekers were launched again. One was a specific question relating to the amount and form of allowances and in-kind benefits provided to asylum-seekers. This information was sought by Luxembourg explicitly in connection with the tripling in 2011 of asylum applications from nationals of Serbia and Montenegro, and the government’s reflections on whether to reduce the amount of support offered. Among the interesting responses from the participating states, Belgium reported that the amount of ‘pocket money’ for people receiving support in kind in reception centres had increased slightly in comparison with the 2009 level, to €7.10 for adults per week, and €5.30 for unaccompanied children. In the survey, Belgium also described its own ‘asylum crisis’, in which asylum-seeker numbers drastically exceeded capacity, and a court had fined the national reception authority for failing to provide accommodation and other entitlements as

¹⁷ The exceptions being Austria, Lithuania, Luxembourg, Portugal and the UK.

required by law. As a result, some accommodation had to be rented by the state from hotels. Thereafter, Belgian law was changed to remove entitlements for those filing a second asylum application after an earlier rejection.

France, which had not responded to some of the previous queries, indicated that single adults in reception centres received €91 per month if catering was provided, or €202 if they were required to cater for themselves – a relatively modest sum when taking into account the cost of living in some parts of the country. Italy provided a sobering picture of the level of entitlements available in that country, indicating that, apart from those who secured limited accommodation places at the regional level, asylum-seekers outside official centres would only have the right to financial assistance for their first 45 days in Italy. This amounted to a total of approximately €1,000 for the duration of the asylum process. Other reports have indicated that this support budget is sufficient for only 3,150 persons in total, and that those who do not fall within this number must find their own means of support.¹⁸

In April 2012, the EMN published responses to a question on the total estimated cost of the reception system in 2012. Among the 20 responses, Belgium indicated that the estimated cost of personnel in the reception authority was some €57 million, while the cost of running the collective centres came to just over €53 million. Funds provided to NGOs and local or other authorities in connection with some accommodation and services dispensed were close to €84 million.

By contrast, the total budget for reception (scope undefined) in Bulgaria in 2012 was set at €1.6 million. In other countries in Central Europe, it ran to the hundreds of thousands – Romania at approximately €546,000, and Slovenia at €662,000. Meanwhile, Estonia's sole reception centre cost €232,162 in 2012 (a jump of over €100,000 compared to the previous year).

Germany did not provide a figure, as the 16 *Länder* had independent reception systems for which total costs were not available. Italy estimated its costs at around €35 million per year, and Luxembourg at approximately €17 million. On a different scale, the costs in the Netherlands were €425 million, while Sweden set its support budget at €554 million.

¹⁸ E. Povoledo (2012), "The Italian Paradox on Refugees", quoting UNHCR Italy, *New York Times*, 27 December.

In sum, the limited available data from cross-European sources provide a clear demonstration of the unequal financial burdens borne by different states, and also the different levels of investment in their systems and of the standard and quality of services and entitlements on offer. In some states, in absolute euro terms (while noting differences in GDP) and in terms of the amounts provided to individuals, it would appear that social support for asylum-seekers is extremely low.

The limited survey conducted for this chapter also indicates that comparative data is difficult to obtain or analyse. The extreme divergences in the way in which states quantify and report the entitlements of asylum-seekers – even for the purposes of an EU-supported research and policy body such as the EMN – indicate the lack of readiness or ability to harmonise data-gathering and reporting. This absence of coherent information and calculation methods for social benefits and support to asylum-seekers renders meaningful policy debate and exchange among European states difficult or impossible. It also would appear likely to hamper the ability of states to develop well-informed policies and budgets for support of asylum-seekers even at national level, without useful indicators of good practice or standards.

2.2 *Social benefits and support to refugees and subsidiary protection beneficiaries*

The financial costs for states in providing support to refugees and subsidiary protection beneficiaries, recognised as being in need of international protection under international and EU law, prove extremely difficult to identify through public sources. Available comparative research and data gathered by or on behalf of the European Commission assesses in qualitative terms only the implementation of the Qualification Directive's obligations to provide support to those recognised as needing protection. The Commission noted in the 2009 Impact Assessment accompanying its proposal for a recast Qualification Directive¹⁹ that “there is no information available on the overall costs of hosting beneficiaries of protection”, and

¹⁹ European Commission, Commission Staff Working Document accompanying the proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted: impact assessment, SEC(2009)1373, 21.10.2009 (Qualification Directive Impact Assessment).

concedes that it was able to gather only “scant information [...] on specific aspects” which did not allow for “plausible estimates.”²⁰ The administrative burden associated with compiling disaggregated data for recipients of social benefits and public support, in all its forms, may mean that states are unable or unprepared to compile disaggregated data on support for refugees and holders of subsidiary protection, as distinct from other categories of welfare beneficiaries. If and where it is gathered, it would appear that data is not compiled in comparable form across states. This remains therefore an area in which further primary research would be needed to obtain a clear picture of the cost of providing social benefits to holders of protection in the EU.

Some insights into the practical implementation of the obligations under the Qualification Directive to provide support to refugees and subsidiary protection holders are available from research published by the Odysseus Academic Network in 2007,²¹ by the European Council for Refugees and Exiles (ECRE)/European Legal Network on Asylum (ELENA) in 2008,²² and by France Terre d’Asile in 2008,²³ as well as the European Commission’s analysis in its Impact Assessment, which drew on information provided by member states in response to questionnaires. These reports examined, among other things, the application of Article 28(1) of the 2004 Qualification Directive, requiring that beneficiaries of refugee status *and* subsidiary protection receive “the necessary social assistance as provided to nationals” of the member state that granted them protection.

Odysseus concluded that the concept of “necessary social assistance” was construed differently across member states. While some states considered that it should include only financial allowances, others extended it to some other benefits not otherwise covered by the

²⁰ Ibid.

²¹ Odysseus (2007), Directive 2004/83: Qualification Directive Synthesis Report, Study on the ‘conformity checking of the transposition by member states of 10 EC Directives in the sector of asylum and immigration’ done for DG JLS of the European Commission, Odysseus Qualification Study, Academic Network for Legal Studies on Immigration and Asylum in Europe.

²² ECRE/ELENA (2009), “The impact of the EU Qualification Directive on international protection”, October.

²³ France Terre d’Asile (2008), “La protection subsidiaire en Europe: une mosaïque de droits”, 5 September.

Qualification Directive, including at least some forms of housing support, clothing, assistance in job-seeking, health and other insurances, disability allowances, old-age and child benefits, or language courses.²⁴ It confirmed also that in several member states, the levels of social assistance for refugees or for subsidiary protection beneficiaries were not equivalent to those of nationals.²⁵

The available sources confirmed that the provision allowing member states to limit social assistance for subsidiary protection beneficiaries to “core benefits” only, under Article 28(2) of the 2004 Qualification Directive, was utilised by very few member states. The Commission’s impact assessment²⁶ cited the *Odysseus* Qualification study finding that Austria and Portugal made use of the discretion to limit social assistance to “core benefits”, the level of which varied in Austria across host regions.²⁷ A further Commission evaluation of the Qualification Directive in 2010 observed that Lithuania went so far as to “exclude” beneficiaries of subsidiary protection from social assistance “due to the temporary nature of their residence permit.”²⁸

The Commission also noted that Germany imposed additional preconditions upon grants of assistance for children and education, providing them to subsidiary protection beneficiaries only after three years of legal residence in the country.²⁹

The available sources also document differing approaches, involving restrictive approaches in some cases, to the provision of other forms of state support to subsidiary protection beneficiaries. Article 29(1) of the 2004 Qualification Directive required member states to provide health care

²⁴ *Odysseus* (2007), op. cit., Section 3.3.10.1, p. 111.

²⁵ *Ibid.*

²⁶ Op. cit., SEC(2009)1373, 21.10.2009; Annex 8.

²⁷ *Ibid.*; see also *Odysseus* (2007), op. cit., Section 3.3.10.2, pp. 113-4.

²⁸ European Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, COM(2010) 314 (Qualification Directive Evaluation), 16.6.2010, section 5.5.11.

²⁹ Op. cit., SEC(2009)1373, 21.10.2009, Annex 8; ECRE/ELENA (2009), op. cit., p. 256; France *Terre d’Asile*, op. cit., p. 49.

“under the same eligibility conditions as nationals” to those needing protection, but Article 29(2) permitted such health care to be restricted to “core benefits” in the case of subsidiary protection beneficiaries. The Commission noted that only Lithuania and Malta appeared to have used the possibility to limit health care in this way, while at least in Germany, certain forms of medical treatment were not available to subsidiary protection holders.³⁰ The obligation under Article 29(3) of the 2004 Directive to provide adequate health care to subsidiary protection beneficiaries with special needs was reportedly not transposed into national law in certain member states,³¹ while its implementation was problematic in others.³²

According to the Commission’s findings and research by other bodies, obligations to provide other state-funded entitlements under the Directive were also implemented in varying ways, with some notable gaps but some other positive approaches. While the 2004 Directive required access to accommodation “under equivalent conditions as other third country nationals” legally resident in the member states, under Article 21, the Commission observed that some states provided entitlements equivalent to those of nationals.³³ Evidence of states offering higher levels of entitlements than the Directive’s minimum standards was also apparent in relation to integration facilities, required under Article 33 of the 2004 Qualification Directive for refugees, but optional (“where it is considered appropriate by the member states”) for subsidiary protection beneficiaries. At least four member states were found to offer the same integration programmes to both categories of protection beneficiaries, including language courses and in some cases other elements such as social orientation and labour market integration support.³⁴

³⁰ European Commission, Qualification Directive Evaluation, section 5.5.12; on health care entitlements, see also Odysseus (2007), *op. cit.*, pp. 114-115.

³¹ These states included Bulgaria, Czech Republic, Estonia and the UK: *Ibid.*

³² Ireland, Latvia, Lithuania, Romania and Spain: *Ibid.*

³³ Ireland, Romania and Sweden: *Ibid.*; see, however, Odysseus Qualification study, p. 125, which noted that access to accommodation was subject to limits on freedom of movement and residence in certain member states.

³⁴ Ireland, Slovenia, Sweden and the UK (contrast Germany, with clear differentiation between two categories): Odysseus (2007), *op. cit.*, p. 127; France Terre d’Asile (2008), *op. cit.*

A further interesting observation emerges from the Odysseus Qualification study's analysis of the implementation of Articles 20(6) and (7). These paragraphs, which entitle member states to reduce benefits under the 2004 Qualification Directive where a person has engaged in activities "for the sole or main purpose of being recognised" as a refugee (paragraph 6) or as a person eligible for subsidiary protection (paragraph 7), were apparently not implemented in any of the 23 states examined in the study.³⁵ The insertion of this paragraph in the Directive appears to suggest that a perception of 'abuse' of the asylum system existed among states taking part in the legislative process. At the same time, it would also appear that states had found it impracticable or undesirable to penalise protection beneficiaries whose actions might have deliberately created their protection needs by depriving them of basic entitlements to support.

In sum, while the available data and analysis did not provide quantitative information about the cost of providing social benefits and other forms of assistance to refugees and subsidiary protection beneficiaries, they revealed significant differences in approaches to implementing the support obligations established by EU law. Moreover, research undertaken on the application of the 2004 Qualification Directive – including, notably, its provisions on assistance – underlined the differentiation in treatment between refugees on the one hand, and subsidiary protection beneficiaries on the other. According to the Commission and some states, a perception that subsidiary protection needs were in some way more temporary than refugee status underlies this differential treatment. However, this perception does not address the needs of subsidiary protection holders, which are not necessarily less than those of refugees or other people during their 'temporary' stay. Lack of familiarity with the concept of subsidiary protection³⁶ may explain the

³⁵ Austria, Belgium, Bulgaria, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Sweden and the UK: Odysseus Qualification study, pp. 85-86.

³⁶ K. Hailbronner states that some member states were 'not familiar with the legal status' of subsidiary protection beneficiaries in explanation of some of their positions in the negotiations leading to the 2004 Qualification Directive; see K. Hailbronner (ed.) (2010), *EU Immigration and Asylum Law: Commentary on EU Regulations and Directives*, Oxford: Hart Publishing, p. 1168; on differential entitlements to social welfare in particular (Article 28), see *ibid.*, p. 1192.

lesser readiness of some member states, who had not applied this form of protection in national law prior to the 2004 Qualification Directive, to invest in the same levels of support for subsidiary protection holders as for refugees, in a political context where the overall costs of the asylum system were perceived by the public as excessive.

3. Policy debates around social benefits and other forms of support

3.1 *Asylum-seekers*

Differing views about the appropriate levels of support for asylum-seekers have emerged most starkly in EU discussions in recent years in the negotiations on the recast Reception Conditions Directive. The Commission's original recast proposal of 2008,³⁷ which sought to raise standards and fill gaps in the 2003 Directive, proved so controversial with member states that in June 2011, the Commission issued a revised proposal which aimed at facilitating a swifter agreement.³⁸ However, difficulties in reaching consensus persisted,³⁹ including on provisions concerning state-funded social assistance. This section describes four key provisions which highlight, on the one hand, the concerns of states to limit costs and the possibility of 'abuse' of reception entitlements by asylum-seekers and, on the other hand, the efforts of the European Commission, Parliament, UNHCR, civil society and others to ensure adequate standards of treatment and support.

In relation to material assistance, the Commission had proposed to address problems identified by the Odysseus Reception study in relation to inadequate standards of support by increasing the minimum level of material assistance member states must provide. It had proposed to strengthen former Article 13 of the 2003 Directive by requiring material assistance, under proposed recast Article 17, which would ensure an

³⁷ European Commission, Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast), COM(2008) 815, 3.12.2008.

³⁸ See S. Peers (2012), "The EU Directive on Reception Conditions: A weak compromise", Statewatch Analysis, July, p. 1.

³⁹ This is noteworthy in light of some observers' critical assessment that the amended proposals did not require member states to raise their standards much; Ibid.

“adequate standard of living for applicants for international protection, which guarantees their subsistence and protects their physical and mental health”. To ensure this, it proposed that such entitlements “shall be determined on the basis of the point(s) of reference established by the member state concerned either by law or practice to ensure adequate standards of living for nationals, such as the minimum level of social welfare assistance.” However, member states were not prepared to accept such a specific commitment, maintaining that the level entitlements should be those established by member states, with no reference to minimum social welfare assistance.

“Necessary” health care for asylum-seekers had been limited under the 2003 Reception Conditions Directive to “at least, emergency care and essential treatment of illness”. The Parliament had proposed to extend this to include treatment of “mental disorders”, a provision which would inevitably increase the cost of care for states and which could, in the view of some states, be vulnerable to misuse. The Council, which had opposed any extension to the health care provisions, agreed finally to additional entitlements to treatment for “serious mental disorders”, a narrower (but important) category of asylum-seekers in need of support.

Provisions relating to the possibility to reduce or withdraw benefits, in recast Article 20, also proved extremely sensitive. While the European Parliament had proposed to prohibit the withdrawal of benefits from asylum-seekers, the Council by contrast had pressed for a far-reaching discretion to do so. The final agreement foresees that withdrawal may be possible “in exceptional and duly justified cases”, where one of several specified criteria applies.

The Commission had proposed, in the revised recast proposal, to abolish a provision allowing member states to reduce material assistance for asylum-seekers submitting applications later than at the first opportunity. The Council had pressed to retain broad discretion to reduce benefits, while the Parliament had argued in support of the Commission’s proposal to retain the same level of assistance for all asylum-seekers, including those applying late. The compromise which was finally achieved on recast Article 20(2) foresees that member states may reduce benefits, but only where they can demonstrate that the asylum-seeker had not applied as soon as “reasonably practicable”, and where the delay was due to “no justifiable reason”.

Another area of significant policy controversy around asylum-seekers’ rights concerns their access to the labour market. It could be

argued that ensuring early access to the labour market could reduce the burden imposed on the states by asylum-seekers claiming benefits. This reasoning holds that if such people can support themselves, the cost of social assistance will be lower, and may even be offset by contributions that working asylum-seekers could make to state revenues through taxation and economic activity.

However, the debate around this issue has revealed that this potential saving is not accepted by, or is not a political priority for, member states. On the contrary, when the Commission in the revised recast proposed to reduce the maximum period after which asylum-seekers would have access to the labour market, it proved to be among the most divisive elements in the negotiations.

Article 11 of the 2003 Reception Conditions Directive had required states to permit an asylum-seeker to work after a maximum of one year following his or her application, if a decision on the claim was not taken by that date. The Commission, with the support of the Parliament, had proposed to reduce the waiting period to six months. After extensive negotiations, the maximum period was set at nine months, precisely between the two positions. The debate brought to the fore member states' acute sensitivities about rising unemployment, with evident fears that the public would see more extensive work rights for asylum-seekers as depriving EU citizens of jobs. Paradoxically for a time of economic difficulty, the possibility of cost savings for European taxpayers through potentially reduced social benefit expenditures were not seen by member states as sufficient to justify a more flexible approach to the proposals.

3.2 Policy debates: Refugees and subsidiary protection beneficiaries

The recast negotiations leading up to the adoption of the revised Qualification Directive in December 2011 also highlighted the extensive range of concerns around the costs to EU member states of providing international protection. Four issues demonstrate this particularly clearly.

The first related to the differential levels of rights conferred on refugees and subsidiary protection beneficiaries under the 2004 Directive, including in relation to various forms of state-funded support benefits. The Commission, in its recast proposal, sought to remove states' discretion under the 2004 Directive to limit social assistance and health care for subsidiary protection holders to "core benefits" only. However, the proposal was contested in the negotiations, with at least some states

evidently concerned about costs. In the final text, the right of states to limit health care support to “core benefits” was removed, decreeing that health care must be available both to refugees and subsidiary protection holders at the same level as nationals. However, member states were not prepared to agree to a similar change in relation to social assistance, which under recast Article 29(2) can thus be restricted to “core benefits”.

This limitation had been severely criticised by observers including ECRE⁴⁰ and UNHCR, which had urged member states not to implement the provision. UNHCR noted the potential interlinkage between this Article and the 2004 Directive’s provisions allowing member states to restrict access for subsidiary protection beneficiaries to the labour market, as well as narrow family unity provisions that meant family members might receive no independent entitlements. Together, it was noted that these provisions had the potential to deprive subsidiary protection beneficiaries and their family members of the basic means of survival. It is noteworthy that states had insisted on maintaining this limitation in the absence of any clear economic data demonstrating that increased assistance to subsidiary protection beneficiaries would impose any unacceptable cost burden in the future.

The provision on state-funded integration facilities, by contrast, was strengthened in the 2011 Qualification Directive. A new mandatory obligation to “ensure access” to integration facilities (going beyond the previous requirement to “make provision”) now extends to subsidiary protection beneficiaries as well as to refugees. Recast Article 34 also establishes more detailed and demanding requirements on the content of integration programmes, which must “take into account the specific needs of beneficiaries of refugee status or of subsidiary protection.” The European Commission had proposed yet more far-reaching requirements, which would have confirmed that integration programmes “could include induction programmes and language training,” tailored “as far as possible” to respond to the needs of individual protection beneficiaries. This change would have addressed the insufficient national programmes it had observed in research on the implementation of the 2004 Directive.

⁴⁰ European Council for Refugees and Exiles (ECRE), ECRE information note on Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or persons who otherwise need international protection and the content of the protection granted, October 2004, pp. 16-17.

Given that expanded integration programmes would also potentially have significant cost implications, it is noteworthy that member states were prepared to agree to these changes. Persuasive arguments can be made that swifter integration into society can mean earlier self-reliance for refugees and subsidiary protection beneficiaries, which has the potential to reduce the time during which they are dependent on state support. However, this would also speak in favour of extending other entitlements, including more rights and support for family members of subsidiary protection beneficiaries, or residence permits of duration longer than one year – proposals that were not taken up in the recast process. Therefore, economic imperatives would not necessarily appear to be the sole factors influencing member states' positions on these issues in the recast process.

In an amendment which significantly strengthens the rights of both refugees and subsidiary protection beneficiaries, the recast Directive deletes the previous paragraphs permitting the reduction of the entitlements of refugees or subsidiary protection beneficiaries who had engaged in activities “for the sole or main purpose of creating the necessary conditions for being recognised.” This change, which responds to recent jurisprudence of the European Court of Human Rights on non-discrimination,⁴¹ also reflects the view of UNHCR, which had recalled that the Geneva Convention did not permit sanctions or lesser entitlements for refugees who had undertaken activities for the purpose of securing protection.⁴² Where a risk of persecution or serious harm is found, UNHCR highlighted that the subjective intent or motivation of the applicant is irrelevant to his or her need for protection and entitlement to associated basic rights. This international legal requirement, it is argued, must prevail over perceived political or cost benefits associated with withdrawing entitlements from a person who might have consciously taken risks that put him or her under threat of persecution or serious harm, regardless of his or her bona fide or other motivations.

4. Use of data

The limited review above suggests that reliable, comprehensive and comparable EU-wide data on costs of social assistance in the asylum field is

⁴¹ European Court of Human Rights, *Okpiz v Germany*, 59140/00, 15 February 2006; *Niedzwiecki v Germany*, 58453/00, 25 October 2005.

⁴² UNHCR (2005), Comment on Article 20(6), UN Refugee Agency, p. 36.

not readily available. This has severely limited the scope for rational discussion on cost arguments in favour of (or against) legislative change.

The lack of data has undermined the economic and logical foundations of some discussions during the recast negotiations, and increased the focus on subjective and political arguments. Some recent political discussions appear to have been predicated on broad assumptions that social welfare is costly, and state support vulnerable to potential 'abuse' by asylum-seekers, at least some of whom have no genuine protection needs. But at the same time, economic arguments in favour of giving asylum-seekers earlier access to the labour market, and affording protection beneficiaries the means to integrate and become self-reliant, were not accepted or fully explored. Data could not be used effectively by either supporters or opponents of increased work rights and other entitlements for asylum-seekers and subsidiary protection holders to support their cases and ensure a more informed debate.

The limited available secondary material, primarily in Commission, academic or civil society research and survey data, offers qualitative assessments and information about the implementation of some welfare obligations, but does not provide figures on costs across the EU. This indicates that further work could usefully seek to gather more data on the costs of social benefits and other forms of support from member states. This could provide a sounder basis for comparison, analysis and informed policy-making and budgeting than readily available material allows.

The Commission, in its impact assessment for the recast Qualification Directive proposal,⁴³ acknowledged the "severe strains" of the economic crisis upon member states' budgets, and that these could undermine public support for measures to improve the situation of protection beneficiaries. However, it also cited Eurobarometer research suggesting that attitudes towards 'genuine refugees' among EU citizens were broadly positive, and the humanitarian rationale underlying refugee protection was more widely accepted than some negative press coverage would suggest.⁴⁴ This view may explain, at least in part, why agreement was reached relatively swiftly

⁴³ Op. cit., SEC(2009)1373, 21.10.2009, section 2.2.8.

⁴⁴ See also T.J. Hatton (2005), "European Asylum Policy", *National Economic Institute Review*, Vol. 194, No. 1, pp. 106-119, 113, cited in the European Commission's Qualification Directive Impact Assessment: Op. cit., SEC(2009)1373, 21.10.2009.

on the Qualification Directive recast – covering people positively identified as needing refugee status or subsidiary protection – including its provisions on more extensive social benefits. By contrast, public perceptions of asylum-seekers – a significant proportion of whom will, on average, be rejected under EU asylum procedures – have undermined states’ interest in raising basic standards of assistance in the Reception Conditions recast. This is despite the fact that asylum-seekers’ basic human and material needs during their legal stay in the EU are the same as those of others with longer-term residence rights. Better compilation and use of economic data on the actual cost of legislative and policy options could help inform debate and encourage sounder, more sustainable and publicly justifiable choices in the future.

5. Policy recommendations

1. Competent EU institutions and agencies are encouraged to consider further research, undertaken by independent experts with specialised skills in economic data compilation and analysis, and knowledge of the asylum field on comparative costs of social assistance to asylum-seekers on the one hand, and protection beneficiaries on the other, based on the recast Directives.
2. Member states should be encouraged, with well-argued and clear explanations, to make available for comparative EU analysis all relevant budgetary information on expenditures relating to the support of asylum-seekers and protection holders. This should be seen as consistent with their own interests in more effective, efficient, consistent and well-informed policy and practice in this field.
3. Discussions on the use of EU financial instruments relevant to asylum and migration, including under the Asylum and Migration Fund (AMF) forming part of the Multiannual Financial Framework for 2014-2020, should be informed by analytical tools and research, including on the needs for and current levels of social benefits and other forms of support.
4. Attention should be paid to systems for the distribution of resources under the AMF, with the objective of ensuring a more efficient and targeted use of resources foreseen for support of those seeking and in need of protection. As part of this, distribution of funding under the AMF could be undertaken with reference to actual sums provided in support of asylum-seekers and protection beneficiaries, rather than overall budgets for reception and associated costs.

5. Detailed analysis of the impact on EU member states' labour markets should be undertaken to assess the respective costs of increasing or maintaining current limits on access to the labour market for protection seekers and beneficiaries. This analysis should take into account changing EU demographics and longer-term economic forecasts.
6. Analysis should be undertaken of the potential economic impacts of increasing mobility for refugees and protection beneficiaries in the EU. Given that limited long-term residence rights are only available after several years of lawful stay in a member state, economic opportunities may be being missed under current arrangements. This analysis should take into account the potential implications of introducing a transfer of protection mechanism, as foreshadowed in the Commission's 2008 Policy Plan on Asylum⁴⁵.
7. To help address member states' concerns about the risk of abuse of asylum systems, research should be undertaken into the cost implications of more efficient, high-quality asylum procedures, maintaining all essential safeguards, which can rapidly and accurately identify those in need of protection. Different models could be examined, with a view to identifying good practices in procedures and support among the member states.

⁴⁵ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Policy Plan on Asylum, an integrated approach to protection across the EU, COM(2008) 360, 17.6.2008.

6. EU REGULATIONS ON THE COORDINATION OF SOCIAL SECURITY SYSTEMS AND SPECIAL NON- CONTRIBUTORY BENEFITS: A SOURCE OF NEVER-ENDING CONTROVERSY

ROB CORNELISSEN^{*}

1. Introduction: Aim and legal basis of the EU Regulations

The objective of the EU Regulations on the coordination of social security systems is to make the right to free movement a reality by ensuring that a person is not penalised with regards to social security for having moved from one member state to another.

The EU Regulations only coordinate, and do not harmonise, the various social security schemes. They do not affect the freedom of member states to determine their own systems. Member states are, in principle, free to decide who is to be insured, what benefits should be granted, how they should be calculated, and for how long they should be granted.¹ However, when exercising those powers, member states must comply with the law of the Union.²

Depending on the social and political history of each state, member states limit the boundaries of their solidarity systems, sometimes on the

^{*} This chapter only reflects the personal views of the author and does not necessarily reflect the position of the European Commission.

¹ Case C-347/10 *Salemink* [2012], judgement of 17 January 2012, not yet reported, para. 38.

² *Ibid.*, para. 39.

basis of nationality, but mostly on the basis of territoriality.³ In general, this means that each state confines the scope of its national scheme by using territorial elements such as working or residing in that state. The objective of the EU Regulations is to overrule the application of these criteria based on nationality and territoriality. Without such an ambition, the goal of the EU Regulations to remove all barriers in the sphere of social security, which impede genuinely free movement, would not be met. Therefore, the prohibition of discrimination on the basis of nationality (i.e. equal treatment), the export of cash benefits, the aggregation of periods of insurance for entitlement to benefits and the removal of residence conditions for family benefits have, for many years, formed the basis of the European coordination of national social security systems.

From day one, the Treaty included a strong legal basis for legislation in the field of coordination of social security, in order to make the free movement of workers a reality. Under Article 51 EEC, the legislature was formed by the Council acting by unanimity. Article 51 EEC was, after the Treaty of Amsterdam, renumbered Article 42 EC. It introduced the co-decision procedure involving the Parliament and Council, but it still required unanimity within the Council.

Under the Treaty of Lisbon, Article 48 TFEU has brought two major changes in comparison with the old Article 42 EC. First, it provides a legal basis for the coordination of social security for employed and self-employed migrant workers and their dependents. The second change is that the Council and the Parliament continue to form the legislature together, but unanimity within the Council is replaced by a qualified majority, accompanied by a brake procedure. Article 21(3) TFEU constitutes a supplementary basis for all EU citizens not covered by Article 48 TFEU. There seems to be no doubt that, in the light of the general scope of the Treaty, Article 48 TFEU is the adequate and sufficient legal basis for future changes of the Coordination Regulations.⁴

³ R. Cornelissen (1996), "The principle of territoriality and the Community Regulations on social security (Regulations 1408/71 and 574/72)", *Common Market Law Review* Vol. 33, No. 3, pp. 439-471.

⁴ For the arguments, see R. Cornelissen (2012), "How difficult is it to change EU social security coordination legislation?", *Pravnik*, Vol. 129, No. 1-2, pp. 57-78. This issue of *Pravnik* (a Slovenian journal for legal researchers and practitioners) contains the presentations in English made by various speakers at the annual

A couple of years ago, we celebrated 50 years of European coordination of social security. In fact, Regulations 3 and 4 came into effect on 1 January 1959. These Regulations were replaced in 1972 by Regulations 1408/71 and 574/72. Subsequently, the coordination system was extended to self-employed persons in 1981,⁵ and students in 1999.⁶ These extensions of scope required, however, that recourse be made to the additional legal base in the predecessors of Article 352 TFEU.

In 2010, Regulations 1408/71 and 574/72 were replaced by the current Regulations 883/2004⁷ and 987/2009. These new Regulations apply to all EU nationals who are insured under national law, whether they are employed, self-employed, students or, indeed, non-active.

The abundant case law of the Court of Justice played an essential role in the development of the early coordination system set up under Regulation 3 into the system under Council Regulation 1408/71 and then into today's modernised Regulation 883/2004. In its very first judgement⁸ concerning the old Regulation 3, the Court of Justice clarified that all provisions laid down in the Regulations on social security should be interpreted in the light of the objective pursued by their legal basis, which aimed to facilitate freedom of movement.

conference of the European Institute of Social Security (EISS) held in Ljubljana, September 2011.

⁵ Council Regulation (EEC) No 1390/81 of 12 May 1981 extending to self-employed persons and members of their families Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community.

⁶ Council Regulation (EC) No 307/1999 of 8 February 1999 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 with a view to extending them to cover students.

⁷ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, modified by Regulation (EC) No 988/2009 the European Parliament and of the Council of 16 September 2009 and by Regulation (EU) No 465/2012 the European Parliament and of the Council of 22 May 2012.

⁸ Case 75/63 *Unger* [1964] ECR 177.

2. Controversy around ‘overprotection’ offered by the EU Regulations

Over the years, the EU Regulations on the coordination of social security systems have been well received, both by the persons covered as well as by the member states. Hardly anybody would contest that the EU Regulations provide a high standard of protection in the field of social security for people moving across borders within the EU.

On the contrary, there have always been voices claiming that the protection offered by these Regulations, as interpreted by the CJEU, goes too far and that member states with the highest level of social protection have to pay disproportionately favourable benefits to people covered by these Regulations. In 1988, for example, a social security professor in the Netherlands published her inaugural lecture, in which she suggested that the EU Regulations as interpreted by the CJEU constituted a threat to the residence-based social security schemes of the Netherlands.⁹ Not only in the Netherlands, but also elsewhere in Europe, the impression was sometimes given that the EU Regulations, as interpreted by the Court of Justice, could jeopardise the high level of protection given by the social security schemes of the northern member states.¹⁰ When I visited the Nordic states in the early 1990s during the process of negotiations leading to the European Economic Area (EEA) agreement, virtually all questions asked at seminars and conferences reflected the fear that the introduction of the EU Regulations on social security would lead to a massive influx of persons from the south of Europe to the Nordic states in order to benefit from the high level of social protection there.

⁹ W.M. Levelt-Overmars (1988), *“Halen de volksverzekeringen het jaar 2000?”* (“Will the Dutch residence based schemes still exist in the year 2000?”), Deventer: Kluwer. My critical review of her publication in *SMA (Sociaal Maandblad Arbeid)*, March 1989, triggered a rather polemic discussion between Prof. Levelt-Overmars and me, published in the May and October 1989 editions of *SMA* under the title: *“Herziening van de Nederlandse volksverzekeringen in Europees perspectief”*.

¹⁰ P. Clever (1993), “Evaluation de la jurisprudence de la Cour de Justice en matière sociale”, *Bulletin de liaison et d’information*, Nos. 1 and 2, p. 20, Centre de sécurité sociale des travailleurs migrants: “La Communauté (ou la jurisprudence communautaire) devient ainsi un frein pour une politique nationale progressiste. En exagérant un peu: si on veut tout accorder à tout le monde et partout, plus personne ne recevra rien et nulle part.”

Nowadays, the participation in national solidarity systems on the same basis as nationals is less disputed than previously, provided that the people coming from other member states are economically active.¹¹ But even in the case of economically active people, the EU Regulations are still criticised from time to time for the ‘overprotection’ they offer migrant workers. The attempt, a couple of years ago, by the Irish government to modify the rule laid down in Regulation 883/2004 according to which Polish and Lithuanian persons working in Ireland are entitled to Irish family benefits for their children residing in their country of origin, is just an illustration of such criticism.¹² It goes without saying that the provision in question¹³ is an expression of the principle of equal treatment required by Article 45 TFEU.¹⁴

3. A never-ending controversy: Special non-contributory benefits

No other part of the EU Regulations has been the source of such long-lasting and vivid controversy as the so-called “special non-contributory benefits”.

The current controversy concerns, in particular, access to minimum subsistence benefits in the host state by economically non-active people coming from other member states. In this context, it is useful to recall that the current Regulation 883/2004 applies to all EU citizens who are insured under national law, whether they are economically active or not.

When citizens coming from other member states are not economically active in the host state and do not have any other previous attachments to that state, the host state is naturally concerned to protect the financial balance of its social security system. In many circles, in particular in the popular press of some member states, the perception exists that the entitlement to certain benefits constitutes a decisive or perhaps the only motivation to exercise the right to free movement within the EU. Fears of

¹¹ H. Verschuere (2007), “European (Internal) Migration Law as an Instrument for Defining the Boundaries of National Solidarity Systems”, *European Journal of Migration and Law*, Vol. 9, No. 3, pp. 307-346.

¹² It seems that this attempt has recently been abandoned (see *Irish Times* of 12 October 2012).

¹³ Article 67 of Regulation (EC) No 883/2004.

¹⁴ Case 41/84 *Pinna* [1986] ECR I, para. 24.

benefit tourism are indeed inextricably linked to the free movement of economically non-active persons. Until now, we have lacked convincing facts and figures showing that the current system imposes an unreasonable burden on the public finances of those member states with the most generous minimum subsistence benefits (see below).

In this context, we should not forget that the majority of non-active persons were already covered by the old Council Regulation 1408/71. The concept of “employed person” within the context of Council Regulation 1408/71 referred to all persons who were covered by a social security scheme applicable to employed persons, even when they performed only work of a marginal extent¹⁵ excluding them from the scope of Article 45 TFEU. The actual nature of their work or even the question of whether they worked at all was irrelevant.¹⁶ The sphere of application was (and is) determined by a social security criterion and not by labour law.¹⁷ Indeed, the concept of “worker” used in the context of Article 45 TFEU and Regulation 492/2001 does not coincide with the definition applied in relation to Article 48 TFEU.¹⁸ All this means that the concept of “employed person” had to be interpreted extensively.

As the Court underlined in its case law, the concept of “self-employed person” used in Council Regulation 1408/71 was intended to guarantee to such persons the same protection as was accorded to employed persons and therefore had to be interpreted broadly, covering, for example, a missionary priest.¹⁹

The circle of persons covered by Council Regulation 1408/71 was not limited to persons who were “employed” or “self-employed”, but extended also to persons who had been “employed” or “self-employed”. In its original version, Council Regulation 1408/71 contained numerous provisions applicable to pensioners, such as the provisions that determined

¹⁵ Case C-2/89 *Kits van Heijningen* [1990] ECR I-01755.

¹⁶ Case C-543/03 *Dodl and Oberhollenzer* [2005] ECR I-05049, para. 30 and Case C-516/09 *Borger* [2011] ECR I-01493, para. 28.

¹⁷ Case C-543/03 *Dodl and Oberhollenzer* [2005] ECR I-05049, para. 31.

¹⁸ Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paras. 31,32,35 and 36, Case C-543/03 *Dodl and Oberhollenzer* [2005] ECR I-05049, para. 27 and Case C-208/07 *Von Chamier-Glisczinski* [2009] ECR I-06095, para. 68.

¹⁹ Case 300/84 *Van Roosmalen* [1986] ECR 3097, para. 20.

which member state was competent for providing health care to pensioners residing in another member state.

In addition, Council Regulation 1408/71 not only covered “employed” and “self-employed” persons, and retired “employed” and “self-employed” persons, it also covered the “members of the family”²⁰ and the “survivors”, whatever their nationality, of the aforementioned persons.

All this means that the group of European citizens not covered by Council Regulation 1408/71 was restricted to a very limited group of people, namely persons who had never been an “employed person” or “self-employed person” in any member state and who were neither a member of the family nor a survivor of such a person.²¹ For this reason, the substantive impact of the extension of the personal scope of Regulation 883/2004 to also include non-active people was rather limited.²²

3.1 The legislature: EU Regulations apply to social security, not to social assistance

As with the current Regulation 883/2004, Regulations 3 and 1408/71 applied only to legislation concerning social security. These Regulations made it clear, from the very beginning, that they applied to all statutory social security schemes, whether contributory or non-contributory.

Also in the same way as Regulation 883/2004, Regulations 3 and 1408/71 excluded explicitly social (and medical) assistance from their material scope. However, a definition of the term “social security” or “social assistance” was (and is) not to be found in any of these Regulations.

²⁰ Since the 1996 Cabanis-Issarte judgement (Case C-308/93 *Cabanis-Issarte* [1996] ECR I-02097), we know that members of the family can fully invoke the Regulation (including the equal treatment provisions) unless it concerns provisions which are applicable only to workers, such as the chapter “unemployment benefits”.

²¹ In addition, Council Regulation (EC) No 307/1999 extended the scope of Council Regulation (EEC) No 1408/71 to students even when they were no longer members of the family (e.g. students no longer fulfilled the age limits in order to be considered as a “member of the family”).

²² Obviously, the extension of the personal scope of Regulation (EC) No 883/2004 to include all EU nationals, including non-active people, had a strong symbolic importance and reinforced European citizenship.

3.2 *The court: Mixed type benefits brought under the material scope of Regulation 1408/71*

As G. Perrin indicated in 1961,²³ there are a number of non-contributory benefits – financed not by contributions but by taxes – which can be considered borderline benefits arising from the progressive integration, in various legislations, of social assistance into social security. These benefits were initially called “non-contributory benefits of a mixed type”, since they have the characteristics of social security and social assistance.

It was clear from the abundant case law of the CJEU that the question of how a benefit was classified under national legislation was not decisive. According to the Court, a benefit which had characteristics of “social assistance” – in that the payment of benefit was dependent upon the proof of need (“means test”) and the entitlement to benefit did not depend upon the completion of periods of insurance or periods of employment – could nevertheless be a social security benefit within the meaning of Council Regulation 1408/71. The CJEU clarified that such a benefit could be regarded as a “social security” benefit falling within the scope of Council Regulation 1408/71 in so far as it was granted to recipients on the basis of a legally defined position provided that it concerned one of the risks expressly listed in Article 4(1) of Regulation 1408/71. This meant that a number of benefits which were considered “social assistance” under the definition of the national legislation of the member state concerned actually fell within the material scope of Council Regulation 1408/71.²⁴

In other words, if a benefit aimed at meeting family expenses was granted automatically to families meeting certain objective criteria, it had to be treated as a family benefit under the definition of Council Regulation 1408/71 with all its consequences; the residence clauses provided for by national legislation as a condition for entitlement to the benefit in question were simply disapplied by virtue of the effect of Article 73 of Council

²³ G. Perrin (1961), “Les prestations non contributives et la sécurité sociale”, *Droit social*, p. 179.

²⁴ Examples: guaranteed income for old people in Belgium (Case 1/72 *Frilli* [1972] ECR 457), mobility allowance in the UK (Case C-356/89 *Stanton Newton* [1991] ECR I-03017), allowances of the Fonds National de Solidarité in France (Case 24/74 *Biason* [1974] ECR 999 and Joined Cases 379,380,381/85, and 93/86 *Giletti* [1987] ECR 955), social pension in Italy (Case 139/82 *Piscitello* [1983] ECR 1427).

Regulation 1408/71.²⁵ Likewise, insofar as the benefit in question was to be considered a pension – being linked to the risks of invalidity, old age or survival – the benefit had to be exported, by virtue of Article 10, even if national legislation confined the benefit in question to persons residing in its national territory.²⁶

There was, however, one important condition that the person claiming the mixed type benefit in a member state had to fulfil: having previously worked as an employed or self-employed person in that member state. This condition was imposed by the Court of Justice implicitly in the *Castelli* judgement²⁷ and explicitly in its *Stanton Newton* judgement. In the latter judgement, the Court of Justice said that only a person who “by reason of his previous occupational activity was already covered by the social security system of the State whose legislation was invoked” could invoke Council Regulation 1408/71 to be entitled to the mixed-type benefit in question.²⁸

3.3 The reaction of the legislature: Creating a separate coordination system with Council Regulation 1247/92

The reaction of the EU’s legislature to the CJEU’s judgements on “mixed-type” benefits was to adopt a new Council Regulation (EEC) No 1247/92.²⁹ The objective of this Regulation was two-fold. First, it “translated” the case law of the CJEU into the wording of the Regulation, by stipulating in Article 4(2a) that Council Regulation 1408/71 also applied to “special non-contributory” benefits.

The second objective of this Regulation was to create an exception from the case law of the CJEU by introducing a separate coordination system for “special non-contributory” benefits in order to avoid their exportability. The new Article 10a(1) of Council Regulation 1408/71 stipulated that persons “to whom this Regulation applies” should be

²⁵ Case C-78/91 *Hughes* [1992] ECR I-04839.

²⁶ Joined Cases 379,380,381/85, and 93/86 *Giletti* [1987] ECR 955.

²⁷ Case 261/83 *Castelli* [1984] ECR 3199.

²⁸ Case C-356/89 *Stanton Newton* [1991] ECR I-03017, paras. 15-18.

²⁹ Council Regulation (EEC) No. 1247/92 of 30 April 1992 amending Regulation (EEC) No. 21408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community.

granted the special non-contributory benefits listed in Annex IIa “exclusively in the territory of the member state in which they reside, in accordance with the legislation of that state”. Such benefits should be “granted by and at the expense of the institution of the place of residence.”

To compensate for the non-exportability of these benefits, member states took up full responsibility for granting “special non-contributory benefits” to every person covered by Council Regulation 1408/71 residing within their territory.³⁰ In fact, three special provisions³¹ were inserted into the Regulation to reinforce the legal position of persons residing in a member state claiming a “special non-contributory benefit” there. Persons covered by Council Regulation 1408/71 should have access to “special non-contributory benefits” in their member state of residence on the same conditions as nationals of that state.

In other words, the position of member states was reinforced, because they were liberated from the obligation to export “special non-contributory benefits”, provided that these benefits were listed in Annex IIa (Article 10a (1)). This was mirrored by the reinforcement of the position of persons covered by Council Regulation 1408/71 towards the institution of the member state of residence, through the special aggregation and assimilation provisions of Articles 10a(2), (3) and (4).³² These reinforcing provisions meant that it was no longer necessary to prove that the person claiming the “special non-contributory benefit” in the member state of residence had previously worked there. In the very first judgement in which it was asked to give its view on the validity of the new separate coordination system for the “special non-contributory benefits”, the CJEU explicitly underlined that “benefit entitlement is not conditional on the claimant’s having previously been subject to the social security legislation of the state in which he applies for the benefit, whereas this was the case prior to the entry into force of Regulation 1247/92.”³³

³⁰ H. Verschueren (2009), “Special Non-Contributory Benefits in Regulation 1408/71, Regulation 883/2004 and the Case Law of the ECJ”, *European Journal of Social Security*, Vol. 11, pp. 217-234.

³¹ Articles 10a (2), (3) and (4) of Regulation 1408/71.

³² See also the conclusions of Advocate General Léger in Case C-20/96 *Snares* [1997] ECR I-06057, paras. 92 and 93.

³³ Case C-20/96 *Snares* [1997] ECR I-06057, para. 48.

It is also important to recall that when Council Regulation 1247/92 was adopted, the Council had, only two years earlier, adopted three Directives on the right of residence for students,³⁴ pensioners³⁵ and non-active people.³⁶ These Directives granted the EU nationals concerned the right of residence in another member state subject to certain conditions. The latter two Directives concerning pensioners and non-active people included having “sufficient resources” as a condition.³⁷ As set out above, the majority of non-active people were covered by Council Regulation 1408/71. According to Council Regulation 1247/92, they should have access to “special non-contributory benefits” in their member state of residence on the same basis as nationals of that state. Council Regulation 1247/92 did not make any reference to Directives 90/364 or 90/365 at all. If the person covered by Council Regulation 1408/71 could prove that he was residing in the member state where the claim for “special non-contributory benefit” was made, then he was entitled to this benefit in the same way as nationals of that state.

3.4 *The court: A separate system is compatible with the Treaty*

In three judgements concerning UK benefits listed in Annex IIa as inserted by Council Regulation 1247/92, the Court confirmed the validity of the separate coordination system for special non-contributory benefits. On the one hand, this meant that these benefits were no longer exportable.³⁸ On the other hand, the Court of Justice made it clear that, under this new system, payment of such benefits was conditional upon the claimant residing in the territory of the member state concerned. In the *Swaddling* case, the CJEU clarified that the term “residence” had a Community-wide

³⁴ Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students; by judgment of 7 July 1992 (Case C-295/90 *Parliament vs. Council* [1992] ECR I-04193) the Court annulled this Directive while maintaining the effects of the annulled Directive until the entry into force of Directive 93/96.

³⁵ Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity.

³⁶ Council Directive 90/364/EEC of 28 June 1990 on the right of residence.

³⁷ Higher than the level of resources below which the host member state may grant social assistance to its nationals.

³⁸ Case C-20/96 *Snares* [1997] ECR I-06057 and Case C-297/96 *Partridge* [1998] ECR I-03467.

uniform meaning, based on criteria defined in Community law and not on criteria used in the national legislation of the various member states. In fact, the objective of the EU Regulations on social security is to avoid people being penalised for having moved from one member state to another. A nationally defined residence concept could lead to a situation where a person, despite having lived all his life in the EU, was not considered a resident by the legislation of any member state.³⁹

Mr Swaddling had worked in France for several years before being made redundant there. He returned to the UK, his member state of origin, where he lived with his brother. His application for income support was refused because he did not satisfy the conditions laid down in UK legislation in order to be considered as “habitually resident” in the UK. According to this legislation, the habitual residence presupposed an appreciable period of residence in the UK in addition to the intention of residing there. The case was finally considered by the Court of Justice, and the CJEU ruled that the concept of “habitual residence” in the context of Council Regulation 1408/71 referred to the member state where the person’s habitual centre of interests is to be found. In that context, account should be taken of a number of factors specified by the CJEU. The length of residence in the member state in which payment of the benefit is sought cannot be regarded as an intrinsic element of the concept of residence within the meaning of Council Regulation 1408/71. The CJEU made clear that Mr Swaddling did satisfy the condition concerning residence within the meaning of Council Regulation 1408/71.

In all three judgements, the Court of Justice concluded that the benefits in question had to be considered as “special non-contributory benefits” by reason of the fact that they were listed in Annex IIa.⁴⁰

In subsequent case law, however, the CJEU ruled that the simple fact that a benefit was listed in Annex IIa was not in itself sufficient to mean that the benefit in question was a “special non-contributory benefit”. On the contrary, for every benefit in question it had to be examined whether it was indeed a “special” and “non-contributory” one. The *Jauch* judgement⁴¹ concerning the Austrian care allowance, listed in Annex IIa, marked this

³⁹ Verschueren (2009), op. cit.

⁴⁰ Case C-20/96 *Snares* [1997] ECR I-06057, para. 32; Case C-297/96 *Partridge* [1998] ECR I-03467, para. 33; Case C-90/97 *Swaddling* [1999] ECR I-01075, para. 24.

⁴¹ Case C-215/99 *Jauch* [2001] ECR I-01901.

new phase of case law. Referring to the objective of Articles 39-42 EC, the CJEU stated that, even when it is permissible for the Community legislature to adopt provisions which derogate from the principle of exportability of social security benefits, such derogations must be interpreted strictly. After careful examination of the Austrian benefit in question, the CJEU came to the conclusion that, notwithstanding its listing in Annex IIa, the benefit was neither “special” nor “non-contributory”. According to the CJEU, the Austrian benefit was a sickness benefit in the sense of Article 4(1) of Council Regulation 1408/71 and could therefore not be a “special non-contributory benefit” in the sense of Article 4(2a).

A couple of months later, the Court of Justice examined in the *Leclere* judgement⁴² whether the Luxembourg maternity allowance, listed in Annex IIa, was “special”. The Court of Justice replied in the negative and declared this part of Annex IIa invalid.

These two judgements showed that a benefit which satisfied the conditions of a “social security benefit” within the meaning of Article 4(1) – a family benefit or a sickness benefit, for example – could not be considered a “special non-contributory benefit”⁴³ in the sense of Article 4(2a) of Council Regulation 1408/71.

3.5 Regulation 647/05: Tightening the conditions for benefits to fall under the separate system

The *Jauch* and *Leclere* judgements were an encouragement for the legislature to review the whole coordination system for “special non-contributory” benefits. In 2003, The Commission presented⁴⁴ a proposal for criteria that had to be fulfilled for benefits to be considered “special” and “non-

⁴² Case C-43/99 *Leclere and Deaconescu* [2001] ECR I-04265.

⁴³ This was later confirmed by the judgement in Case C-286/03 *Hosse* [2006] ECR I-01771.

⁴⁴ European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71, COM(2003) 468, 31.7.2003.

contributory.” When adopting Regulation 647/2005,⁴⁵ the legislature accepted the Commission’s proposal for the wording of the new criteria with hardly any changes.⁴⁶

Having in mind the broad interpretation of the terms “sickness benefit”⁴⁷ and “family benefit”⁴⁸ as given by the Court of Justice, within the meaning of Article 4(1), the legislature tightened the conditions for a benefit to be considered as a “special non-contributory” one within the meaning of Article 4(2a) of Council Regulation 1408/71.

In addition, the distinction between the two categories of “special non-contributory benefits” – Article 4(2a)(i) on the one hand, and Article 4(2a)(ii) on the other – became much clearer. The first category covers benefits aimed at helping people in financial need (*“guarantee a minimum subsistence income having regard to the economic and social situation of the member state concerned”*). The second category concerns benefits aimed at helping people who are in need of assistance in order to participate in daily life of society (*“solely protection for the disabled, closely linked to the said person’s social⁴⁹ environment in the member state concerned”*).

The current Regulation 883/2004 contains the same criteria as Regulation 647/05.

To reflect the fact that the coordination system for “special non-contributory benefits” had really been revised, and not merely adapted by Regulation 674/05, the content of Annex IIa was amended as a whole.

A large number of benefits which had been listed in Annex IIa prior to the coming into force of Regulation 647/05 were not included in the new

⁴⁵ Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 amending Council Regulations (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, and (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71.

⁴⁶ There was only a slight difference in the wording of the criterion “non-contributory” contained in Article 4 (2a).

⁴⁷ Case C-160/96 *Molenaar* [1996] ECR I-00843 and Case C-215/99 *Jauch* [2001] ECR I-01901.

⁴⁸ Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-04895; Case C-275/96 *Kuusijärvi* [1998] ECR I-03419; Case C-255/99 *Humer* [2002] ECR I-01205; Case C-333/00 *Maaheimo* [2002] ECR I-10087.

⁴⁹ No reference is made to “economic” environment as is the case in the first category.

Annex, since they had to be considered either as “family benefits” or as “sickness benefits” covered by Article 4(1) of Council Regulation 1408/71. In accordance with the general principle of exportability of cash social security benefits required by Council Regulation 1408/71, benefits no longer listed in Annex IIa had to be paid to the persons fulfilling the conditions for entitlement, even when they did not reside in the member state from which they claimed the benefit.

3.6 Controversy continued: Dispute over five entries in Annex IIa of Regulation 1408/71

When negotiating the Commission proposal, three member states insisted on having five entries in the new Annex IIa that did not, in the opinion of the Commission, correspond to the concept of “special” benefits because they concerned “sickness benefits” or “family benefits” within the meaning of Article 4(1) of Council Regulation 1408/71, as interpreted by the Court of Justice. However, the UK made it clear that it would never accept the Commission’s proposal unless its three entries concerning disability living allowance⁵⁰, attendance allowance and carer’s allowance were included in Annex IIa. Sweden took the same position regarding its disability allowance, and Finland concerning its childcare allowance.

To avoid blocking the progress made in the other parts of the proposal, the other member states felt that they had to accept, at least for the time being, the inclusion of these benefits in the Annex.⁵¹ Following the adoption of Regulation 647/2005, the Commission brought an action against the legislature (Council and Parliament) before the Court of Justice under former Article 230 EC.⁵² The purpose of the action, which was without precedent in the field of social security, was to annul Regulation 647/2005 in so far as it retained the five entries in Annex IIa.⁵³ With its

⁵⁰ Only the care component of the disability living allowance was disputed. The mobility component clearly fulfilled the conditions of being “special” in the sense of Article 4 (2a) of Regulation 1408/71.

⁵¹ The negotiations took place under former Article 42 EC: co-decision by Council and Parliament and unanimity within Council required.

⁵² Corresponding to the current Article 263 TFEU.

⁵³ As to the disability living allowance of the UK, the request only concerned the care component.

judgement of 18 October 2007⁵⁴ the CJEU indeed annulled the five entries⁵⁵ concerned. According to the CJEU, the benefits in question were sickness benefits within the meaning of Article 4(1) and therefore could not be “special” benefits in the sense of Article 4(2a) of Council Regulation 1408/71.

3.7 *Current controversy: The relationship with Directive 2004/38/EC*

Where in the past, controversy concentrated mainly on whether the benefits in question were “special” benefits (non-exportable) or classical social security benefits (exportable), current controversy relates to the other side of the separate coordination system. More specifically, it concerns the question of which conditions apply to persons to have access to special non-contributory benefits listed in Annex X of the current Regulation 883/2004 in their member state of residence. As said before, this controversy mainly concerns non-active people and brings us to another question: What is the relationship between Directive 2004/38/EC and the separate coordination system set up by Regulation 883/2004 for the “special non-contributory benefits”?

3.7.1 *Residence rights for economically inactive EU citizens in the host state under Directive 2004/38/EC*

The right of EU citizens to move and reside freely within the territory of the members states is enshrined in Article 21 TFEU and Article 45 of the EU Charter.

Directive 2004/38/EC⁵⁶ specifies the rights of residence of EU citizens (and members of their family) who move within the European Union and defines certain conditions and limitations. This Directive repealed a number of old legal instruments, such as the three Directives dating from the 1990s concerning students, pensioners and non-active people. The

⁵⁴ Case C-299/05 *Commission vs. Council and Parliament* [2007] ECR I-08695.

⁵⁵ As to the disability living allowance of the UK, the annulment only concerned the care component.

⁵⁶ Directive 2004/38/EC of 29 April 2004.

Directive has also repealed two Articles of Council Regulation 1612/68,⁵⁷ but makes no reference to Regulation 883/2004.

Contrary to Regulation 883/2004, there is no definition of “residence” to be found in Directive 2004/38/EC; the term seems to cover both habitual residence and temporary stay.

By virtue of Article 7(1) of Directive 2004/38/EC, the right of residence for more than three months for economically inactive persons is subject to the condition that they have sufficient resources for themselves and their family members so as not to become a burden on the social assistance system of the host member state, as well as to the condition that they have comprehensive sickness insurance. These conditions regarding sufficient resources and comprehensive sickness insurance do not apply to workers and self-employed people.⁵⁸

3.7.2 Entitlement to “social assistance” for economically inactive EU citizens in the host member state

Article 24(1) of Directive 2004/38/EC guarantees to all EU citizens residing on the basis of the Directive in the territory of the host member state equal treatment with the nationals of that state within the scope of the Treaty. However, as regards social assistance, Article 24(2) of Directive 2004/38/EC stipulates that the host member state shall not be obliged to confer entitlement to social assistance during the first three months of residence. Likewise, Article 14(1) of the Directive only guarantees the retention of the right of residence for the first three months as long as the EU citizen does not become an unreasonable burden on the social assistance system of the host state.

3.7.3 Directive 2004/38/EC and the separate coordination system of Regulation 883/2004 for “special non-contributory benefits”

According to Article 11(3)(e) of Regulation 883/2004, non-active people are subject to the legislation of the member state of residence. As said before, the concept of “residence” defined by Regulation 883/2004 has an EU-wide

⁵⁷ The repealed Articles were Articles 10 and 11 of Regulation 1612/68. Regulation 1612/68 has been codified and replaced in 2011 by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the EU.

⁵⁸ Article 7(1)(a) of Directive 2004/38/EC.

meaning. According to Article 1(j) of Regulation 883/2004, this refers to the place where a person habitually resides. It depends on a number of factors, as indicated by the CJEU in the *Swaddling* judgement, aimed at determining the centre of interest of the person concerned. Where there is a difference in views between the institutions of two or more member states over the determination of the residence of a person, Article 11 of Regulation 987/2009⁵⁹ stipulates that these institutions shall establish by common agreement the centre of interests of the person concerned based on an overall assessment of all available information and taking into account a list of factors.

A number of member states, however, have imposed on the entitlement to “special non-contributory benefits” listed in Annex IIa of Regulation 883/2004 for non-active people coming from another member state the condition that they have a residence right there in accordance with Directive 2004/38/EC. The question is whether such conditions laid down in national legislation for entitlement to “special non-contributory benefits” within the meaning of Regulation 883/2004 are compatible with EU law.

3.7.4 *Two pending preliminary cases*

It is expected that the judgements to be delivered by the Court of Justice in two pending preliminary cases will soon give us the answer to this question. The first case concerns Mr Brey, a German national who is in receipt of a modest German invalidity pension. In 2011, he transferred his residence to Austria where he applied for an Austrian compensatory supplement – a “special non-contributory benefit” – listed in Annex X of Regulation 883/2004. This benefit is aimed at guaranteeing the person concerned a minimum subsistence income in Austria. If, for instance, a person receives a pension lower than the minimum subsistence income applicable in Austria, then he will be entitled to the supplement. However, Austrian legislation restricts the entitlement to such supplements to persons who are legally residing in Austria. Mr Brey’s claim for the supplement was refused by Austrian because, in order to reside legally in Austria, a (non-active) person must have sufficient resources for himself and the members of his family. Since Mr Brey only receives a pension that

⁵⁹ Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004.

is lower than the minimum subsistence level in Austria, he did not, in the view of the Austrian authorities, have legal residence in Austria. The case eventually reached the Court of Justice. The main issue here concerns the question of whether or not Mr Brey is entitled to the Austrian supplement. However, the question referred to the CJEU focuses on the right of residence. The Court is asked to give judgement on the question of whether the Austrian compensatory supplement is “social assistance” within the meaning of Article 7(1) of Directive 2004/38/EC. As stated above, Article 7(1) of Directive 2004/38 applies to the right of residence for more than three months for non-active people the condition that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host state.

The second case concerns UK legislation. By virtue of UK legislation, entitlement to all “special non-contributory benefits” listed in Annex X Section UK is subject to the condition that the claimant has a right to reside in the UK. The right to reside may arise under either domestic or EU law.

In 2006, Ms Saint Prix, a French national, came to the UK. After having worked in various jobs, she became a student. Having become pregnant, she withdrew from her studies in order to start agency work. She stopped working in March 2008 and made a claim for Income Support, a special non-contributory benefit listed in Annex IIa of Regulation 1408/71.⁶⁰ Ms Saint Prix’s claim was refused by the UK authorities on the grounds that she did not have a right to reside in the UK. Ms Saint Prix appealed against this decision and the case reached the UK Supreme Court. As in the Brey case, the nub of the matter concerned the claimant’s right to be paid a “special non-contributory benefit” within the meaning of Council Regulation 1408/71. However, the questions addressed to the CJEU focus on the right of residence of the claimant. In fact, the Supreme Court asks whether Ms Saint Prix was a worker within the meaning of Directive 2004/38/EC. As stated above, the conditions concerning sufficient resources required by Directive 2004/38/EC for economically non-active people do not apply to workers. In this context, it is relevant to mention that the compatibility of the right-to-reside test with EU law, in particular with the right of equal treatment guaranteed by Article 3 of Council Regulation 1408/71, was brought before the UK’s Supreme Court in 2011 in

⁶⁰ Regulation 1408/71 was replaced by Regulation 883/2004 only on 1 May 2010.

the case of *Patmalniece*,⁶¹ but that the UK Supreme Court did not see fit to refer the legality of the right-to-reside test to the Court of Justice.

It is possible that the CJEU will stick to the questions raised and limit itself to answering the question of whether or not Ms Saint Prix was a worker within the meaning of Article 7 of Directive 2004/38/EC. Hopefully the CJEU will also give its view on the compatibility of the right-to-reside test with EU law, in particular as regards Council Regulation 1408/71.⁶²

3.7.5 Does “social assistance” within the meaning of Directive 2004/38/EC include special non-contributory benefits within the meaning of Regulation 883/2004?

There seem to be arguments for the conclusion that the term “social assistance” used in Directive 2004/38/EC does not cover benefits falling within the material scope of Regulation 883/2004 such as special non-contributory benefits and other social security benefits.

The EU Regulations on the coordination of social security systems have, from the very beginning, excluded from their scope “social and medical assistance.”⁶³ It is true that “special non-contributory benefits” have some characteristics of social assistance, but they also display characteristics of social security. That is the very reason why the CJEU has made clear in its abundant case law dating from the 1970s that such benefits fall within the scope of the EU Regulations on the coordination of social security systems. In 1992, this case law was “translated” into the text of Council Regulation 1408/71 and later into Regulation 883/2004.

The Commission’s proposal for Directive 2004/38/EC was clearly marked by the consideration that social assistance within the meaning of Articles 7(1)(b) and 24(2) of the Directive could only be benefits which “*at the present stage (were) not covered by Community law.*”⁶⁴ Indeed, there was –

⁶¹ *Patmalniece vs. Secretary of State for Work and Pensions*, (2011) UK SC 11.

⁶² This Regulation was still applicable on the date Ms Saint Prix made her claim.

⁶³ Article 2(3) of Regulation 3, Article 4 (4) of Regulation 1408/71 and Article 5 of Regulation 883/2004.

⁶⁴ Explanatory Memorandum to the Commission’s proposal on Article 7(1) and Article 24(2) of Directive 2004/38/EC as adopted: European Commission, Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001) 257, 23.5.2001.

and still is – no specific coordination regime at the EU level for social⁶⁵ and medical assistance. Likewise, there is still no specific coordination regime at the EU level for maintenance aid for studies.⁶⁶ This explains the very existence of the specific provisions on maintenance aid for studies in Article 24(2) of Directive 2004/38/EC corresponding to Article 21(2) of the Commission proposal.

However, as stated above, it had been clear since the 1970s that special non-contributory benefits fell within the scope of application of the EU Regulations on the coordination of social security systems. Therefore, in the Commission's view, special non-contributory benefits could not be considered to be "social assistance" within the meaning of Directive 2004/38/EC.

In this context, it is also important to refer to the CJEU's judgement in the *Vatsouras* case.⁶⁷ This judgement concerned the right of EU citizens to "benefits to cover subsistence costs under the basic provision for jobseekers."⁶⁸ As regards these benefits, the CJEU ruled: "*Benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting "social assistance" within the meaning of Article 24(2) of Directive 2004/38*". Very recently, the CJEU confirmed that Article 24(2) of Directive 2004/38/EC must be interpreted narrowly and in accordance with the principles of the Treaty.⁶⁹ In a general way, there is no indication whatsoever that the EU legislature, when adopting Directive 2004/38/EC, sought to limit the rights to benefits already existing under Council Regulation 1408/71 and Regulation 883/2004. Directive 2004/38/EC does

⁶⁵ That does not exclude, of course, a possible application of Regulation 492/2011: Case 249/83 *Hoeckx* [1985] ECR 973 and Case 122/84 *Scrivner and Cole* [1985] ECR 1027.

⁶⁶ This does not exclude, of course, a possible application of Regulation 492/2011: Case C-33/99 *Fahmi and Cerdeiro-Pinedo Amado* [2001] ECR I-02415.

⁶⁷ Joined Cases C-22/08 and 23/08 *Vatsouras and Koupatantze* [2009] ECR I-04585, in particular para. 45.

⁶⁸ This is a "special non-contributory benefit" listed in Annex X of Regulation 883/2004.

⁶⁹ Case C-46/12 *L.N.* [2013], judgment of 21 February 2013, not yet reported, para. 33.

not contain any reference to the aforementioned Regulations.⁷⁰ In its *Metock* judgement,⁷¹ the Court ruled that “Union citizens cannot derive less rights from this directive [Directive 2004/38/EC] than from the instruments of secondary legislation which it amends or repeals.” It seems obvious that this is all the more true for secondary legislation which is neither repealed nor amended by Directive 2004/38/EC.

However, in its conclusions of 29 May 2013 in the *Brey* case,⁷² the Advocate General is of the opinion that the Austrian benefit in question does constitute “social assistance” for the purposes of Article 7(1)(b) of Directive 2004/38. There seem to be some inconsistencies in his argumentation. Referring to the *Hosse* judgement⁷³ he states that “the concepts of “social security benefit” and “special non-contributory benefit” are thus mutually exclusive”.⁷⁴ This is wrong. In the *Hosse* judgement, the Court ruled that a social security benefit within the meaning of Article 4(1) of Regulation 1408/71 cannot be analysed as a “special non-contributory benefit”. In other words, if a benefit is a ‘classical’ social security benefit, it cannot be a “special non-contributory benefit”. In the *Hosse*, judgement the Court acknowledged that a “special non-contributory benefit” is nevertheless a social security benefit covered by Regulation 1408/71! Moreover, the Advocate General says⁷⁵ that “the aim of Articles 3(5)(a) and 70(4) of Regulation 883/2004 is to prevent the export of the benefits which they govern”. It is surprising that the Advocate General treats Article 3(5)(a), which concerns social assistance being excluded from the material scope of the Regulation, on the same footing as Article 70(4), which deals with “special non-contributory benefits”. True, the purpose of the first sentence of Article 70(4) is to prevent export of “special non-contributory benefits”. But the purpose of the second sentence of Article 70(4) is to guarantee the access of “special non-contributory benefits” to all persons

⁷⁰ Directive 2004/38/EC and Regulation 883/2004 were adopted on the same day (29 April 2004)!

⁷¹ Case C-127/08 *Metock* [2008] ECR I-06241, para. 59.

⁷² Case C-140/12: Reference for a preliminary ruling from the Oberster Gerichtshof (Austria), lodged on 19 March 2012 — *Pensionsversicherungsanstalt vs. Peter Brey*.

⁷³ Case C-286/03 *Hosse* [2006] ECR I-01771.

⁷⁴ See Opinion of Advocate General Wahl in Case C-140/12, delivered on 29 May 2013, para. 49.

⁷⁵ *Ibid.*, para. 56.

covered by Regulation 883/2004 who reside in the host state on the basis of equal treatment as nationals of that state. This second sentence of Article 70(4) of Regulation 883/2004 is ignored in the conclusions of the Advocate General.

3.7.6 *Is the right-to-reside test compatible with EU law?*

As set out above, the conditions for the granting of special non-contributory benefits in the host state have, since 1992, been exhaustively regulated by EU law. After 1992, it was no longer necessary to prove that the person claiming the “special non-contributory” benefit in the member state of residence had previously worked there; he was entitled to be treated in the same way as nationals of the host state. For the purpose of Regulation 883/2004, the term “residence” has an EU-wide meaning as indicated in the *Swaddling* judgement. It is of a factual nature: where is the person’s centre of interests? The idea of “residence” within the meaning of Council Regulation 1408/71 (or Regulation 883/2004) never depended on the legality of that residence. If the person concerned could prove that his centre of interests was in the host state, then he was entitled to “special non-contributory benefits” provided by the legislation of that state. Implicitly, the EU legislature at that time accepted that a person covered by Council Regulation 1408/71, who proved that his centre of interests was in the host state, had shown he had a sufficient genuine link with the host state in order to claim payment of special non-contributory benefits.

A requirement in national legislation that claimants comply with an additional condition, namely the right to reside, as a basis for accepting that they actually “reside” in the host state within the meaning of Regulation 883/2004 seems to be incompatible with this Regulation. Moreover, it constitutes indirect discrimination based on nationality. In fact, this additional requirement is intrinsically liable to affect nationals of other member states to a greater extent than nationals of the host state.⁷⁶

3.7.7 *Does “residence” demonstrate a sufficient genuine link with the host state? Case law on European citizenship*

As referred to above, member states, with a view to protecting the financial balance of their social security systems, ask that persons coming from other member states can demonstrate a certain degree of integration in the host

⁷⁶ Case C-124/99 *Borawitz* [2000] ECR I-07293, in particular, paras. 25-27.

state before they can be eligible for special non-contributory benefits.⁷⁷ In a number of judgements concerning non-contributory benefits, the Court of Justice has stated that such aims are legitimate and are capable of justifying restrictions on the rights on freedom of movement and residence under Article 21 TFEU.⁷⁸ Most of this case law concerned benefits falling outside the scope of Regulations 1408/71 and 883/2004, such as genuine social assistance benefits,⁷⁹ benefits for war victims⁸⁰ and study loans or grants⁸¹, or benefits where Council Regulation 1408/71 could not be applied, given the circumstances of the specific case.⁸² The Court of Justice has also referred to this requirement in relation to a non-contributory benefit falling within the scope of Council Regulation 1408/71.⁸³ With regards to this last judgement, we should not forget that the benefit in question was not a “special” non-contributory benefit within the meaning of Council Regulation 1408/71. Therefore, the benefit in question in the *Stewart* case fell under the classical coordination rules, including the exportability laid down in Article 10 of Council Regulation 1408/71.

The CJEU also underlined that measures restricting the free movement of EU citizens, where they pursue a legitimate objective, must

⁷⁷ See F. Van Overmeiren, E. Eichenhofer and H. Verschueren (2011), “Social security coverage of non-active persons moving to another Member State”, Analytical Study, Network on the Coordination of Social Security Schemes in the European Union, TrESS (Training and Reporting on European Social Security) (retrievable from www.tress-network.org).

⁷⁸ Case C-224/98 *D’Hoop* [2002] ECR I-06191.

⁷⁹ Case C-184/99 *Grzelczyk* [2001] ECR I-06193 and Case C-456/02 *Trojani* [2004] ECR I-07573.

⁸⁰ Case C-192/05 *Tas-Hagen* [2006] ECR I-10451; Case C-499/06 *Nerkowska* [2008] ECR I-03993; Case C- 221/07 *Zablocka-Weyhermüller* [2008] ECR I-09029.

⁸¹ Case C-209/03 *Bidar* [2005] ECR I-02119 and Case C-158/07 *Förster* [2008] ECR I-08507.

⁸² Case C-138/02 *Collins* [2004] ECR I-02703; Case C-212/05 *Hartmann* [2007] ECR I-06303 and Case C-213/05 *Geven* [2007] ECR I-06347.

⁸³ Case C-503/09 *Stewart* [2011] ECR I-06497; in para. 92 of this judgment the Court stated that “where acquisition of entitlement to a non-contributory benefit is not subject to conditions as regards contributions, it can be considered to be legitimate for a Member State to award such benefit only after it has been established that there was a genuine link between the claimant and the competent State”.

not go further than is necessary to achieve that goal.⁸⁴ The proportionality principle requires that a person should be enabled to demonstrate his degree of integration via a variety of relevant connecting factors or criteria, taking into account all individual circumstances of the case. A dominant connecting factor or criterion for the establishment of the genuine link should be avoided.

The concept of “residence” in Regulation 883/2004 seems to be in line with the CJEU’s case law concerning the requirement of a certain degree of integration. The variety of elements to be taken into account in order to establish whether a person does indeed have habitual residence in a member state appears to fit into this case law concerning the genuine link. It was the CJEU which introduced this variety of factors when interpreting the term “residence” in Council Regulation 1408/71.⁸⁵ The concept has now been elaborated further and codified in Article 11 of Regulation 987/2009. The evaluation based on all relevant individual circumstances referred to in Article 11 of Regulation 987/2009 seems to align with the way the CJEU has interpreted the establishment of a certain degree of integration between the claimant of social benefits and the member state granting the benefit.

It would be wrong to conclude that under the current system, every non-active EU citizen could go to another member state and claim special non-contributory benefits there. This right is restricted to those persons who do actually reside in the host state. The practice shows that often a social security institution assumes that the place of residence is identical to the place that a person has declared as his home address. A clarification of the term “residence” within the meaning of Regulation 883/2004 could exclude a number of possibly unjustified claims.

To this end, the Administrative Commission for the coordination of social security systems last year created an ad hoc group to provide guidance on the determination of the place of residence within the meaning of Regulation 883/2004. This group has very recently presented its final report which contains a number of concrete examples aimed at drawing attention to specific characteristics that might be common to many cases

⁸⁴ Case C-138/02 *Collins* [2004] ECR I-02703; Case C-192/05 *Tas-Hagen* [2006] ECR I-10451; Case C- 221/07 *Zablocka-Weyhermüller* [2008] ECR I-09029 and Case C-503/09 *Stewart* [2011] ECR I-06497.

⁸⁵ Case 76/76 *Di Paolo* [1977] ECR 315; Case C-102/91 *Knoch* [1992] ECR I-04341 and Case C-90/97 *Swaddling* [1999] ECR I-01075.

(e.g. students, pensioners, and inactive highly mobile persons). The report will be discussed by the Administrative Commission, most probably before summer 2013.

The mere fact that the EU legislature accepted in 1992 the habitual residence condition of Council Regulation 1408/71 (now Regulation 883/2004) as creating a sufficient genuine link between the claimant and the host member state for entitlement to “special non-contributory benefits” does not mean, of course, that this is an irreversible choice. If there was convincing evidence showing, on the basis of facts and figures (see below), that the current system leads to unreasonable consequences for member states with the most generous minimum subsistence benefits, then the EU legal framework could and should be revised. The Think Tank of the network of independent (academic) experts on coordination of social security systems, trESS, presented in 2011 an analytical report containing an interesting idea on how the current legal framework could be modified without affecting the principles of coordination.⁸⁶ In fact, the report suggests a modified notion of “residence” in Regulation 883/2004 for the application of the separate coordination system of “special non-contributory benefits”. A waiting period could be introduced before the person is entitled to such benefits in the host state. It would mean that during the first period of “residence” within the meaning of Directive 2004/38/EC, a person is not yet considered to be a resident of the host state within the meaning of Regulation 883/2004, unless this person can prove the opposite.⁸⁷ During this waiting period, the person concerned would be considered as having kept his residence within the meaning of Regulation 883/2004 in the member state of origin. In other words, the member state of origin continues to be the competent state for entitlement to special non-contributory benefits during the waiting period.

This suggestion is interesting, because it respects the principles of the coordination system whilst also meeting the concerns of the member states in relation to the coverage of non-active persons. If the waiting period were to be fixed at three months, then the period would also correspond to the social assistance exception of Article 24(2) of Directive 2004/38/EC.

⁸⁶ See F. Van Overmeiren, E. Eichenhofer and H. Verschueren (2011), *op. cit.*

⁸⁷ This possibility to provide proof of a really existing genuine link with the host State is important given the need to take into account the principle of proportionality when restricting the free movement of persons.

However, we should be very careful envisaging any further modification of the conditions for entitlement to “special non-contributory benefits”. In the first place, the habitual residence condition of Council Regulation 1408/71 (now Regulation 883/2004) to create a sufficient genuine link between the claimant and the host member state for entitlement to “special non-contributory benefits” was a crucial element of the balance achieved by the EU legislature when agreeing to end the export of these benefits. Perhaps even more importantly, we should not forget that this balance also played a role for the CJEU when it decided that the non-exportability of such benefits was not incompatible with the objective of former Article 42 EC, namely to protect people who make use of their right to free movement.⁸⁸

3.7.8 *The importance of facts and figures*

Claims that the current system leads to benefit tourism in the member states with the most generous “special non-contributory benefits” have become more and more vociferous, and we should take the concerns expressed by several member states seriously. But before deciding on any change to the current legal framework (see above), we need to collect and consider facts and figures.

In 2011, the Think Tank of trESS made an effort to gather, through a questionnaire sent to member states, statistical information on the number of cases related to possible issues with non-active people. The vast majority of the member states responding to the questionnaire declared that no such data was available in their systems.⁸⁹ Uncertainty still remains over the size and the impact of the alleged problematic issues.

Therefore, the Commission launched in late 2012 a study to obtain statistical data on past, current and potential future flows of non-active intra-EU migrants, breaking down the data by category of migrant, such as jobseekers, pensioners, students, people with disabilities and other non-active migrants. The study aims to cover the drivers for migration as well as access to special non-contributory benefits of non-active intra-EU migrants and its impact on member states’ social security systems.

⁸⁸ Case C-20/96 *Snares* [1997] ECR I-06057, paras. 46-49.

⁸⁹ See Van Overmeiren, Eichenhofer and Verschueren (2011), op. cit.

4. Conclusions

It is apparent that, in the current state of EU law, Directive 2004/38/EC does not restrict access to special non-contributory benefits covered by Regulation 883/2004. On the one hand, no provision of Directive 2004/38/EC refers to Regulation 883/2004. On the other hand, the application of Regulation 883/2004, in particular its provisions granting access to special non-contributory benefits in the state of residence and its definition of the term “residence”⁹⁰, has not been made subject to the need to fulfil the criteria for obtaining a right of residence under Directive 2004/38/EC. Likewise, the Court of Justice has never referred to Directive 2004/38/EC, or to the legal instruments repealed by this Directive, when interpreting the term “residence” within the meaning of the EU Regulations on the coordination of social security systems. Entitlement to special non-contributory benefits listed in Annex X of Regulation 883/2004 depends only on the condition that persons have their habitual centre of interests in a member state. Any other interpretation would undermine the balance agreed by the EU legislature in 1992 between the limitations on the export of these benefits in the event of migration and the obligation for the new member state of residence to grant the benefits listed in Annex X.⁹¹ Any other interpretation would also deprive the provisions of Regulation 883/2004 of their effectiveness.⁹²

The concept of “residence” in Regulation 883/2004 seems to be in line with the CJEU’s case law concerning the requirement of a certain degree of integration in the host state.

Before deciding on any change to the current legal framework, we need to have the facts and figures. As mentioned above, an initiative to obtain statistical data on past, current and potential future flows of non-active EU migrants has been launched recently.

The preparatory works leading to Directive 2004/38/EC seem to indicate that special non-contributory benefits within the meaning of Regulation 883/2004 cannot be considered as “social assistance” in the

⁹⁰ Laid down in Article 11 of the implementing Regulation 987/2009.

⁹¹ The benefits are listed in Annex X on the explicit request of the member state concerned (and after careful examination by the legislature whether the conditions for being “special” and “non-contributory” are fulfilled)!

⁹² Verschueren (2007), *op. cit.*

sense of Directive 2004/38/EC. It is, therefore, difficult to imagine that the mere act of invoking Regulation 883/2004 in the host state in order to obtain access to special non-contributory benefits would result in “having become an unreasonable burden on its social assistance system” within the meaning of Article 14(1) of Directive 2004/38/EC.

All this would imply that an EU citizen who resides, within the meaning of Regulation 883/2004, in the host member state and who has, thanks to this Regulation, obtained a special non-contributory benefit there, probably fulfils the subsistence requirement under Directive 2004/38/EC for obtaining or maintaining a right of residence in the host State. But, of course, it is up to the Court of Justice to rule on this question.

7. DOES GENEROUS WELFARE ATTRACT IMMIGRANTS? TOWARDS EVIDENCE-BASED POLICY-MAKING

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1. Introduction

In the past 20 years, both immigration and spending have substantially increased in the European Union. The European discourse about migration policy heated up with the eastern expansion of the Union in 2004 and 2007. Given the significant income differentials and other dissimilarities between incumbent EU member states (EU15) and the new entrants (EU8+2 and EU2),¹ fears of negative effects on the labour market and welfare systems have been voiced in the receiving countries.² A specific concern put forward was the notion that migrants are especially attracted to countries that provide more generous welfare provisions, the so-called ‘welfare-magnet hypothesis’.

In spite of the recent attenuating effect of the Great Recession on migration to the European Union and of the generally low interstate mobility rates within the Union,³ many EU member states host significant

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¹ EU15 includes Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Portugal, Spain, Netherlands, Sweden, and the United Kingdom. EU8 includes the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia; EU8+2 adds Cyprus and Malta, and EU2 is comprised of Bulgaria and Romania.

² H.-W. Sinn and W. Ochel (2003), “Social Union, Convergence and Migration”, *Journal of Common Market Studies*, Vol. 41, No. 5, pp. 869–896.

³ I.S. Gill and M. Raiser (2012), *Golden Growth: Restoring the Luster of the European Economic Model*, Washington, D.C.: World Bank.

immigrant populations.⁴ These populations are on average well skilled and mobile, but often suffer from segmentation and exclusion from labour markets and other spheres of life.⁵ As these welfare magnet concerns have begun to affect policy-making, it is necessary to confirm their validity with hard empirical evidence.⁶ In fact, misinformed policies could be the reason behind some difficulties which migrant populations face.

In this chapter, we review recent studies on whether generous public spending attracts immigrants to the EU. We focus on the EU15, since about 94% of immigrants to the EU27 reside there.⁷ We first look at the general development of welfare spending and migration, identifying some trends and stylised facts. We then critically evaluate the European evidence and confront it with studies possessing similar contexts. The technical aspects of the statistical evaluation of the studied relationship are discussed next.

We conclude that current empirical evidence suggests weak or no magnet effects. This has important implications for the policy debate, which appears to be rather misinformed regarding this topic. In the final section, we discuss methodological implications as well as challenges for evidence-based policy.

2. Is immigration related to welfare spending?

Welfare spending has traditionally been high in the EU15, but over the past 20 years it has reached particularly high levels (Figure 1). In 2011, EU15 member states on average devoted nearly one-quarter of GDP to welfare

⁴ M. Kahanec (2013), “Skilled Labor Flows: Lessons from the European Union”, Social Protection and Labor Discussion Paper No. SP 1301, World Bank, Washington, D.C.

⁵ See A.F. Constant, M. Kahanec and K.F. Zimmermann (2009), “Attitudes Towards Immigrants, Other Integration Barriers, and their Veracity”, *International Journal of Manpower*, Vol. 30, No. 1-2, pp. 5-14; and M. Kahanec, K.F. Zimmermann, L. Kurekova and C. Biavaschi (forthcoming), “Labour Migration from EaP Countries to the EU - Assessment of Costs and Benefits and Proposals for Better Labour Market Matching” (www.iza.org/files/ENPImatching.pdf).

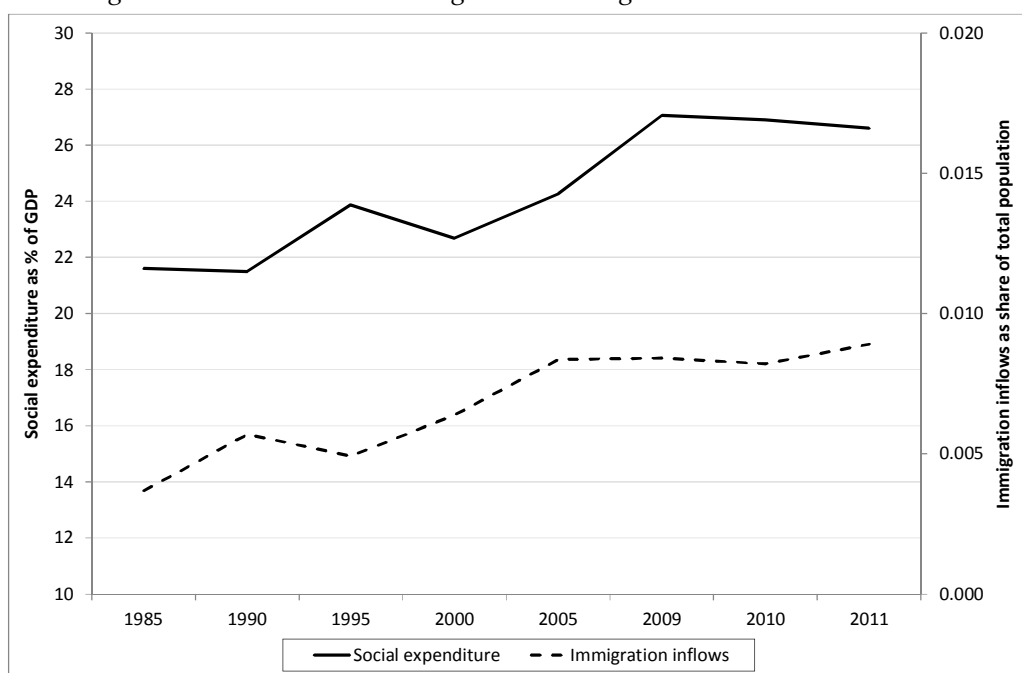
⁶ For an account of the recent debate in the UK, see www.bbc.co.uk/news/uk-22712569 and www.economist.com/news/britain/21573144-government-wants-curb-benefits-eu-migrants-can-it-once-more-onto-breach.

⁷ This figure is based on our own calculations using Eurostat data (http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Migration_and_migrant_population_statistics).

spending. Yet spending varies substantially across countries, both in terms of level and composition (Figure 2). Pension spending is the highest component of expenditure in most countries, but is nearly three times higher in Italy than in Ireland. Expenditure on health is more homogenous across countries (between 6% and 8%). Spending on unemployment benefits is highest in Belgium and Spain and lowest in the UK.

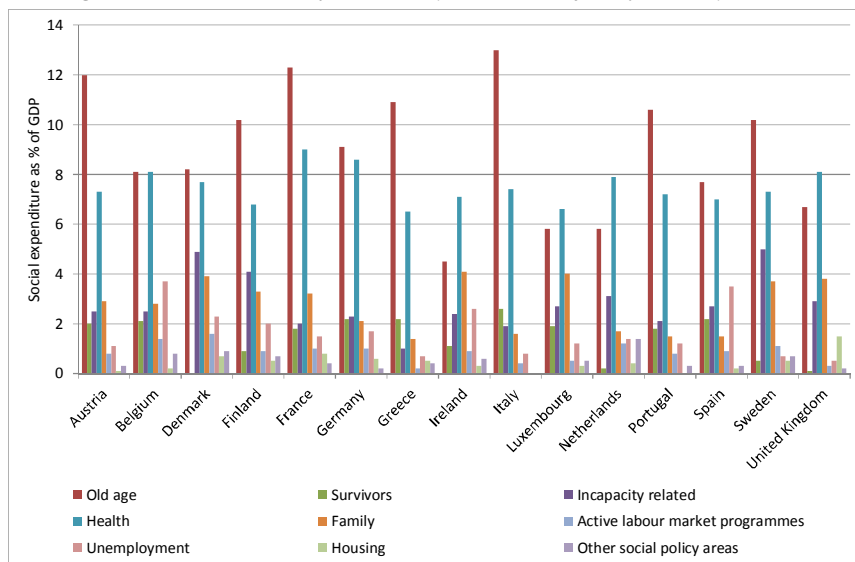
In parallel, over the past 20 years immigration to the EU15 has increased substantially. In 2011, one in eight residents was born in another country.⁸ This high stock of immigrants has been reached principally due to rising immigration flows over the past 30 years (Figure 1).

Figure 1. Attitudes towards migrants – immigrants' tax contribution



Source: Own elaborations from OECD International Migration Database and from OECD SOCX database, 1985-2011.

⁸ Ibid.

Figure 2. Breakdown of social expenditure by major components

Source: Own elaboration from OECD SOCX database, 2009. For detailed definitions of expenditure components, see W. Adema, P. Fron and M. Ladaïque (2011), "Is the European welfare state really more expensive? Indicators on social spending, 1980-2012; and a Manual to the OECD Social Expenditure Database (SOCX)", OECD Social, Employment and Migration Working Paper No. 124, OECD, Paris.

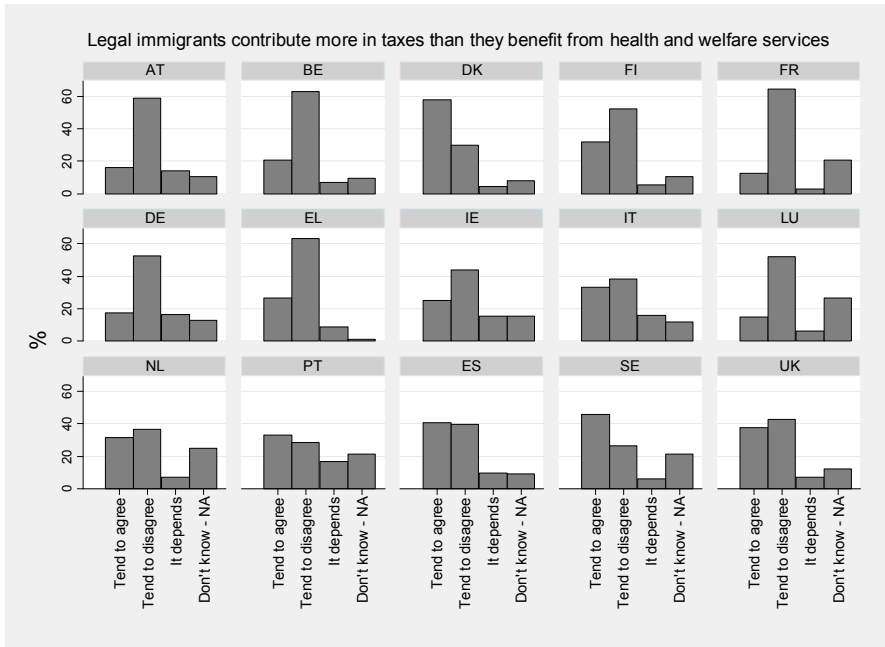
The public debate about the consequences of immigration to the EU has perhaps increased at a greater speed than immigration itself and has climaxed in recent years. In many countries, there are public worries that immigrants "take jobs" from natives, or that they constitute a fiscal burden to the extent that they contribute to the public system less than they receive in social benefits.

Data on attitudes towards migrants show that across the EU15, there is a rather high share of individuals who are sceptical about migrants contributing enough to the social system.⁹ Such opinions can be driven by individuals' perceptions and feelings, but are often instilled by the media or originate from the political arena. The rise of anti-immigration sentiment

⁹ European Commission (2010), Eurobarometer 71: Future of Europe: (http://ec.europa.eu/public_opinion/archives/eb/eb71/eb713_future_europe.pdf).

and of political parties strongly opposed to immigration is a clear indicator on how the immigration debate has become a key issue for Europe.

Figure 3. Attitudes towards migrants



Source: Own elaboration from Eurobarometer data, 2009. DE includes the samples of East and West Germany; UK includes the samples of Great Britain and Northern Ireland. Figures refer to simple averages for each sample (data accessed at www.gesis.org/en/eurobarometer/data-access/).

Whether such worries are warranted in any way (i.e. whether immigration benefits or hinders the host country) is very much an empirical question, which economists have explored for the past 20 years or so. The picture that emerges is that immigration does not substantially impact the wages or employment in the host region; this appears to hold across countries, including EU member states.¹⁰

¹⁰ Contributions to the analysis of the economic effects of immigration include: G.J. Borjas (1994), "The Economics of Immigration", *Journal of Economic Literature*, Vol. 32, No. 4, pp. 1667-1717; G.J. Borjas (2003), "The Labor Demand Curve is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market", *Quarterly Journal of Economics*, Vol. 118, No. 4, pp. 1335-1374; D. Card

This chapter reviews the literature and major economic studies discussing whether or not welfare acts as a magnet for immigrants in the EU15. Before doing so, we first describe the EU15's current patterns of welfare and migration using data gathered for this chapter. The scope is to introduce the reader to the complexities behind obtaining empirical evidence on this issue and to familiarise her with the topics discussed in the review.

First, it is certainly possible that there is a 'raw positive association' between immigration flows and welfare spending in host countries. Both spending and immigration flows as a whole increased in the EU15 at a similar rate (see Figure 1). The raw correlation between the two aggregate series is a staggering 0.82.

However, such positive association *per se* is often misleading and stems from a spurious correlation operating through other variables – such as macroeconomic fundamentals – which share the same positive trend as immigration and public spending. The effect of such confounding factors could be isolated by the means of regression analysis. Using this statistical tool for the pool of 15 member states over the period 1985–2011 produces a positive, but rather mild, association, even when narrowing the attention to inflows from developing countries (see column 1 in Table 1). A correlation of 0.011 for the case of developing countries implies that if public spending increases by 1%, flows would increase – in relative terms – by about 1.5%.

A spurious correlation between migration and welfare spending may arise when putting in relation these variables with contextual ones with which they share similar trends. In a regression framework, one way to directly control for such co-movements is to add indicators for each year

(1990), "The Impact of the Mariel Boatlift on the Miami Labor Market", *Industrial and Labor Relations Review*, Vol. 43, No. 2, pp. 245-257; D. Card (2001), "Immigrant Inflows, Native Outflows, and the Local Labor Market Impacts of Higher Immigration", *Journal of Labor Economics*, Vol. 19, No. 11, pp. 22-64; D. Card (2005), "Is the New Immigration Really So Bad?", *The Economic Journal*, Vol. 115, No. 507, pp. 300-323; for the US, K. Butcher and D. Card (1991), "Immigration and Wages: Evidence from the 1980s", *The American Economic Review*, Vol. 81, No. 2, pp. 292-296; for the UK, C. Dustmann, F. Fabbri and I. Preston (2005), "The Impact of Immigration on the British Labour Market", *Economic Journal*, Vol. 115, No. 507, pp. 324-341; for Germany, F. D'Amuri, G. Ottaviano and G. Peri (2010), "The Labor Market Impact of Immigration in Western Germany in the 1990s", *European Economic Review*, Vol. 54, No. 4, pp. 550-570.

(see column 2 in Table 1). Another – or additional – strategy is to control for destination-specific, time-varying factors, such as the unemployment rate (see column 3 in Table 1). After implementing year fixed effects and controlling for the unemployment rate, the positive raw correlation between migration and welfare generosity becomes essentially zero, or even negative in some cases.

Table 1. Regression of immigration inflows on social expenditure

| | OLS | | | Panel data | | |
|--------------------------------|--|---------------------|-----------------------|---------------------|--------------------|---------------------|
| | Immigrants - inflows from EU15 | | | | | |
| Social expenditure as % of GDP | 0.0010 (0.0026) | -0.0041 (0.0030) | -0.0050 * (0.0029) | -0.0012 (0.0045) | | -0.0007 (0.0049) |
| Unempl expenditure as % of GDP | | | | | 0.0320 (0.0220) | |
| Soc. Exp X Year>=2008 | | | | | | -0.0070 (0.0038) |
| R ² | 0.001 | 0.094 | 0.121 | 0.341 | 0.413 | 0.360 |
| | Immigrants - inflows from other OECD | | | | | |
| Social expenditure as % of GDP | 0.0019 (0.0013) | 0.0010 (0.0016) | 0.0000 (0.0015) | -0.0019 (0.0022) | | -0.0019 (0.0022) |
| Unempl expenditure as % of GDP | | | | | 0.0047 (0.0156) | |
| Soc. Exp X Year>=2008 | | | | | | -0.0004 (0.0008) |
| R ² | 0.024 | 0.113 | 0.298 | 0.374 | 0.370 | 0.374 |
| | Immigrants - inflows from A10 | | | | | |
| Social expenditure as % of GDP | 0.0031 (0.0026) | -0.0049 (0.0029) | -0.0054 * (0.0031) | 0.0008 (0.0040) | | 0.0018 (0.0038) |
| Unempl expenditure as % of GDP | | | | | 0.0261 (0.0153) | |
| Soc. Exp X Year>=2008 | | | | | | -0.0125 (0.0074) |
| R ² | 0.022 | 0.367 | 0.385 | 0.650 | 0.612 | 0.705 |
| | Immigrants - inflows from developing countries | | | | | |
| Social expenditure as % of GDP | 0.0106 * (0.0059) | -0.0085 (0.0065) | -0.0075 (0.0063) | 0.0120 (0.0094) | | 0.0131 (0.0106) |
| Unempl expenditure as % of GDP | | | | | 0.0321 (0.0312) | |
| Soc. Exp X Year>=2008 | | | | | | -0.0140 (0.0101) |
| R ² | 0.048 | 0.436 | 0.446 | 0.690 | 0.665 | 0.701 |
| Year effects | N | Y | Y | Y | Y | Y |
| Unemployment rate | N | N | Y | Y | Y | Y |
| N | 104 | 104 | 104 | 104 | 78 | 104 |

Source: Own computations from OECD international migration database and from OECD SOCX database, 1985-2009. Unemployment rate is obtained by Eurostat Labour Force Survey Statistics 1985-2009. Observations are weighted by the population size of each country.

More sophisticated methods to control for confounding factors come from the use of panel data methods. These allow for control of unobserved heterogeneity of each country, namely time-variant specific factors which are usually not observed by the analyst. Fixed effects panel data methods applied to our data corroborate that there is no statistical evidence of a magnet effect (see column 4 in Table 1). The same overall conclusion is reached if we focus on a particular component of expenditure, unemployment benefits spending. In all samples, the estimated correlation is statistically insignificant, with very small magnitudes (an estimate of 0.03 for developing countries would imply that a 1% increase in unemployment benefit spending would increase migration by 0.3%).

While panel data methods are useful to address problems of identification, there are additional challenges when trying to identify the welfare magnet hypothesis. Some of these are related to immigration and welfare measurement, others pertain to the possibility that the two variables are endogenous. The size and direction of the bias derived from these issues are *a priori* unknown. In the following section, we explore how recent studies have coped with such challenges.

3. Recent evidence from the European Union

A few studies have attempted to assess whether immigrants are attracted by welfare. Here we review three recent studies that have explored this question within the European Union.¹¹

Pedersen et al. analyse the determinants of immigration flows into 22 OECD countries (including the whole EU15 except Ireland) over the period 1990-2000.¹² Their comprehensive origin-destination database allows accounting for the bilateral 'distance' between countries in income per capita and unemployment rates – two of the most important factors

¹¹ For comprehensive reviews on this topic, see P. Nannestad (2007), "Immigration and Welfare States: A Survey of 15 Years of Research", *European Journal of Political Economy*, Vol. 23, No. 2, pp. 512-532; and C. Giuliotti and J. Wahba (2013), "Welfare Migration", in K.F. Zimmermann and A.F. Constant (eds.), *International Handbook on the Economics of Migration*, Cheltenham: Edward Elgar Publishing, pp. 489-504 (pre-publication version available at <http://ftp.iza.org/dp6450.pdf>).

¹² P.J. Pedersen, M. Pytlikova and N. Smith (2008), "Selection and Network Effects: Migration Flows into OECD Countries 1990-2000", *European Economic Review*, Vol. 52, No. 7, pp. 1160-1186.

determining immigration. The study finds that besides such macroeconomic factors, social networks are an important determinant for immigrants. On the other hand, social expenditure as a per cent of GDP – the authors' measure of welfare – only weakly influences immigration.

De Giorgi and Pellizzari analyse whether more welfare-generous countries attract immigrants in the EU15 by combining micro-level data from the European Community Household Panel (ECHP) with information from the OECD Database on Unemployment Benefit Entitlements and Replacement Rates.¹³ They measure welfare generosity using the net replacement rate (NRR), which corresponds to the ratio between out-of-work income (e.g. unemployment benefits) and the average wage. They estimate the correlation between the location choice of immigrants from outside the EU15 and the NRR using various specifications. Their conclusion is that there is a statistically significant but small effect in the sense that immigrants tend to locate in more generous welfare countries. In terms of size, the effect of welfare is smaller in magnitude than the magnet effect of other incentives, such as wages or lower unemployment. Yet, according to the simulations carried out by the authors, the effect is deemed large enough for welfare to be non-trivially affecting labour mobility within the European Union.

There are several reasons why results from De Giorgi and Pellizzari differ from Pedersen et al. Besides differences in the data sources, the paper by De Giorgi and Pellizzari uses a sample of immigrants observed at a certain point in a country and correlates it with the level of benefits at the time of arrival. The paper by Pedersen and co-authors uses origin-destination migration flows – a more 'macro' approach. Both papers only partially address the problem of causality. De Giorgi and Pellizzari assess that the correlation between observables – namely, the welfare measure and other covariates such as unemployment rate and wages – is low and hence deduce that the role of unobservable confounding factors is limited. Pedersen et al. reduce the potential bias by using panel methodology and by exploiting the availability of origin-destination flows, which allow for better control of unobserved heterogeneity.

In a more recent paper, Giulietti et al. directly tackle the issue of endogeneity by using an instrumental variable (IV) approach within a

¹³ G. De Giorgi and M. Pellizzari (2009), "Welfare Migration in Europe", *Labour Economics*, Vol. 16, No. 4, pp. 353–363.

panel setting.¹⁴ The authors analyse immigration flows into 19 European countries over the period 1993-2008. The measure of welfare generosity is represented by unemployment benefit spending as a percentage of GDP. The ordinary least squares (OLS) estimates on panel data show that the unemployment benefit positively correlates with immigration inflows from non-EU countries; the association is not large, yet it is statistically significant. On the other hand, inflows from EU origins are essentially uncorrelated with unemployment benefit spending, and the same conclusion is reached when only cross-country variation is explored. The positive association between immigration and welfare could be driven, the authors argue, by the endogeneity between the two variables. In order to cope with this issue, the authors adopt the number of parties in the government coalition as an instrumental variable that predicts immigration only through its effect on unemployment benefit spending. The rationale is that public spending tends to be larger when ruling coalitions are composed of a large number of political parties, each of which has its own incentives to spend, and coordination becomes more difficult. At the same time, this variable is believed to not directly influence immigration. This procedure allows mitigating the role of potential reverse causality or other sources of endogeneity bias, such as omitted variable factors. The IV specifications yield estimates of the coefficient of interest that are essentially zero for both inflows from EU and non-EU origins. The same results are obtained when generalised methods of moments techniques are applied.

The authors discuss the potential channels of endogeneity behind the discrepancy between IV and OLS. First, immigration could influence unemployment benefit spending as a percentage of GDP, for example through welfare programme participation, as well as through tax contributions and consumption. Second, welfare policy could react to immigration, such that policy-makers could encourage or discourage immigrant welfare participation by modifying eligibility criteria or welfare duration. The authors provide some evidence that both channels of endogeneity could be at work and need to be accounted for in the analysis. More research is therefore desirable in order to better understand the

¹⁴ C. Giulietti, M. Guzi, M. Kahanec and K.F. Zimmermann (2013), "Unemployment Benefits and Immigration: Evidence from the EU", *International Journal of Manpower*, Vol. 34, No. 1, pp. 24-38.

various causality channels active within the immigration-welfare relationship.

4. Related evidence

4.1 Welfare use

An often-investigated parallel question is whether immigrants ‘abuse’ the welfare system. While this is a rather challenging question to test, the typical approach is to compare welfare use between immigrants and natives and assess whether the former exhibit ‘residual’ welfare dependence, i.e. excess use not explainable by observable characteristics.

Barrett and Maître analysed a sample of 19 EU member states plus Norway from the 2007 European Union Survey on Income and Living Conditions (EU-SILC) and found that after immigrant characteristics are taken into account, there is evidence of residual welfare dependency only in Sweden, Denmark and, marginally, Finland and Germany.¹⁵ Higher relative welfare use by migrants is found when looking at unemployment support in eight countries; however, once immigrants’ higher probability of being unemployed is accounted for, the large gap with natives disappears or even becomes negative in some countries. This indicates a residual disadvantage of migrants in accessing unemployment benefits. Similar results are found when considering other welfare programmes. One striking result in Barrett and Maître is that, against weak evidence of welfare dependency, in nearly all countries immigrants face a substantially higher risk of poverty than natives.

Welfare use by immigrants in the European Union is also investigated in the country studies collected in Zimmermann et al.¹⁶ The analysis reveals the presence of welfare dependency in a few countries. However, the picture that often emerges yet again is one of insufficient welfare coverage by migrants in many countries, documented by the absence of assistance programmes or the presence of obstacles to welfare access due to institutional constraints or discrimination. Severe barriers to

¹⁵ A. Barrett and B. Maître (2013), “Immigrant Welfare Receipt across Europe”, *International Journal of Manpower*, Vol. 34, No. 1, pp. 8–23.

¹⁶ K.F. Zimmermann, M. Kahanec, A. Barrett, C. Giulietti, B. Maître and M. Guzi (2012), “Study on Active Inclusion of Immigrants”, IZA Research Report No. 43, Institute for the Study of Labor, Bonn.

migrant inclusion are corroborated by the results from a stakeholder survey reported by Constant et al. and Kahanec et al.¹⁷

4.2 *Welfare magnets in the United States*

While the United States has different migration and public spending patterns, it is interesting to compare the statistical evidence for this country and the European Union. One of the main substantial differences between the European Union and the United States is that, in the latter, migration is unrestricted across state borders. On the other hand, within the European Union, free movement of labour is virtually free only for EU citizens. As documented by Razin and Wahba, the migration regime can affect the magnitude of the welfare magnet effect.¹⁸

Most of the US evidence on the welfare magnet hypothesis is focused on welfare programmes that provide cash benefits, such as the Aid to Families with Dependent Children (AFDC). In this case, studies are interested in investigating whether cross-state differences in the provision of welfare affect the location choices of welfare recipients, such as women who receive AFDC. The evidence in this case is mixed, with some studies finding some ‘magnet effect’,¹⁹ and some finding a small or inexistent effect.²⁰

¹⁷ A.F. Constant, M. Kahanec and K.F. Zimmermann (2009), *op. cit.*; Kahanec, M., A.M.-H. Kim and K.F. Zimmermann (2013), “Pitfalls of Immigrant Inclusion into the European Welfare State”, *International Journal of Manpower*, Vol. 34, No. 1/2, pp. 39-55.

¹⁸ A. Razin and J. Wahba (2011), “Free vs. Controlled Migration: Bilateral Country Study”, NBER Working Paper No. 17515, National Bureau of Economic Research, Cambridge, MA.

¹⁹ L. Southwick (1981), “Public Welfare Programs and Recipient Migration”, *Growth and Change*, Vol. 12, No. 4, pp. 22-32; E.M. Gramlich and D.S. Laren (1984), “Migration and Income Redistribution Responsibilities”, *Journal of Human Resources*, Vol. 19, No. 4, pp. 489-511; R. Blank (1988), “The Effect of Welfare and Wage Levels on the Location Decisions of Female Households”, *Journal of Urban Economics*, Vol. 24, No. 2, pp. 186-211; M.E. Enchautegui (1997), “Welfare Payments and other Economic Determinants of Female Migration”, *Journal of Labor Economics*, Vol. 15, No. 3, pp. 529-554.

²⁰ P.B. Levine and D.J. Zimmerman (1999), “An Empirical Analysis of the Welfare Magnet Debate Using the NLSY”, *Journal of Population Economics*, Vol. 12, No. 3, pp. 391-409; B. Meyer (2000), “Do the Poor Move to Receive Higher Welfare

In the context of international migration to the United States, Borjas compares the location choices of natives and immigrants who receive AFDC, Supplemental Security Income and general assistance using data from the 1980 and 1990 Census Public Use Microdata Samples.²¹ He finds statistically weak but sizeable evidence that immigrants who receive benefits are geographically clustered in a few welfare-generous states, such as California. Most of this clustering, however, is explained by low-skilled immigrants self-selecting into California. Kaushal exploited an exogenous nationwide policy change in welfare provision during the mid-1990s, which excluded access to means-tested benefits for five years to immigrants who arrived after August 1996.²² After the enactment of the reform, several states decided to institute state-level welfare programmes. The comparison between states which restored means-tested benefits and those which did not allows assessing whether newly arrived immigrants are more likely to locate in the former rather than the latter states. The results show that the location choices of low-skilled single immigrant women – a welfare-prone group – are only marginally affected by the new state-level programmes.

4.3 *Sustainability of welfare systems*

Concerns about welfare migration are also related to whether welfare systems are sustainable. Excessive welfare use by immigrants could ultimately generate a fiscal burden for the host society. Yet, typically migrants are on average younger than natives and hence more likely to contribute to taxes, which could generate fiscal gains. Some simulations for the United States show that admitting a large flow of high- and medium-skilled immigrants would be a sustainable policy.²³ Such intervention would exclude low-skilled immigrants, since they do not contribute enough in terms of taxes. When simulations take the demographic

Benefits?”, Joint Center for Poverty Research Working Paper No. 58, Northwestern University, Evanston, IL.

²¹ G.J. Borjas (1999), “Immigration and Welfare Magnets”, *Journal of Labor Economics*, Vol. 17, No. 4, pp. 607–637.

²² N. Kaushal (2005), “New Immigrants’ Location Choices: Magnets Without Welfare”, *Journal of Labor Economics*, Vol. 23, No. 1, pp. 59–80.

²³ See K. Storesletten (2000), “Sustaining Fiscal Policy Through Immigration”, *Journal of Political Economy*, Vol. 208, No. 2, pp. 300–323.

evolution of the population into account, higher immigration would provide fiscal benefits irrespective of skill composition.²⁴ In the EU context, Dustmann et al. assess the consequences of the 2004 EU enlargement for immigrants from eight accession countries.²⁵ The analysis reveals that immigrants are highly educated, are young and go to the UK mainly for work reasons. These factors make them net contributors to the tax system in the various scenarios considered by the authors.

4.4 *The effect of the crisis*

Evidence on whether the financial crisis has affected the relationship between welfare spending and migration is still sparse. OECD data show that welfare spending did not change dramatically in the past few years and neither did immigration flows (Figure 2). In parallel, the unemployment rate for immigrants increased by five percentage points during the period 2009-12 (vis-à-vis 3% for natives), and particularly affected young and unskilled immigrants.²⁶ This suggests that the number of immigrants in need of welfare might have increased. It is unlikely that a stronger positive relationship between welfare spending and migration is found during the crisis. In fact, estimates from our data suggest that the relationship could even be negative (see column 6 in Table 1). Although not statistically significant, we found a negative correlation between immigration and the interaction term between social expenditure and an indicator for the period after 2007 (the beginning of the crisis). However, more empirical evidence is needed to test the welfare magnet hypothesis during the crisis.

5. A critical assessment of the literature

The studies covered in this chapter provide comprehensive and exhaustive evidence that there is either weak or no support for the hypothesis that welfare acts as a magnet for immigration. The study comparison offers the

²⁴ See R. Lee and T. Miller (2000), "Immigration, Social Security, and Broader Fiscal Impacts", *American Economic Review, Papers and Proceedings* Vol. 90, No. 2, pp. 350-354.

²⁵ C. Dustmann, T. Frattini and C. Halls (2010), "Assessing the Fiscal Costs and Benefits of A8 Migration to the UK", *Fiscal Studies*, Vol. 31, No. 1, pp. 1-41.

²⁶ See OECD (2013), *International Migration Outlook 2013* (online at http://dx.doi.org/10.1787/migr_outlook-2013-en).

opportunity to highlight not only what we have learned about identifying such effects, and on which type of data to rely, but also the potential limitations and future steps that research could take to provide sound empirical evidence on this topic.

First, we address how to measure migration and welfare, and which data are most suitable for analysis. Most of the US studies use microdata to investigate migrant location choices, and combine them with aggregate measures of welfare provision. A similar approach is adopted in De Giorgi and Pellizzari,²⁷ who combine ECHP microdata with country-specific levels of NRR for EU member states. The remaining two studies for the European Union, Pedersen et al. and Giulietti et al., use data aggregated at the state level.²⁸ Each approach has its advantages and disadvantages. Microdata are desirable since they allow modelling individual migration status as a function of actual or potential welfare participation. On the other hand, they might present particular challenges in terms of the sample size necessary for identification (e.g. individuals living at the border of two states) or self-selection (e.g. only individuals who did not return to the place of origin are eventually observed in the data). Aggregated data are ideal for cross-country comparisons of the migration and welfare measures, but have the disadvantage of being prone to measurement error and to allowing for a relatively small set of covariates to be controlled for in the regressions. Also, a behavioural interpretation of the results based on macro-level data is not straightforward.

The second main challenge relates to the appropriate methodology to identify the causal relationship of interest. In other words, the issue is whether the estimated correlation captures a causal effect or is rather the artefact of self-selection or endogeneity. Irrespective of whether micro or macro data are used, the use of longitudinal data to control for unobserved heterogeneity (at the individual or aggregate level) is desirable. In addition, the use of control variables which are deemed to affect both welfare spending and immigration (such as macroeconomic controls) are effective in reducing omitted variable bias. IV strategies are perhaps a sound method, but their use is often hindered by the need to find a convincing

²⁷ De Giorgi and Pellizzari (2009), *op. cit.*

²⁸ Pedersen, Pytlikova and Smith (2008), *op. cit.*; Giulietti, Guzi, Kahanec and Zimmermann (2013), *op. cit.*

valid instrument (Giulietti et al. offer one²⁹). To our knowledge, there is scarce evidence on the use of quasi-experimental methodologies to test the welfare magnet hypothesis (an exception is Kaushal for the United States³⁰). However, this is a promising avenue allowing for a neater identification of a causal effect.

An aspect that could not be directly tested in the three studies covered in this review is the interactive role between welfare and other policies. The effects of welfare interventions could well be interrelated with those of other instruments that affect mobility, namely immigration policies (point-based systems, skill transferability, etc.). The joint modelling of the political processes and of immigration is rather unexplored and is a promising avenue for research on this topic.

6. Conclusion and policy perspectives

Statistical analysis does not support the hypothesis that welfare is a strong magnet for immigrants; even when such an effect is found, it is relatively weak compared to other immigration determinants.

Even though findings indicate that welfare migration is not substantial and does not constitute a fiscal burden, such myths derail European policy discourse. Welfare ‘abuse’ by migrants remains a predominant prior in this discourse, yet the hard evidence reviewed in this chapter makes a rather strong case for a paradigm shift accounting for the existence of barriers to migrants’ inclusion in receiving labour markets and welfare systems.³¹

The role for integration policy intervention remains crucial. One promising path – followed only by a few countries so far – is to design programmes that improve immigrants’ socioeconomic situation upon arrival by integrating them into the host labour market and fostering assimilation. Interventions in this direction include language training, active labour market policies and anti-discrimination interventions.³² By

²⁹ Giulietti, Guzi, Kahanec and Zimmermann (2013), op. cit.

³⁰ Kaushal (2005), op. cit.

³¹ See Zimmermann, Kahanec, Barrett, Giulietti, Maître and Guzi (2012), op. cit.

³² For a review, see U. Rinne (2013), “The Evaluation of Immigration Policies”, in K.F. Zimmermann and A.F. Constant (eds.), *International Handbook on the Economics of Migration*, Cheltenham: Edward Elgar Publishing, pp. 530-551, forthcoming (pre-publication version available at <http://ftp.iza.org/dp6369.pdf>).

effectively improving immigrants' labour market attachment, such interventions could ultimately lead to a reduction of immigrants' welfare claims. Empirical studies are still scarce, yet there is evidence of such an effect. For example, in Denmark – a country where immigrants' welfare take-up is rather high – participation in active labour market policies, such as subsidised employment programmes, is found to hasten immigrants' assimilation out of social assistance (Heinesen et al., 2013).³³

As much of the observed gaps between immigrants and natives are due to distributional characteristics of some immigrant populations, migration policy lays the foundation for future prospects of immigrants in host labour markets. For example, migration policy could provide for a positive selection of migrants, possibly by means of point-based systems. In fact, a battery of complementary policies is desirable. This could include integration policies, but also complementary interventions ensuring transferability of rights upon immigrants' arrival and departure, reducing informational asymmetries, enabling migrants to reconcile their migration project with family life and childcare in particular, or ensuring access to education, housing and financial services. Negative perceptions and beliefs lead to inadequate policy approaches, resulting in adverse integration outcomes, which in turn feed back into negative attitudes. Only a thorough and concerted effort could break this vicious circle and achieve more positive migrant labour market outcomes, and lessen the gap between immigrants and natives.

³³ H. Heinesen, L. Husted and M. Rosholm (2013), "The Effects of Active Labour Market Policies for Immigrants Receiving Social Assistance in Denmark", *IZA Journal of Migration*, Vol. 2, No. 15.

8. SOCIAL BENEFITS AND MIGRATION: A CONTESTED RELATIONSHIP AND POLICY CHALLENGE IN THE EU

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This book has critically examined some of the main controversies surrounding the intersection between social benefits and migration in the European Union, and the usages and misuses of data and knowledge in these debates and policy making processes. The various chapters have studied these contested issues from the perspective of five general categories of ‘non-citizens’ who are captured by EU law and policy for the purposes of social benefits: first, EU citizens living in a member state other than that of their nationality; second, third-country nationals lawfully resident in the European Union; third, Turkish nationals; fourth, third-country nationals covered under the Euro-Mediterranean Association Agreements; and fifth, asylum seekers and refugees.

The analysis has revealed three cross-cutting findings delineating the relationship between migration and social benefits in the European Union: first, member states attempting to limit or ‘re-nationalise’ free movement (social benefits) rights and freedoms of mobile EU citizens (Section 1, below); second, a rather confusing setting and framing of the policy issues, priorities and challenges, particularly concerning the scope of the actual phenomenon at stake (is it ‘migration’ or is it ‘mobility’?) and the group/category of people who are covered (are they ‘migrants’ or ‘EU citizens’?) (Section 2); and third, the need for more social sciences knowledge and higher quality statistics on the costs of social benefits in the migration-related fields, which are currently incomplete or largely lacking, to gain a better understanding of the actual reach (and relevance) of this phenomenon (Section 3) and to support a more optimal a more optimal policy-shaping and policy-making process in these domains at the EU level (Section 4).

1. Member states' challenges to free movement

A first controversy relates to widespread political discourses and policy agendas/strategies from a growing number of national governments and authorities of member states on the 'costs' and '*financial burdens*' of migration and '*social welfare tourism*.' The various chapters have signalled a trend in a number of EU member states for 'migration' to be perceived as creating a disproportionate burden on their labour market and social welfare systems. Some of the contributions have illustrated past and ongoing national government reactions and attacks on 'free' mobility of EU citizens exercising intra-EU movement to a second member state. They are calling for the restriction of pre-established EU freedoms and rights currently envisaged by EU free movement, social security coordination, asylum and migration laws.

As referred to by Jean Lambert, MEP in her Foreword, a prime example of the highly protectionist attitude some member states have adopted is reflected in the joint letter that the ministers for the interior of Germany and Austria, the UK home secretary and the Dutch immigration minister sent to the Irish Presidency in May 2013.¹ In this letter, the ministries of interior requested the amendment of Directive 2004/38/EC (on citizens of the European Union) because of the use of national social welfare schemes by "certain immigrants from other member states." The concerns expressed related to the additional costs such member states would have to bear because of a "fraudulent use of the right of free movement of EU citizens", which, in their view, would require more effective sanctions, such as expulsion, re-entry bans, and "practical measures to address the pressures" according to these member states.²

In their response of 24 May 2013, Commissioners Reding (DG Justice, Fundamental Rights and Citizenship), Andor (DG Employment, Social Affairs and Inclusion), and Malmström (DG Home Affairs) took a clear position stating that EU law already provided explicitly and sufficiently for the prevention of abuse or fraud, and criticised the member states for alleging welfare tourism without backing the allegation up with any

¹ Letter to Mr. Alan Shatter, Minister for Justice and Equality (Republic of Ireland), President of the European Council for Justice and Home Affairs, May 2013.

² Ibid., pp. 2-3.

statistical evidence and data.³ The Commission stressed that in such cases, certain guarantees must be safeguarded; hence general prevention measures cannot be taken by the member states. The response further underscored the importance of the freedom of movement of EU citizens while also highlighting the economic and demographic need for and the positive effects of increased intra-EU mobility.

After a discussion at the Justice and Home Affairs Council meeting on 6-7 June 2013 in Luxembourg, Commissioner Malmström gave a “*blunt refusal*” to the request of the four member states, reiterating that the Commission did not intend to amend the fundamental right of free movement.⁴ The Commissioner further stressed that there was an agreement to clarify the application of the existing EU rules. The Irish Minister warned that this debate could fuel xenophobic reflexes.⁵ The Council invited the Commission to look at the implementation of the free movement rules, including guidance on fighting the ‘abuse’ of these rules, and to present an interim report to the Justice and Home Affairs Council by October 2013 and a final report by December 2013.⁶ Importantly, it must be borne in mind that there is no abuse where EU citizens and their family members obtain a right of residence under EU law (as specified in the EU Treaties, the EU Charter of Fundamental Rights and EU secondary legislation) in a member state other than that of the EU citizen’s nationality, as they are benefiting from an advantage inherent in the exercise of the right of free movement protected by the Treaty. This was stressed and clarified by the above-mentioned response from the Commission.⁷

³ Letter from the Commissioners Reding, Andor and Malmström to Mr. Alan Shatter, President of the European Council for Justice and Home Affairs, 24 May 2013, Ref. Ares (2013) 997663.

⁴ “JHA: Commission and Dublin do not want to revise free movement rules”, Agence Europe, 7 June 2013.

⁵ Ibid.

⁶ Council of the European Union, “3244th Justice and Home Affairs Council Meeting”, 6-7 June 2013, Luxembourg, document number: 10461/13, p. 22.

⁷ See European Commission, Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states, COM(2009) 313, 2.7.2009, p. 15, referring to Cases C-212/97 *Centros* [1999]

The non-evidence-based fears expressed by certain EU member states have been addressed by a majority of the chapters in this volume. Jean Lambert, MEP highlights the work carried out by the European Parliament in tracking down the basis upon which claims concerning ‘*abuse*’ of and ‘*pressure*’ from migration on social benefits are made. The Parliament’s work indicates that, in fact, it is very difficult to substantiate the claims with objective evidence and concrete examples, and that these discourses “*are rarely backed with figures and data.*” Fears of ‘welfare tourism’ have consistently preceded every single enlargement process in the EU. Paul Minderhoud’s analysis in Chapter 3 explains the revitalisation of a nation-state approach in a phase of European integration where EU legislation and rules are increasingly interfering with national discretion and member states’ policies related to social security systems. Anja Wiesbrock emphasises in Chapter 4 that “interior ministers are inherently eager to defend national sovereignty and are concerned about ‘losing control’ over who is admitted and who is beneficiary of social benefits.” The UK constitutes a case in point in this respect. Rob Cornelissen clarifies in Chapter 6 that the concept of residence in the scope of Council Regulation 1408/71 was never dependent upon the legality of that residence. Cornelissen concludes that the UK’s right-to-reside test is incompatible with the Regulation and that “it constitutes indirect discrimination based on nationality [...] this additional requirement is intrinsically liable to affect nationals of other member states to a greater extent than nationals of the host state.”⁸

This has been also signalled in Chapter 5 by Madeline Garlick, who has pointed out how the issue of perceived financial burdens and high costs of asylum on the social welfare systems of EU member states was very controversial during the negotiations of the recast proposals composing the Common European Asylum System (CEAS), with comparatively weaker leadership on solidarity and an humanitarian approach. Her contribution underlines how the concerns of member states to limit costs and of the possibility of ‘*abuse*’ of reception entitlements were

ECR I-01459, para. 27 and C-147/03 *Commission vs. Austria* [2005] ECR I-05969, paras. 67-68.

⁸ On the “right-to-reside-test”, see also P. Minderhoud (2009), “Free Movement, Directive 2004/38 and Access to Social Benefits”, in P. Minderhoud and N. Trimikliniotis (eds), *Rethinking the free movement of workers: the European challenges ahead*, Nijmegen: Wolf Legal Publishers, pp. 69-85.

raised during the negotiations of the recast proposals, in contrast with the efforts by the European Commission, the European Parliament, UNHCR and civil society actors.

Garlick's analysis also shows, however, that 'economic imperatives' have not always been central when determining member state governments' positions during the negotiations of the recast proposals. She gives examples of where national governments could have agreed on provisions that would have reduced the economic dependency of asylum-seekers, but have not done so. For instance, when negotiating the recast of the Reception Conditions Directive, the member states did not accept early access by asylum-seekers to the labour market; this proved to be amongst the most critical issues at stake. The potential contributions of asylum-seekers to state revenues through taxation and economic activity were overridden by "member states' sensitivities about rising unemployment, with evident fears that the public would see more extensive work rights for asylum seekers as depriving them of jobs." This takes us to the point emphasised by Kees Groenendijk in Chapters 1 and 2 about the decisive role played by state control.

2. The material and personal scope: What and who?

The second controversy relates to the following question: 'What' and 'who' are we talking about in the migration-welfare debates? As this collection of contributions illustrates, the legal categories or statuses of people at play are of particular relevance when looking at the set of rights and freedoms (in terms of access to social benefits) granted to each individual having exercised mobility to a member state of the European Union, as well as the set of derogations and exceptions which national authorities are entitled to apply to their enjoyment.

There is currently a highly fragmented legal framework for access to social benefits depending on the relevant legal category into which the person on the move falls (see Section 2.1 below on the personal scope). The chapters have pointed out the complexities and high technicalities inherent to the EU legal frameworks in this policy area, which are by and large confusing and leave considerable room for discretion for member states, yet also set common standards and principles with which national governments need to comply. The resulting picture is one which too often leads to legal uncertainty. It also makes it challenging to inform non-citizens about, and therefore enable them to effectively claim and have access to, the rights and benefits to which they are entitled under EU law.

This is a point of concern underlined in Anja Wiesbrock's chapter, in which she points out that "[...] migrant workers are often insufficiently informed about their social security rights in EU law. It is individuals who keep those rights visible, by exercising them and invoking them before courts and other national authorities."

This is also an area of EU law and policy where concepts and notions matter a great deal and where the boundaries between them often remain contested territory, ending too often before European tribunals. That has been particularly visible when member states have tried to limit the allocation and granting of rights and freedoms to non-citizens. Concerning the definitions of "abuse and fraud" as used in the Free Movement Directive, the Commission referred to its 2009 guidelines for ensuring the correct transposition of Directive 2004/38/EC that were issued in the context of a previous, similar attempt to modify the Free Movement Directive in 2008 by the member states.⁹ However, the Council's attempt turned out to be rather unsuccessful.

There has also been some disagreement as regards the difference between the concepts of social security and social assistance, and the legal boundaries differentiating one from another. Anja Wiesbrock's contribution emphasises how "special non-contributory benefits" have tended to fall into the grey area between the two concepts. Similar debates have taken place regarding the various substantive connotations inherent to the concept of "residence", as benefits have often been granted on the basis of residence or on contributions made (Chapter 4). Madeline Garlick's chapter highlights how the concept of "necessary social assistance" has been diverged in different member states in relation to refugees and subsidiary protection beneficiaries, or the definition of "core benefits" (Chapter 5). Similar contested concepts have been, as Rob Cornelissen's highlights, those related to "special non-contributory benefits" as well as a number of non-contributory benefits considered "borderline benefits."

2.1 *'Who' are we talking about?*

The knowledge emanating from the various chapters illustrate the blurring of the target groups subject to these discourses and policies. Are they

⁹ Council of the European Union, "Council conclusions on abuses and misuses of the right to free movement of Persons", document number: 16483/08, 28 November 2008.

migrants, or are they citizens? Are we talking about EU citizens or third-country nationals? The policy controversies and debates across a majority of member states in Europe, and particularly those more openly concerned with ‘migration’ such as the UK, Germany and the Netherlands, mainly focus on EU citizens moving (exercising their free movement rights and freedoms) and amongst those, the non-economically active (the ‘poor’) exercising their freedom to move. Romanian and Bulgarian nationals, and especially those of Roma origin, appear to be a group raising major concerns.¹⁰ The ‘young migrants’ seeking jobs in the European Union also seem to be at the centre of political attention and are often artificially constructed as a ‘threat’ to the national welfare systems, labour markets and economies of the receiving member states.¹¹ An immediate issue of concern arising from these framings is that they challenge the equal treatment and non-discrimination principles laying at the basis of citizenship of the European Union.

Jean Lambert’s Foreword has underlined the ways in which the actual barriers and practical hurdles which are still experienced by many EU citizens and non-citizens entitled to social benefits under EU law have not been a priority in EU-level political debates and on member states’ agendas. Her contribution resituates the concerns not so much on ‘misuses’ and ‘abuses’ but rather on ensuring that “the system works better for people”. An illustrative example is access to health care, which remains a highly contested right on the ground. In Lambert’s own words, the priority should be for the system to not work against people, including those having moved from one member state to another (cross-border cases). Kees Groenendijk’s analysis demonstrates that the main focus of recent debates on immigration and social benefits has surprisingly not concerned third-country nationals, but rather EU nationals from other member states exercising their freedom to move, i.e. EU citizens. The status and institution of citizenship of the Union comes into sharp relief here and is subject to reframing strategies by some member state governments. This has

¹⁰ On the specific case of the evictions of Roma, see S. Carrera (2013), “Shifting Responsibilities for EU Roma Citizens – The 2010 French Affair on Roma Evictions and Expulsions Continued”, CEPS Working Paper No. 55, Centre for European Policy Studies, Brussels.

¹¹ R. Minder (2013) “Europe’s Reservation on Immigration Growth”, *The New York Times*, 28 May; P. Pinzler (2013), “Arme, junge, kluge Einwanderer”, *Die Zeit*, 4 May.

particularly been the case concerning the rights of jobseekers and unemployed persons from other member states, and those related to the accession of Romania and Bulgaria. In his contribution, Groenendijk also illuminates that – under Directive 2004/38/EC – the principle of equal treatment was extended to social assistance (except for the first three months of residence in the host member state) and the possibilities to remove EU nationals for being in need of social assistance were limited. The scope *ratione materiae* of the Citizens Directive 2004/38/EC regarding social benefits and its relationship with Regulation 883/2004 have been the subject of various controversies too, in particular with regard to special non-contributory benefits for economically non-active persons, as examined by Rob Cornelissen.

For third-country nationals, the coordination of social security today is highly dispersed and characterised by a patchwork of legal regimes. The internal dimension of this coordination is determined by Regulation 1231/2010 that only applies to third-country nationals legally residing in a member state and who are in an EU ‘cross-border’ situation.¹² The external dimension of social security coordination is even more fragmented, as EU law provides for different rules for certain third-country nationals (such as Turkish nationals and nationals from Algeria, Morocco and Tunisia, as examined by Minderhoud and Wiesbrock in their respective contributions). In addition, some member states have also bilaterally concluded conventions on social security matters with selected countries of origin leading to inconsistent social security coordination, and thus adding to the patchwork external approach.¹³ The Commission, being aware of the need to address this fragmentation, issued in 2012 a Communication calling for

¹² Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality.

¹³ H. Verschuere (2009), “Social Security Co-ordination in the Agreements between the EU and Mediterranean Countries, in particular Turkey and the Maghreb Countries”, in D. Pieters and P. Schoukens (eds), *The Social Security Co-Ordination Between the EU and Non-EU Countries*, Antwerp: Intersentia, pp. 19-55; Prof. Hervig Verschuere highlighted the fragmented legal framework and the difficulties it entails at the Seminar on “Labour Migration and Mobility in the European Union – Assessing Attractiveness and Labour Market Needs” that was jointly organised by CEPS and the EESC on 7 May 2013 at the EESC.

better cooperation among the member states and a common EU approach to social security coordination with third countries.¹⁴

2.2 *The scope of non-citizens' EU freedoms and rights*

Another point of controversy has been the actual reach of non-citizens' (all five categories of people listed above) freedoms and rights conferred by EU law and the lawfulness of member states' attempts to limit and/or derogate those freedoms in their national arenas, in particular in the light of the 2013 European Year of Citizens.

The role played by CJEU has been particularly active and substantive in interpreting and reviewing such freedoms and rights for EU citizens and third-country nationals.¹⁵ Anja Wiesbrock's chapter covers the ways in which the main controversies reaching the CJEU have concerned the scope of the right to equal treatment or non-discrimination on the basis of nationality with regards the right to social security benefits in the framework of the so-called Euro-Mediterranean Association Agreements (EMAAs) concluded with *inter alia* Algeria, Morocco and Tunisia. She demonstrates the ways in which certain member states, such as Belgium, France and the Netherlands, have attempted several times to limit the impact and practical application of such Agreements on their domestic social security systems.

The CJEU has played a significant role in these controversies and has been a key driver for resolving disputes in this area. Anja Wiesbrock's contribution also demonstrates how the Court's interventions have been

¹⁴ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the External Dimension of EU Social Security Coordination, COM(2012) 153, 30.3.2012; a relevant issue that falls outside the scope of this book relates to access to social security for third-country migrant workers who find themselves in an irregular situation in the EU. More research is needed on this particularly vulnerable group, see K. Kapuy (2009), "European and International Law in relation to the Social Security of Irregular Migrant Workers", in D. Pieters and P. Schoukens (eds), *The Social Security Co-Ordination Between the EU and Non-EU Countries*, Antwerp: Intersentia, pp. 115-153.

¹⁵ See for instance Case C-443/11 *Jeltes and Others* [2013], judgement of 13 April 2013, not yet reported, in which the CJEU ruled that a wholly unemployed EU frontier worker can obtain unemployment benefit only in his member state of residence.

overall positive when protecting the EU rights of migrant workers. The Luxembourg Court has applied what it refers to as “a maximalist approach” to enforcement, presenting significant similarities to the jurisdictional approach taken in the scope of EU internal market law, such as an inclusive notion of ‘worker’. It has equally limited the margin for manoeuvre of EU member states to control and limit the access of third-country nationals to social security systems and to apply additional criteria. The extent to which the EMAAs have direct effect has been particularly contested here. The role of the CJEU has been also underlined by Rob Cornelissen. He states that, for instance, “it was clear from the abundant case law of the Court [of Justice], that the question how a benefit was classified under national legislation was not decisive”, which in practice meant that benefits not falling within the national definition of social assistance were still interpreted as falling within the scope of Regulation 1408/71.

3. Data and statistics: Evidence-based policy-making?

One could be inclined to think that data and statistics would be a central component in current EU debates on social benefits and migration in the Union. That notwithstanding, it is striking to see that quantitative and qualitative knowledge on costs of social benefits in the migration fields are not available or lacking, and have been largely missing in current debates. There is, in fact, very little data and statistics as regards the actual reliance on social benefits in the receiving member states by non-citizens and the extent to which these people use social benefits in the receiving state. Surprisingly, therefore, the widening of alarming discourses on ‘social welfare tourism’ has not been accompanied by objective evidence and solid statistical data backing up these claims.

One would assume that the existence of ‘evidence’ would be central at the EU level for member states to have well-justified, necessary and proportionate restrictions or exceptions to EU-level rights and freedoms. As the European Commission Guidelines on the transposition of Directive 2004/38/EC have clearly outlined, member states’ derogations to EU-recognised rights and freedoms cannot take place on a purely precautionary or preventive basis, or on the basis of “fears” of national governments and administrations. Such derogations need to comply with a number of specific conditions and criteria.

More generally, the following findings emerge from the examination conducted in the various chapters as regards the challenges inherent to the provision of data and statistics in these discussions.

First, all the contributions have highlighted that data and national statistics on the uses of social assistance are scarce, limited, lacking and not easily accessible and comparable in a cross-member state fashion. This favours an increasing focus on subjective, non-rational and politicised discourses and policy initiatives, particularly by some national governments of the EU member states. Perceptions and fears appear to be the main framing factors in presenting access to social benefits and social welfare tourism as a major policy problem. These fears, however, are not corroborated by objective, comparative and high-standard data and statistical evidence. This has been confirmed by Corrado Giulietti and Martin Kahanec's chapter, which concludes that "statistical analysis does not support the hypothesis that welfare is a strong magnet for immigrants; even when such an effect is found, it is relatively weak compared to other immigration determinants". Their analysis concludes that an examination of the existing research on the relation between welfare and immigration demonstrates that the actual challenge is one of insufficient welfare coverage by immigrants and barriers to their inclusion in many EU member states. The lack of knowledge therefore leads to irrational debates about the linkages between non-citizens and social benefits in the European Union. More analysis and data showing the negative repercussions of national restrictions and barriers for non-citizens to access the labour market of the receiving state should be also conducted. As Rob Cornelissen has pointed out, "until now we lack convincing facts and figures showing that the current system leads to imposing an unreasonable burden on the public finances of Member States with the most generous subsistence benefits."

Second, there is a largely diversified and heterogeneous picture as regards the publicly available data across the different EU member states. For example, in the UK data broken down by nationality of people having access to social assistance simply do not exist. Each member state presents their own methodologies in the gathering, collection and interpretation/calculation of the data. This is often linked to their distinct national traditions and systems of social security and assistance. The examination of existing statistical knowledge included in some of the chapters of this book reveals, however, the mismatch between policy discourses and actual realities. Kees Groenendijk's chapter provides some detailed statistical figures which demonstrate that "long-term residents

having more than five to ten years' residence in the member states or are 65 years or older" are those receiving more social assistance in the Netherlands and Germany. Madeline Garlick demonstrates that "social support for asylum-seekers is extremely low in the EU."

Third, the shaping of politics and the production of statistics are too often intertwined. Statistics are highly vulnerable to, and sometimes dependent on, political interests and weak (and normatively driven) methodologies. This is pointed out by Kees Groenendijk, who highlights that "the decision not to register the nationality of persons claiming social benefits not only has administrative but clearly also political dimensions." Other reasons may well relate to the political choice to ignore the actual facts and figures because they could be politically unwelcomed, or could perhaps provide additional ammunition to anti-immigration discourses. Similarly, Madeline Garlick's examination underlines that "the administrative burden associated with compiling disaggregated data for recipients of social benefits and public support [...] may mean that states are unable or unprepared to compile disaggregated data on support for refugees and holders of subsidiary protection, as distinct from other categories of welfare benefits." The absence of data makes it difficult to verify the legitimacy of claims and statements such as those recently expressed by the above-mentioned letter by the four ministries of interior of Austria, Germany, the Netherlands and the UK.¹⁶

4. Policy Recommendations

On the basis of the research findings provided in this book, the following policy recommendations are advanced:

- **There is an urgent need for more research and quantitative/qualitative knowledge and statistics as regards the relationship between migration and social benefits in the European Union and the actual financial demands by non-citizens on public funds and welfare (reliance on social benefits), as well as their contributions to the receiving state.** The focus of the research should be balanced so that not only the right of non-citizens to have access to social benefits is well documented but, more generally, their

¹⁶ See letter from the Commissioners Reding, Andor, and Malmström to Mr. Alan Shatter, President of the European Council for Justice and Home Affairs, 24 May 2013.

contributions to the receiving societies and economies are equally factored in and form part of any comprehensive analysis.

- **The member states' governments and administrations should ensure the production of better statistics, quality of administration and better guidance to local and regional authorities at the national level.** The EU could play a key role in preventing a mismatch between the policy discourse and realities by ensuring (and even coordinating) a high standard of methodology, the comparability of data, and the collection, evaluation and dissemination of the relevant information and data. At the same time, it is vital to bear in mind that statistics have to be interpreted and put into context with care, as they can easily be misused for certain nationalistic political agendas.
- **A more rational and evidence-based debate on human mobility is needed, as demonstrated by the current politicised discussions on the trends of alleged welfare tourism in the EU.** Such a debate should be framed on the basis of the applicable terminology that EU free movement law foresees, taking into account that the use of language may convey strong, subtle messages, especially to a non-informed audience. The letter on an alleged social welfare tourism drafted by Germany, the Netherlands, Austria and the UK constitutes a shining example of how terms and fears can be misused for political purposes.
- **It is crucial to raise the question of who is responsible for shaping the recent debates on 'social welfare tourism' in the EU.** Why did ministers in charge of home affairs, as well as one minister responsible for immigration matters, send the letter requesting an amendment to EU free movement law, and not the ministers for employment-related issues? This proves that the dividing line between the free movement regime for EU citizens and immigration matters concerning third-country nationals has been blurred and the two different legal regimes have wrongfully been intertwined. It also demonstrates that an approach and understanding of human mobility driven by a ministry of interior tends too often to artificially link it with insecurity and illegality, which stands in direct conflict with the equality of treatment and non-discrimination embodying the status that all nationals of EU member states behold as EU citizens.
- **There is no abuse or illegalities when EU citizens and their family members exercise a right to move and to residence under EU law in a member state other than that of the EU citizen's nationality, as**

they are benefiting from an advantage inherent in the exercise of the right of free movement protected by the Treaty and enshrined in the status of citizenship of the European Union. This should be stated in unequivocal terms and be communicated as a key message to EU citizens. Priority should be given, for instance, to ensuring the protection of particularly vulnerable human beings (independently of their migratory status) and effectively improving immigrants' labour market attachment and inclusion.

- **The current EU rights and freedoms as envisaged in the Citizens' Directive 2004/38/EC should not be restricted and the amendments to existing EU legislation should not be proposed if not proven to be necessary and proportionate to achieve a public goal backed up with objective, accurate and scientifically based data and figures.** In case of an abuse of rights, Directive 2004/38/EC sets forth sufficient legal safeguards as pointed out by the Commission.¹⁷ In this connection, it is to be welcomed that the Commission has regularly emphasised its readiness to enforce EU free movement law in the member states, pointing to its "Report under Article 25 TFEU – On progress towards effective EU Citizenship 2011-2013."¹⁸
- **A common EU approach on social security coordination for third-country nationals is highly desirable.** Such an approach should be primarily focused on remedying the current fragmented legal and policy frameworks at the EU and national levels, and thereby contribute to strengthening legal certainty. A more coherent regulation concerning the access to social benefits is also needed under the six EU migration Directives that the EU has adopted since 2003. The member states should make a stronger commitment to social security benefits for third-country nationals in line with the EU Charter, including reinforcing the right to equal treatment.¹⁹ To

¹⁷ See letter from the Commissioners Reding, Andor, and Malmström to Mr. Alan Shatter, President of the European Council for Justice and Home Affairs, 24 May 2013, Ref. Ares(2013) 997663, Annex, p. 4 on the prevention of abuse.

¹⁸ European Commission, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions under Article 25 TFEU – On progress towards effective EU Citizenship 2011-2013, COM(2013) 270, 8.5.2013.

¹⁹ For a detailed analysis on the prohibition of nationality discrimination in social security matters in light of the EU's accession to the ECHR, see F. Pennings (2013),

ensure greater reliance on the rights envisaged in EU legal frameworks, information and knowledge on social security rights should be accessible, transparent and clear, so that such rights can be increasingly and effectively invoked before national and European courts.

“Non-Discrimination on the Ground of Nationality in Social Security: What are the Consequences of the Accession of the EU to the ECHR?”, *Utrecht Law Review*, Vol. 9, No. 1, pp. 118-134.

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LIST OF ABBREVIATIONS

| | |
|------------------------|--|
| AMF | Asylum and Migration Fund |
| CEAS | Common European Asylum System |
| CERD | Committee on the Elimination of Racial Discrimination |
| CJEU, Court of Justice | Court of Justice of the European Union |
| CoE | Council of Europe |
| DWP | UK Department for Work and Pensions |
| EC, Community | European Community |
| ECHP | European Community Household Panel |
| ECHR | European Convention on Human Rights |
| ECRE | European Council for Refugees and Exiles |
| EEA | European Economic Area |
| EEC | European Economic Community |
| EHIC | European Health Insurance Card |
| ELENA | European Legal Network on Asylum |
| EMAAs | Euro-Mediterranean Association Agreements |
| EMN | European Migration Network |
| EP, Parliament | European Parliament |
| ESA | Employment and Support Allowance |
| EU Charter | EU Charter of Fundamental Rights |
| ILR | indefinite leave to remain |
| ILO | International Labour Organization |
| IV | instrumental variable |
| NINo | National Insurance Numbers |
| NRR | net replacement rate |
| OLS | ordinary least squares |
| RWW | non-contributory assistance to unemployed workers in the Netherlands (Rijksgroepsregeling Werkloze Werknemers) |
| TFEU | Treaty on the Functioning of the European Union |
| UNHCR | United Nations High Commissioner for Refugees |

Following the financial crisis that commenced in 2008, the relationship between migration and social benefits has become increasingly contested in a number of large EU member states. The Eastern expansion of the EU in 2004 and 2007 has added a new dimension to the relationship. Concerns have spread across a number of member states about the 'costs' and 'financial burdens' of migration and intra-EU mobility and there have been calls for restrictions of existing EU rights and freedoms in the areas of EU free movement, social security coordination, asylum and migration laws.

The collection of essays contained in this book examines the main policy controversies that have emerged in the EU regarding linkages between welfare and migration. Does migration constitute a disproportionate burden to member states' domestic labour markets and welfare systems? Should non-citizens be entitled to social benefits in the state where they live? Is there objective evidence and statistical data indicating abuse of social benefits and increasing financial burdens by non-citizens, 'social welfare tourism' or the so-called 'welfare magnet' hypothesis, whereby migrants are attracted to countries that provide more generous welfare?

The book analyses these controversies as they affect different categories of non-citizens in the framework of EU law and policy. This is coupled with an examination of the uses or misuses of data, information and social science knowledge in the debates on the reliance by non-citizens on social benefits. The book concludes with a set of recommendations addressed to EU policy-makers.

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