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Analytical Note

Retention of EU worker status – Article 7(3)(b) of Directive 2004/38

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1. Introduction

This analytical note examines the meaning and scope of the right to retain EU worker status for EU nationals who have worked in a host Member State (hereafter EU workers) for longer than one year but who have lost their employment involuntarily. The European Commission

has requested the Network on the Free Movement of EU Workers to analyse the scope and meaning of Article 7(3)(b) of Directive 2004/38 that regulates the retention of EU worker status, discuss the relevant case law of the Court of Justice on this issue, provide information regarding the national implementation and practice in relation to this issue and map out the position of relevant stakeholders.

The structure of this note is as follows: Section 2 discusses the legal basis for retention of EU worker status in EU law and the relationship between primary and secondary law. Section 3 provides an overview of the Court's case law in relation to retention of worker status, while Section 4 focuses on the relevant literature and stakeholders. Finally, sections 5-9 discuss the national implementation and practice in relation to retention of worker status. This part of the note is based on the replies of the national experts to a questionnaire that was devised for this purpose.

2. Retention of worker status – the legal framework

The legal framework of the rights of EU workers must be understood in the light of the following legal provisions:

- Article 45 TFEU – the right of free movement of workers which has direct effect in the legal orders of the Member States;
- The secondary legislation which implements (in part) Article 45 TFEU – specifically Directive 2004/38; Regulation 1612/68 (now 492/2011); repealed Directive 68/360;
- The jurisprudence of the CJEU on free movement of workers and citizens of the Union, and generally on Directive 2004/38.

According to Article 45(3) TFEU, the freedom of movement of EU workers includes the rights:

- (a) to accept offers of employment actually made;
- (b) to move freely within the territory of Member States for this purpose;
- (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action and
- (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

These rights may be subjected to limitations justified on grounds of public policy, public security or public health. According to Article 45(2) the freedom of movement of EU workers entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. The Treaty of Lisbon has not changed the substance of the rights enjoyed by workers moving to another Member State, as indicated by the reading of former Articles 39 EC and 48 EEC. As the Treaty makes it clear, (Article 46 TFEU) the freedom of movement of

workers has to be implemented via secondary legislation. Directive 2004/38 sets out in secondary legislation the right of a Union citizen to reside in another Member State, which finds expression in primary law in the fundamental freedoms and the rules on European Union citizenship. Also relevant for the topic of this study are the abandonment of the residence permit system in as far as EU citizens exercising free movement rights are concerned, and the introduction of the concept of permanent residence which is acquired after five years of continuous residence (Article 16 of Directive 2004/38). Where an EU worker has completed five years residence in a host Member State, he or she will benefit from permanent residence under Article 16 et seq of Directive 2004/38. These workers and former workers can no longer be made subject to limitations on their residence except in the exceptional circumstance set out in the Directive. Where EU workers have resided for less than five years in the host Member State and become unemployed, some Member States are looking more and more attentively at whether they have the right to continue to reside, particularly where they claim social benefits. The issue tends to be formulated around the scope of Article 7 of the Directive which must be read in conjunction with Article 14 which in (1) allows Member State to consider the position of EU citizens and their family members who have become an unreasonable burden on the social assistance system of the host state and (3) which prohibits the expulsion of an EU citizen or a family member as the automatic consequence of recourse to the social assistance system of the host state. The CJEU decision in *Antonissen* is relevant in this context since the Court held that where an EU national has a reasonable chance of finding employment he or she is entitled to reside on the territory of the Member State.¹ This reasonable chance cannot be limited to three or even six months but must be assessed in light of the relevant circumstances. Directive 2004/38 has codified this aspect of the Court's case law in article 14(4)(d).

Article 45(3) TFEU does not expressly list the right to retain worker status. The possibility of retaining EU worker status or self-employed status is expressly provided for in secondary legislation, namely in Article 7(3) of Directive 2004/38. Article 7 of Directive 2004/38 deals with the right of residence for longer than 3 months and is applicable to all categories of EU citizens regardless of whether or not they are involved in an economic activity. The right remains subject to several conditions in the case of students and economically inactive citizens, who must show sufficient resources and comprehensive sickness insurance. Workers do not need to meet other conditions, except that of being an EU worker.² Paragraph 3 of Article 7 deals with the situation in which the status of worker and therefore the right of residence for longer than 3 months is maintained although employment has ceased. It reads as follows:

Article 7:

[...]

¹ Case C-292/89 *Antonissen* [1991] ECR I-745

² This note does not discuss the conditions that have to be met by an EU citizen in order to be considered an EU worker.

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment

In the absence of a provision in primary law referring expressly to retention of worker status, the Court's case law provides some answers to the question of the legal basis of the right to retain worker status. In the *Lair* decision, the Court acknowledged that “neither Article 7(2) Regulation 1612/68 nor Articles 48 or 49 of the EEC Treaty provide an express answer to the question whether a migrant worker who has interrupted his occupational activity in the host State in order to pursue university leading to a professional qualification is to be regarded as having retained his status as a migrant worker for the purposes of Article 7 of the regulation.”³ Yet, the Court found that “there is nevertheless a basis in Community law for the view that the rights guaranteed to migrant workers do not necessarily depend on the actual or continuing existence of an employment relationship.”⁴ In relation to students who had been previously employed, the Court used the following legal provisions as arguments in favor of this view: Article 48(3)(d) EEC Treaty (now Article 45(3)(d) TFEU) and Regulation 1251/70 implementing it; Directive 68/360 that prohibited the member states from withdrawing a residence permit under certain circumstances and finally, Article 7(1) of Regulation 1612/68 stating that a migrant worker who has become unemployed should not be treated differently from a national worker as regards reinstatement or re-employment.⁵

Based on the Court's later case law addressing the legal position of jobseekers, it can be argued that a national of a Member State who has been employed in a host State but who is unemployed and seeking employment in that state continues to derive a right to stay in the host state based on Article 45(3) TFEU since he can be said to be staying in that Member State for the purpose of employment. The Court of Justice has interpreted Article 45 TFEU as including both workers and jobseekers. This was confirmed in the *Antonissen* case, which

³ *Lair*, para. 30

⁴ *Lair*, para 31

⁵⁵ *Lair*, para.34

involved the right to stay in a host state while seeking employment.⁶ The Court stated that “*It follows that Article 48(3) must be interpreted as enumerating, in a non-exhaustive way, certain rights benefiting nationals of Member States in the context of the free movement of workers and that that freedom also entails the right for nationals of Member States to move freely within the territory of the other Member States and to stay there for the purposes of seeking employment.*”⁷ The Court’s interpretation of Article 45(3) TFEU as enumerating in a non-exhaustive way rights that benefit nationals of the Member States in the context of free movement of workers can be used as an argument that the right to retain worker status stems from Article 45 TFEU, while Directive 2004/38 implements it.

In terms of how to understand the relationship between the rights provided for in Article 45 TFEU and the provisions of Directive 2004/38 that implement together with Regulation 492/2011 (former Regulation 1612/68) the fundamental freedom of movement for workers it is useful to bear in mind the following issues. In relation to former Regulation 1612/68, the position of the Court has been that the secondary legislation protects and facilitates the exercise of the primary rights conferred by the Treaty, rather than itself creating new rights.⁸ In this vein, regarding the conditions listed by Regulation 1612/68 and Directive 68/360 for the issuing of a residence permit the Court has stated that “*...the legislative authorities of the Community were aware that, while not creating new rights in favour of persons protected by Community law, the regulation and directives concerned determined the scope and detailed the rules for the exercise of rights conferred directly by the Treaty.*”⁹

According to Spaventa, the Court’s position on the relationship between primary and secondary law is that “rights that derive directly from the Treaty can be clarified by secondary law, but are not per se established by such case-law. [...] It is for the Court alone to decide the boundaries of the rights granted by the Treaty; secondary legislation simply gives effect to those rights.”¹⁰ Spaventa’s comments were made in relation to the Court’s approach to citizenship cases and the need for EU citizens to fulfil the black-letter conditions of the Residence Directives from the 1990s and now Directive 2004/38 in order to reside in a host Member State. Thus, although not concerned specifically with the rights of workers as such, this interpretation of the relationship between primary and secondary law highlights the fact that although an EU citizen may “fail to satisfy the black-letter requirements imposed by secondary legislation (Directive 2004/38) ...s/he might have a right in primary legislation which is at the same time more limited and more extensive than that granted by secondary legislation.”¹¹ Such a right will depend on “the appraisal of the factual circumstances at stake

⁶ Case C-292/89 *Antonissen* [1991] ECR I-00745

⁷ *Antonissen*, para 13

⁸ P. Craig and G. de Búrca, p 774

⁹ Case 48/75, *Royer*, para 28

¹⁰ E. Spaventa (2010) ‘The impact of articles 12, 18, 39 and 43 of the EC Treaty on the coordination of social security systems.’ in 50 years of social security coordination: past – present – future. Luxembourg: European Commission, pp.112-1128 (p. 121).

¹¹ *Idem*, p 120

and on whether denial of the right is a justified and proportionate response by the Member State.”¹²

Moreover, in interpreting the rights provided for in Directive 2004/38, Recital 3 and the therein-stated objectives of the instrument should be kept in mind: “Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.” Moreover, in the *Metock* case, the Court stated at para 59 “The same interpretation must be adopted a fortiori with respect to Directive 2004/38, which amended Regulation No 1612/68 and repealed the earlier directives on freedom of movement for persons. As is apparent from recital 3 in the preamble to Directive 2004/38, it aims in particular to ‘strengthen the right of free movement and residence of all Union citizens’, so that Union citizens cannot derive less rights from that directive than from the instruments of secondary legislation which it amends or repeals.” This was later repeated in para 30 of the decision of CJEU in the *Lassal* case.¹³ Thus, no interpretation of Article 7 of Directive 2004/ 38, which will place greater restrictions on the rights of EU workers than existed under the previous legislation, is permissible.

Prior to the adoption of Directive 2004/38, this issue was regulated by Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers and their families. Together with Regulation 1612/68, the Directive implemented the Treaty provisions on free movement of workers.¹⁴ Article 1 declared that the scope of Directive 68/360 was to abolish restrictions on the movement and residence of nationals of said States and of members of their families to whom Regulation 1612/68 applied.¹⁵ Article 7 of the Directive dealt with the possibility of withdrawing a residence permit from a former worker, which in the general context of the instrument should be interpreted as a restriction on the exercise of the worker’s right to free movement. According to Article 6 of the same Directive, the residence permit had to be valid for at least five years from the date of issue and automatically renewable.¹⁶ According to Article 7 of Directive 68/360, the right of residence of a person who became involuntarily unemployed enjoyed a certain level of protection. If involuntary unemployment occurred during the first five years of residence, the host State was not allowed to withdraw the residence permit solely on grounds of involuntary unemployment - Article 7(1). The host State was allowed to restrict the right of residence upon the first renewal of the residence permit, if involuntary unemployment occurred or existed at that moment. Even in this scenario, the right of residence had to be awarded for a max of 12

¹² *Ibidem*

¹³ Case C-162/09 *Taous Lassal* [2010] ECR I-09217

¹⁴ Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community is now replaced by Regulation 492/2011; Directive 68/360 EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families has been abrogated by Directive 2004/38

¹⁵ Article 1 of Directive 68/360

¹⁶ Article 6(1)(b) of Directive 68/360

months, if the person had been involuntarily unemployed for the last 12 consecutive months - Article 7(2). In addition, if unemployment did not occur during the last 12 consecutive months but at some other point during the first five years, the first renewal of the residence permit could not limit the duration for which the second residence permit was issued. Thus, if involuntary unemployment occurred or existed at the time that the residence permit was renewed for a second time, the host State could no longer restrict residence.

Prior to the adoption of Directive 2004/38, the Member States had some scope for restricting the residence of an involuntarily unemployed person, but that scope was limited to the first renewal of the residence permit. They nevertheless retained the power to end residence in case the person no longer fulfilled the additional condition of being involuntarily unemployed. Moreover, it was generally understood that a voluntarily unemployed national may have his residence permit revoked.¹⁷ This interpretation of Article 7 of Directive 68/360 takes into account the scope of the measure, which was the abolition of restrictions on the exercise of the right to free movement for workers and the *effect utile* of the provisions on the free movement of workers, more generally. The possibility of ending the right of residence because of involuntary unemployment is a measure that could deter EU nationals from trying to make use of the right to free movement as workers.

During the negotiation process of Directive 2004/38, some Member States wished to limit the possibility of retaining worker status in case of unemployment. In its original proposal, the Commission argued that Article 7(3) “*broadly takes over certain provisions of Directive 68/360 with clarifications and incorporates Court of Justice case law regarding retention of worker status where the worker is no longer engaged in any employed or self-employed activity.*”¹⁸ During the negotiations in the Council, Denmark and the Netherlands have proposed the introduction of a deadline by which the person in involuntary unemployment ceased to be entitled to residence.¹⁹ The 2003 amended version of the Commission’s proposal did not contain changes to the initial text (the same requirements applied: involuntary unemployment and registration as a job-seeker with the relevant employment office).²⁰ However, the final version of Article 7(3)(b) expressly states that the person must have been employed for at least one year before the involuntary unemployment takes place in order to retain worker status. Article 7(3)(c) was also changed during the negotiation process in order to make it clear that in case of employment for less than one year or expiration of a short-term contract for less than one year, the retention of worker status is limited in time. *By implication*, it results that in case of Article 7(3)(b), the legislator did not wish to limit the retention of worker status. The joint reading of paragraphs 3(b) and 3(c) of Article 7 indicates that a difference in treatment was envisaged that sets the completion of at least one year of employment as a threshold. Once the threshold and the rest of the conditions are met, the retention of worker status cannot be limited.

¹⁷ C. Barnard (2004) *The Substantive Law of the EU – The Four Freedoms*, Oxford University Press, p 270

¹⁸ Com (2001) 257 final, p 12

¹⁹ Council Doc 10572/02 p 22 and Council Doc 6147/03 p 19

²⁰ Com (2003) 199 final

3. The jurisprudence of the Court of Justice

Through its jurisprudence, the Court of Justice has played an important part in ensuring that the rights of EU workers are properly and fully implemented at the national level. Although, retention of worker status has not been one of the most litigated provisions relating to the free movement of workers, it has been examined by the Court in relation to claims to benefits and equal treatment with nationals of the host State. In such cases, holding EU worker status becomes important as it reduces substantially the capacity of the host Member State to deny benefits or to reserve them only for own nationals. This remains the case under the legal regime introduced by Directive 2004/38 since based on Article 24(2) of the Directive workers and persons who retain such status may not be excluded from social assistance as opposed to economically inactive EU citizens who may have to wait until acquiring permanent residence in the host state before being entitled to equal treatment on the basis of EU law.²¹

In one of its earliest cases on workers, the Court acknowledged that the concept of worker had a Community meaning and that the Treaty and its implementing legislation “*did not intend to restrict protection only to the worker in employment but tend logically to protect also the worker who, having left his job, is capable of taking another.*”²² The case dealt with the meaning of the concept of “wage-earner or assimilated worker” for the purposes of Regulation No3 on social security for migrant workers, which was implementing Article 48 EEC (now Article 45 TFEU).

The Court’s overall position on retention of worker status is well summarized by its findings in the *Martinez Sala* case.²³ The applicant, a Spanish national, resident in Germany for about 25 years had a patchy employment history with interruptions due to unemployment periods. She applied for a child benefit which was refused due to her lack of a residence permit and/or entitlement and lack of worker status. Although, the Court decided the case on the basis of the applicant’s EU citizenship status, regarding her possible worker status it held that “*once the employment relationship has ended, the person concerned as a rule loses his status of worker, although that status may produce certain effects after the relationship has ended, and a person who is genuinely seeking work must also be classified as a worker.*”²⁴

The idea that worker status may survive the end of an employment relationship has been upheld in the Court’s case law. In *Lair*²⁵, the applicant, a bank clerk, was a French national residing in Germany who had a mixed employment record, consisting of periods of unemployment, retraining or brief employment. After embarking upon university studies in Roman and Germanic languages, Ms Lair applied for maintenance and study grants but was denied them due to her lack of worker status. The Court argued that “*the rights guaranteed to migrant workers do not necessarily depend on the actual or continuing existence of an*

²¹ P. Minderhoud (2013) Access to social assistance benefits for EU citizens in another Member State, in *Online Journal of Free Movement of Workers within the European Union* no 6, pp 26-33

²² Case 75/63 *Hoekstra (Unger)*.

²³ Case C-85/96 *Martinez Sala* [1998] ERC I-2691

²⁴ Case C-85/96 *Martinez Sala* para 32

²⁵ Case 39/86 *Lair* [1998] ECR I-3116

employment relationship”²⁶ and that persons who have been engaged in an effective and genuine activity as an employed person but who are no longer employed are nevertheless considered to be workers under certain provisions of Community law.²⁷ However, the Court imposed an important limitation in respect of the retention of worker status in as much as it required the existence of some continuity between the former employment and the course of study “*unless the person has become involuntarily unemployed and is obliged by conditions on the job market to undertake occupational retraining in another field.*”²⁸ This approach has been confirmed in later cases, such as *Raulin*²⁹ or *Ninni-Orasche*³⁰ and is now codified by Directive 2004/38 in Article 7(3)(d).

Another category of cases examined by the Court, concerns former frontier workers³¹ who claimed benefits from their former state of employment relying on the preservation of worker status. In cases such as *Meints*³² or *Leclere*,³³ the Court has decided that retention of worker status operates only regarding benefits relating to the prior existence of an employment relationship and to the applicant’s objective status as worker. (Former) Article 48 EEC and (former) Regulation 1612/68 protect the worker against any discrimination affecting rights acquired during the former employment relationship but benefits relating to events occurring after the end of that relationship are excluded.³⁴

The Court has explained the privileged position of workers in contrast to first time-jobseekers or economically inactive citizens as relating to them having participated in the employment market of a Member State. As such, “*they have in principle established a sufficient link of integration with the society of that state, allowing them to benefit from the principle of equal treatment, as compared with respectively, national workers and resident workers. The link of integration arises, in particular, from the fact that, through the taxes which they pay in the host Member State by virtue of their employment there, migrant workers and frontier workers also contribute to the financing of the social policies of that State.*”³⁵ While it can be generally argued that migrant workers are granted certain rights linked to their status of worker even when they are no longer in an employment relationship, the Court’s case law is silent on whether temporal limitations can be applied to the retention of worker status. In *Collins*³⁶ the

²⁶ *Lair*, para 31

²⁷ *Lair*, para 33

²⁸ *Lair*, para 36

²⁹ Case C-357/89 *Raulin* [1992] ECR I-1027

³⁰ Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187

³¹ Under EU law, a frontier worker can be defined as someone who lives in one Member State and works in another, returning home at least once a week.

³² Case C-57/96 *Meints* [1997] ECR I-6689. The applicant was a German national who had worked in agriculture in the Netherlands but became involuntarily unemployed. In the Netherlands, he applied for a benefit intended to compensate persons in his situation. His claim was rejected on grounds that he was not resident.

³³ Case C-43/99 *Leclere* [2001] ECR I-4265. The applicant was a former frontier worker residing in Luxembourg. As a result of an accident at work he was receiving an invalidity pension from Luxembourg, and he never returned to work. He claimed child benefits in Luxembourg for his child who had been born after he stopped working.

³⁴ *Leclere*, para 59

³⁵ Case C-379/11 *Caves Krier Frères Sàrl* [2012]

³⁶ Case C-138/02 *Collins* [2004] ECR I-2703

Court has limited itself to arguing that there is no retention of worker status in case of an absence of 17 years from the host Member State as “no link can be established between the activity and the search for another job more than 17 years after it came to an end”.³⁷ It can be inferred from *Collins* that as long as the link to which the Court refers can be shown to exist, worker status may be retained. This interpretation would be in line with the manner in which the Court has interpreted the right of first-time job-seekers to remain in the host Member State and look for work. In *Antonissen*³⁸ the Court was asked to decide on the right of the host Member State to impose limits as to how long a person may remain there in search of a job. It decided that six months were an appropriate period of time, after which the host State may require the person to leave. However, if the person could show that he was still looking for employment and had genuine chances of being engaged, he cannot be required to leave the territory of the host state.³⁹ It can be argued that the condition of being duly registered with the employment office in order to retain worker status on the basis of Article 7(3)(b) of Directive 2004/38 captures well the Court’s overall philosophy that retention of worker status is generally related with the person’s willingness to continue to look for a job, formulated as early as the *Hoekstra* case and therefore, continue to have links with the host State’s labour market.

Under the legal regime of Directive 2004/38, being involuntarily unemployed remains one of the main conditions for enjoying the retention of worker status. This means that in practice, the difference between voluntary and involuntary unemployment will be extremely relevant. As discussed previously, in case a person stops working in order to engage in university studies that have no connection with the former occupation, the Court has considered that such a person should not retain worker status and the advantages associated with it. The idea that voluntary unemployment does not deserve the same level of protection fits well with the Union’s economic goals and the worker’s privileged position in that system. In *Ninni-Orasche*, the Court of Justice has nuanced its position as to what constitutes involuntary unemployment by arguing that a person on a fixed-term contract may nevertheless be considered involuntarily unemployed at the end of that contract, despite its essentially temporary nature.⁴⁰ The following circumstances were judged relevant: (a) practices relevant in the sector of economic activity; (b) the chances of finding employment in the sector which is not fixed-term; (c) whether there is an interest in entering into only a fixed term employment relationship or (d) whether there is a possibility of renewing the contract of employment. The Court acknowledged that labour market conditions play a considerable part in the type of contract a person may be awarded in specific sectors and equally, that the worker may not have any bargaining power over the type and duration of contact he may conclude. Directive 2004/38 takes an even stricter stand as in cases of employment for less than one year the retention of worker status is limited in time by Article 7(3)(c).

³⁷ *Collins* para 29

³⁸ Case C-292/89 *Antonissen* [1991] ECR I-745; see also case C-258/05 *Ioannidis* [2005] ECR I-8275

³⁹ *Antonissen*, para 21

⁴⁰ Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187 para 39

The Court of Justice will have a new opportunity to engage with the issue of retention of worker status in the pending case *Jessy Saint Prix*.⁴¹ The applicant is a French national who came to the UK in July 2006 and worked in a variety of jobs before enrolling on a teaching course (September 2007 and June 2008). She became pregnant, the child being due in June 2008, and withdrew from her studies in February 2008, undertaking agency work until March 2008 when she stopped looking for work because of her pregnancy, and unsuccessfully applied for Income Support. This benefit was refused because the UK authorities considered that she had no legal right to reside in the UK after she stopped looking for a job. In their opinion, she no longer held EU worker status because she could not claim to be looking for a job, and she did not meet self-sufficiency requirements. The Court of Justice was asked to decide whether the status of EU worker and/or the rules that allow for retention of worker status upon cessation of employment extend to a woman who reasonably gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth.

4. Positions expressed by stakeholders

The issue of retention of worker status has not been extensively investigated in the literature on free movement of persons. The topic is usually treated in general commentaries of EU law but there are no in-depth studies dedicated to it. The explanation probably relates to the Court's minimal jurisprudence on the topic. Based on the Court's interpretation of Directive 2004/38, the rights it offers should not be less than those provided for in previous instruments of Community law that were repealed or modified by the Directive. To this extent, it is useful to review the literature on Article 7 of Directive 68/360, which remains the yardstick against which the rights awarded by Directive 2004/38 should be measured.

According to Martin and Guild, Article 7 of former Directive 68/360 should be seen as complementing the rights set out in Article 7 of Regulation 1612/68 (now Regulation 492/2011) in relation to the retention of worker status upon unemployment and the right of residence. Their interpretation of Article 7 Directive 68/360 is that "The right of the host state to limit the validity of the permit and finally to refuse to renew it does not extend beyond the first renewal."⁴² The example given is that of a worker who works for four and half years and then finds himself unemployed for 15 years. He is entitled to renewal of his residence permit each time it expires. Van der Mei reached a similar conclusion when he argued that based on Directive 68/360 "basically, workers who have found employment in another Member State for more than one year, are ensured a right of residence for at least six years. The workers become entitled to reside permanently in the host State if at the end of the sixth year they are (still) in employment."⁴³ It was generally agreed that a person voluntarily giving up

⁴¹ Case C-507/12 *Saint Prix*, pending.

⁴² D. Martin and E. Guild (1996) *Free Movement of Persons in the European Union*, Butterworths, p 176

⁴³ A.P. van der Mei (2003) *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits*, Hart Publishing, p 31, footnote 48

employment would lose the right of residence.⁴⁴ Those who gave up employment voluntarily lost the right to reside as a worker in the host state and in matters not related to former employment, the equal treatment rights which Community law conferred upon workers. The involuntarily unemployed could retain the right of residence or, in case of retirement or permanent incapacity, they acquired a right to remain (under the system of Directive 2004/38, they acquire a right to permanent residence). Moreover, involuntarily unemployed persons falling under the scope of Article 7 Directive 68/360 retained equal treatment rights and remained entitled to the rights they initially enjoyed as Community workers.⁴⁵

Rogers and Scannel differentiate between the right to remain based on Article 39(3)(d) EC (now Article 45 (3)(d) TFEU) and cases relating to the Court's decision in *Sala* recognizing in certain circumstances the status of worker is able to produce certain effects after the relationship has ended. They argue that according to the Court's case law "it is clear that the secondary legislation does not represent the full extent of circumstances" where rights are expressly given upon cessation of the employment relationship.⁴⁶ Thus, the status of worker is not lost immediately upon cessation of employment and that drawing on the rights of job seekers it can be argued that EU law recognizes that those who have previously worked have a reasonable period within which to seek and obtain further employment.⁴⁷ Their analysis is premised on the fact that that some Member States seem to treat own nationals as retaining the objective status of workers through the combination of being available for work and being prepared to take it up.⁴⁸ Their overall conclusion is that "the precise consequences of retention of the status of worker may depend on the national law provisions of a Member State. At the heart of most situations considered is the proposition that it would be discriminatory and contrary to Community law to treat own nationals and free movers differently in terms of benefits and advantages given by national law to those who have been in employment."⁴⁹

It is important to note that the Court in its decisions refers to loss or retention of the "status of worker" and not only to retention of the right to reside. This aspect is important because prior to Directive 2004/38, Directive 68/360 regulated the situation where the right to reside was retained although the person was involuntarily unemployed. In the case law discussed in Section 3, retention of worker status was relevant for the applicants' right to claim social advantages based on Article 7(2) of Regulation 1612/68 (now Regulation 492/2011). This suggests that the syntagm "retention of worker status" used by the Court has a wider scope than just retention of the right to reside. Directive 2004/38 has taken on board the Court's position in as much as it uses *expressis verbis* the syntagm "retention of worker status and of the status of self-employed person", even if Article 7(3) of the Directive deals with the right to reside for longer than three months. Another argument is the fact that the Directive contains

⁴⁴ Van der Mei, p 31; C. Barnard (2004) *The Substantive law of the EU – The Four Freedoms*, Oxford University Press, p 270

⁴⁵ Van der Mei, p 38

⁴⁶ N. Rogers and R. Scannel (2005) *Free Movement of Persons in the Enlarged European Union*, Sweet and Maxwell, p 116

⁴⁷ *Ibidem*

⁴⁸ *Idem*, p 117

⁴⁹ *Idem*, p 118

several other provisions that regulate the position of beneficiaries under Article 3 of Directive 2004/38 where changes took place in the circumstances that gave rise to their rights based on the Directive (Articles 12, 13).⁵⁰ In these last cases, the legislator uses the term “retention of the right to reside” and not retention of the status of family member, for example. This interpretation takes into account the fact that “Directive 2004/38, insofar as it resumes the law in force, integrating it with the case law and the judgements issued by the Court of Justice over time, does not represent a breaking point with the past, but instead helps to better understand the rules.”⁵¹ According to Craig and de Búrca Article 7(3) of Directive 2004/38 governs the position of former workers who although have ceased working, nevertheless retain some of the rights of workers for themselves and their family members. The provision replaces the pertinent parts of Directive 68/360 and supplements them with the relevant case law of the ECJ on voluntary and involuntary unemployment.⁵² In their opinion, the persons referred to in Article 7(3) should be distinguished from first time jobseekers similar to the applicants in the *Antonissen* and *Collins* cases who “cannot be said to enjoy the status of workers in the full sense of the word although they enjoy a right to reside during the period they are seeking work and access to certain benefits which are specifically intended to facilitate access to employment.”⁵³

In relation to Directive 2004/38, Barnard has argued that EU citizens retain the right of residence for as long as they remain workers or self-employed persons including the situations covered by Article 7(3). In this case, EU citizens and their family members cannot be expelled for as long as the Union citizen can provide evidence that they are continuing to seek employment and they have a genuine chance of being employed. She argues that by implication a residence permit may be withdrawn from a migrant who is voluntarily unemployed.⁵⁴

In order to have a better understanding of the issue of retention of worker status, we have requested several experts to formulate an opinion in relation to Article 7(3)(b) of the Directive and the possibility of limiting retention of worker status.

- *Prof. Herwig Verschueren, Professor of International and European Labour and Social Security Law at the University of Antwerp, Belgium*⁵⁵

In his reply, Prof. Verschueren does not consider that time limits besides those already provided for in Article 7(3)(b) can be applied. He underlined that Article 7(3)(b) applies to EU workers who have been employed in the host Member State for more than one year. Consequently, according to the provisions of Regulation 883/2004 on social security

⁵⁰ Article 12 deals with retention of the right of residence by family members in the event of death or departure of the Union citizen. Article 13 deals with retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership.

⁵¹ Condinazzi, Lang and Nascimbene, p 67

⁵² P. Craig and G. de Búrca, *EU law: Text, Cases and Materials* (OUP, 2008), p 772

⁵³ *Idem*, p 773

⁵⁴ C. Barnard (2006) *EC Employment Law*, p 186

⁵⁵ Position formulated by Professor Verschueren on 23.09.2013, on file with the author.

coordination, the host Member State is the Member State competent to grant unemployment benefits (Article 61 Regulation 883/2004). This means that in order to determine the right of the migrant worker to unemployment benefits, this Member State has to aggregate the periods of insurance, employment or self-employment completed under its legislation as well as under the legislation of other Member States. It also has to respect the right to equal treatment (Article 4 Regulation 883/2004). During the period of his/her entitlement to unemployment benefits the migrant person involved fulfills the condition of sufficient resources of Article 7(1)(b) Directive 2004/38 and maintains the right to reside in the host State on the basis of this provision alone. Unemployment benefits cannot be regarded as ‘social assistance’ within the meaning of Directive 2004/38 (see *Vatsouras and Koupatantze*).⁵⁶ These persons can also claim sickness insurance on an equal footing with the nationals of the host State who are receiving unemployment benefits (Article 4 Regulation 883/2004). In addition, by virtue of the prohibition of discrimination on grounds of nationality (Article 45 TFEU; Article 7 Regulation 492/2011; Article 5 Regulation 883/2004) the host Member State has to apply its legislation with regard to a person’s registration as a job-seeker with the employment office without any form of discrimination on grounds of nationality. Prof. Verschueren emphasized that withdrawing a person’s registration as a job-seeker is only allowed under the same conditions as those applicable to the unemployed nationals of the host Member State. Only if the nationals of the host Member State can be removed from the list of persons registered as job-seekers with the employment office, the same measure could be taken against unemployed migrant workers, and of course, only for reasons also applicable to the nationals of the Member State concerned. The same reasoning applies to the termination of the right to unemployment benefits, which could then possibly lead to the loss of the right to reside under Article 7(1)(b) Directive 2004/38.

- *Prof. Ferdinand Wollenschläger, Professor of Public law, European Law and Public Commercial Law at the University of Augsburg, Germany*⁵⁷

Prof. Wollenschläger has also underlined that retention of the status of worker is important in particular in view of the right of residence and the right to non-discrimination (regarding social benefits). He argues that these two aspects (right of residence and right to non-discrimination) have to be distinguished in principle. Article 7(3) Directive 2004/38 refers to Article 7(1) and thus only to the right of residence. The claim to non-discrimination according to Article 24 Directive 2004/38, however, explicitly refers to the right of residence granted by the same directive (“... all Union citizens residing on the basis of this Directive in the territory of the host Member State ...”). Moreover, Article 7 (3) Directive 2004/38 may also be applied to define the concept of worker for other legal instruments, in particular.⁵⁸ In view of the objectives stated by the Commission and the requirement to register provided for by Article 7(3)(b) Directive 2004/38, Member States may apply objective conditions for the

⁵⁶ Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-04585

⁵⁷ Position formulated by Professor Ferdinand Wollenschläger on 30.09.2013, on file with the author.

⁵⁸ Article 7(2) Regulation 1612/68 (now Regulation 492/2011); F. Wollenschläger (2007) *Grundfreiheit ohne Markt*, p 67

registration.⁵⁹ Regarding temporal restrictions, Prof. Wollenschläger notes that Article 7(3)(c) Directive 2004/38, dealing with persons not fulfilling the stricter conditions of Article 7 (3) (b) *ratione temporis*, expressly allows for a temporal restriction. Since this is not the case in the context of lit. b (cf. its wording), one might even argue against any temporal limitation at all (*argumentum e contrario*). If one principally accepts the possibility of temporal limitations, Article 7 (3)(b) interpreted in the light of lit. (c), requires the retention of the status of worker for a period going substantially beyond six months. Moreover, considering the status quo ante (Articles 6 and 7 Directive 68/360) in line with the *Metock* jurisprudence (para. 59) as a minimum standard, the minimum period at least for the right of residence is up to six years.⁶⁰ Prof. Wollenschläger considers that the situation under Directive 68/360 was controversial due to the imprecise wording of Article 7 Directive 68/360.⁶¹ This complicates the task of determining a minimum standard. It should also be noted that the practical significance of the retention of the status of worker diminishes as soon as a person has acquired the right of permanent residence, namely after a continuous period of legal residence for five years (Art. 16 seq. Directive 2004/38); for this right is not subject to the economic conditions of residence, and a far-reaching right to non-discrimination may be claimed by persons enjoying that status.

- *Mr Jonathan Tomkin, Member of the Legal Service EU Commission, former barrister-at-law, King's Inns Ireland and former director of the Irish Centre for European Law - Trinity College, Dublin*⁶²

The reply of Mr Tomkin focuses on the differences between various categories of jobseekers and their rights under EU law. According to Mr Tomkin, it is important to bear in mind that Union law confers rights incrementally on job-seekers. It is apparent from the terms of Directive 2004/38, which essentially reflects the Court's settled case-law that Union law distinguishes between different categories of jobseeker, depending on whether or not they have worked previously in the host Member State. In particular, the following categories of jobseekers exist:

- (i) Jobseekers who have never previously worked in a host Member State (covered by Article 14(4) of Directive 2004/38 and Article 24(2));
- (ii) Jobseekers who have worked for 1 year or less as provided for in Article 7(3)(c); and
- (iii) Jobseekers who have worked for over 1 year as provided for in Article 7(3)(b).

Jobseekers who have never worked previously in a host Member State enjoy the least amount of protection under Union law while those who have worked for over one year and fall within

⁵⁹ Case C-171/95 *Tetik* [1997] ECR I-00329, para 41

⁶⁰ Directive 68/360 – Article 6(1)(b): validity for a minimum period of five years, Article 7(1): no withdrawal possible; Article 7(2): minimum period of renewal 12 months.

⁶¹ F. Wollenschläger (2007) *Grundfreiheit ohne Markt*, pp 66 et seq

⁶² Position expressed by Mr Jonathan Tomkin on 3.10.2013, on file with the author. Mr Tomkin's position is expressed in a purely personal capacity and does not reflect the position of the European Commission.

the scope of Article 7(3)(b), are protected most. This may be explained by the fact that job seekers who have previously worked in a host Member State will have paid taxes, contributed to the social security system of the host Member State and have generally developed ties with a host Member State, whereas the same does not apply as regards first time jobseekers.⁶³ He suggests that in the absence of a specific case law on Article 7(3)(b), the rights of first time jobseekers should be the reference point in relation to which the rights of jobseekers covered by Article 7(3)(b) should be assessed. Regarding the last category, their rights cannot in any event be reduced below the minimum rights applicable to individuals who have never worked previously in a host Member State. Given that (1) an absolute time limit cannot be imposed on first-time jobseekers in relation to how long they can reside in the host state looking for employment⁶⁴ and (2) jobseekers who have previously been economically active are to be afforded *more extensive rights* than first time jobseekers,⁶⁵ Mr Tomkin considers that Member States would be precluded from applying a generally applicable time-limit on the period during which Union citizens may retain their 'worker' status under Article 7(3)(b). This conclusion should not be understood to mean that once a worker has worked for over one year, he/she may rely on that status for ever after. Such an approach would clearly be inconsistent with the objective and spirit of the provision, which implies that the person concerned is under an obligation to seek work and that there is a chance that work will be found. Mr Tomkin considers that Member States may take measures to limit the right of Union citizens to retain their "worker" status to persons that are truly and genuinely attempting to secure employment and have genuine prospects of being engaged. However, any such limitation would have to be expressed in a manner that respects, among other things, the principle of proportionality and may be applied on a case by case basis taking into account the particular circumstances of the job seeker concerned.

- *The AIRE Centre*⁶⁶

The AIRE Centre has provided legal support to the claimant in the *Jessy Saint Prix* case before the national court (see, section 3). In this context it was submitted that an EU citizen, who travels to another Member State in order to work there, does work there, but temporarily ceases work owing to the demands of pregnancy, remains a 'worker'. This conclusion is based upon the long-standing and well-settled approach of the CJEU giving a broad and purposive interpretation to the term 'worker' having regard to social as well as economic considerations. If a pregnant woman loses the status of 'worker', she may also lose her right to reside in the host state (there is even a risk that she might be threatened with removal). It would be a substantial deterrent to the free movement of female workers if they were faced with the prospect of being left destitute, and threatened with removal to their home country,

⁶³ See, in this respect, Case C-542/09. *Commission v Netherlands*, judgment of 14 June 2012, paras 65 and 66

⁶⁴ Case C-292/91 *Antonissen* [1991] ECR I-745 and Case C-344/95 *Commission v Belgium* [1997] ECR I-1035

⁶⁵ Directive 2004/38 Article 14(4) in relation to protection against expulsion as long as they can provide evidence that they are continuing to seek employment and have a genuine chance of being engaged.

⁶⁶ The AIRE Centre is a specialist charity whose mission is to promote awareness of European law rights and assist marginalised individuals and those in vulnerable circumstances to assert those rights (<http://www.airecentre.org>). The position of the AIRE Centre was formulated by Eleanor Sibley (Legal Project Manager) and Saadiya Chaudary, (Interim Director, The AIRE Centre) and is on file with the author.

should they become pregnant and temporarily give up work in the later stages of pregnancy. In addition, there comes a point in any pregnancy where a woman has to give up actual work for a short while just in order to give birth, but she will not fall within the literal wording of Article 7(3)(a). Further, it would be anomalous if a pregnant woman who gave up work and returned to her home country for up to a year did not lose her continuity of residence for the purpose of Article 16, while a pregnant woman who gave up work for up to six months but remained in the host country would do so. The latter retains a significantly closer connection with the host country but would have to start her qualifying period of residence all over again.

The AIRE Centre believes that any temporal restrictions on Article 7(3)(b) would, in light of the case law of the CJEU on the scope of Articles 45 and 49 TFEU, be unlawful. In *Martinez Sala*, the CJEU indicated that the only condition on retention of worker status by Union citizens who become involuntarily unemployed is that they are genuinely seeking work. Any fixed temporal restrictions on the retention of worker status under Article 7(3)(b) would run counter to the unqualified proposition of the Court that such status should be retained by Union citizens who have become involuntarily unemployed for so long as they are genuinely seeking work. In light of the broad, and unqualified right to retention of worker status by the ECJ in the *Martinez Sala* case, the AIRE Centre argues that any temporal restriction on retention of worker status under Article 7(3)(b) of Directive 2004/38 would be unlawful. Given the parity between rights enjoyed under Article 45 and 49 of TFEU, the same must be true of retention of self-employed status under Article 7(3)(b). Similar to Mr Tomkin, the AIRE Centre has emphasized that Union citizens who have exercised a right to reside as a worker/self-employed Union citizen before becoming involuntarily unemployed arguably enjoy strengthened rights of residence compared to those who have merely exercised a right to reside as a jobseeker.

Regarding the possibility of setting other types of restrictions in relation to retention of worker status, more specifically registration requirements, the AIRE Centre reminds that, the terms ‘worker’ and ‘self-employed’ are autonomous concepts of EU law and have an EU-wide meaning, which cannot be restricted by national provisions. Further, the interpretation of these terms must be consistent with the scope of Articles 45 and 49 TFEU, and the CJEU case law on those provisions. Therefore, any national restrictions on registration with the relevant employment office cannot be determinative *against* a Union citizen who meets the conditions for retention of worker or self-employed status for the purposes of Articles 45 or 49 TFEU. Given the unqualified statement by the Court of Justice of the circumstances in which worker status is retained in *Martinez Sala* (at [32]), it is arguable that it would be unlawful to impose any conditions for registration which would prevent a Union citizen from retaining worker/self-employment status in circumstances under which he/she genuinely continues to seek work in his or her host Member State. Permitting Member States to restrict retention of worker status under Article 7(3)(b) through imposing conditions over and beyond those permitted by *Martinez Sala* could dissuade Union citizens from exercising their right to free movement under Articles 45 and 49 TFEU.

5. National implementation and practice in relation to retention of EU worker status

This part of the analytical note is based on a questionnaire that was sent out to the national experts asking them to detail the national transposition of retention of worker status and any available state practices in relation to this issue. The following questions were asked:

- Q1: What is the national legal provision implementing Article 7(3) (b) of Directive 2004/38?
- Q2: Are there differences between the implementing national measure and the measure that implemented Article 7 of Directive 68/360?
- Q3: What are the main differences in terms of rights between a national worker in the situation regulated by Article 7(3) (b) and an EU worker?
- Q4: In your national legislation what conditions must be met for someone to be considered as “duly registered with the employment office”? For example, would refusal to take on jobs available lead to the conclusion that the person is no longer duly registered?
- Q5: In your national legislation what conditions must be met in order to be considered in duly recorded involuntary unemployment?
- Q6: Besides the conditions set out in Article 7 (3) (b) does your national legislation impose additional conditions? For example, does your national legislation contain any time limits concerning the period of time someone can retain worker status? If yes, what is the legal situation of a person who is no longer considered to retain worker status in terms of his residence and access to benefits?
- Q7: If available, please provide information about case law and literature.
- Q8: What is your own opinion in relation to retention of worker status?

5.1 The transposition of Article 7(3)(b) of Directive 2004/38

The aim of the first two questions was to assess the existence of any transposition issues in relation to Article 7(3)(b) at the national level and possible differences in relation to the previous EU legislative piece addressing retention of worker status, Directive 68/360.

Several Member States have transposed verbatim Article 7(3)(b): *Austria, Cyprus, Croatia, Denmark, Estonia, Finland, Greece, Malta, Netherlands* and *Spain*. *Latvia, Romania*, and the *UK* have transposed the provision in a manner consistent with the text of the Directive.

In its 2008 report on the application of Directive 2004/38, the Commission stated that a number of Member States had transposed wrongly Article 7(3) of the Directive, since they provided for retention of the right of residence, but not for retention of worker status. The Commission argued that retention of the status of worker is a larger concept than retention of the right of residence. As such, “Retention of a status of a worker has impact not only, on the right of residence but also confers additional protection against expulsion, the possibility to acquire the right of permanent residence on favourable conditions and an unrestricted right of

equal treatment.”⁶⁷ The national replies show that this remains an issue in several states: *Belgium, Czech Republic, Germany, Hungary, Ireland, Italy, Latvia, Slovenia, Slovak Republic and Sweden.*

In the *Czech Republic*, the relevant legislation refers only to EU citizens, and not specifically to EU workers. However, the law provides that a registration certificate documenting the right of residence of an EU citizen may not be terminated for the sole reason that the person is no longer a worker or self-employed person. The right of residence is guaranteed unless the EU citizen becomes a burden on the social assistance system or endangers public security or seriously violates public policy.⁶⁸ According to the applicable legislation, a job-seeker may not be regarded as a burden on the social assistance system if he/she was employed for at least one year and is registered with the relevant labour office unless his/her job was terminated because of a serious violation of the work contract by him/her.

In *Hungary*, retention of worker status where the person has worked for longer than one year is not transposed along the lines of the Directive to the extent that there is no explicit difference between persons who worked longer than one year and those who worked for shorter periods. According to Section 9(1)(b) of FreeA, an EEA national who is no longer gainfully employed retains the right of residence if he/she has registered as a job-seeker as prescribed in specific legislation following the termination of his/her gainful employment. Section 9(2) specifies that the right of residence be retained on the grounds of gainful employment for the period of granting the job-seeking assistance as specified in specific legislation.

The *Irish* legislation diverges from the text of the Directive, since it does not expressly provide for the retention of the status of worker or self-employed person but instead states that in the circumstances listed a Union national, “may remain in the State on cessation of the activity”. Regulation 6(2)(c) is subject to Regulation 20 which enables the Minister for Justice and Equality to order a person to whom these Regulations apply to leave the State within a specified time where the person has been refused a residence card or a permanent residence certificate or card, or the person refuses to comply with a requirement under Regulation 19 (personal conduct contrary to public policy, public health or public security) or Regulation 22 (suffering from a disease specified under Schedule 1) or the person is no longer entitled to be in the State in accordance with the provisions of these Regulations, or in the opinion of the Minister, the conduct or activity of the person is such that it would be contrary to public policy or it would endanger public security or public health to permit the person to remain in the State.

The *Romanian* provision states that a person in the circumstances referred to in Article 7(3)(b) Directive 2004/38 retains both worker status and the right to reside.

⁶⁷ Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States , Com/2008/0840 final, para 3.7

⁶⁸ Section 87a of Act No. 326/1999 Coll., Act on the residence of Foreigners

Lithuania has introduced the possibility to retain worker status only in 2012 because of changes to the Aliens Law.

In *Portugal*, there is no reference to the requirement of employment of certain duration in order to retain worker status. The legal provision applicable lists as conditions being duly recorded as involuntarily unemployed and registered as a jobseeker.⁶⁹

In the following Member States, the personal scope of the national provision transposing Article 7(3) includes workers and self-employed persons: *Croatia, Denmark, Germany, Finland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Slovak Republic, Spain* and *Sweden*. This issue is interesting because in *Ireland* the *UK*, the question whether self-employed person may retain their status has been problematic and has led to case law (see Annexes, Table 2).

5.2 Relationship with Directive 68/360

Regarding the legal framework applicable prior to Directive 2004/38, namely, Article 7 of Directive 68/360 it should be noted that this issue is not relevant for *Bulgaria, Croatia and Romania*. Upon their accession to the EU, the relevant piece of secondary legislation addressing retention of worker status was Directive 2004/38. Some of the EU-8 states amended their legislation in accordance with Directive 2004/38 and did not implement Directive 68/360 (*Slovenia* and *Slovak Republic*). *Ireland* failed to transpose Directive 68/360, while *Italy* failed to transpose Article 7 of former Directive 68/360. However, there is no indication that these failures have resulted in problems with the retention of the right to reside on the basis of former Directive 68/360. Several states reported no differences with the system under the previous Directive: *Cyprus, Estonia, Germany, Greece* and *Sweden*.

As mentioned before, *Lithuania* introduced legal provisions regarding retention of EU worker status only in 2012. Prior to that date there was no possibility to retain worker status; a worker could reside only for the period of validity of the residence permit; if it was established that he no longer met the conditions of residence as a worker, he had to show he possessed necessary resources and a valid health insurance in order to retain the right of residence.

Differences between the legal framework applicable under Directive 68/360 and the one applicable based on Directive 2004/38 are mentioned in the following countries:

In *Belgium*, prior to the transposition of Directive 2004/38, the possibility to end the right of residence of EU citizens generally, was more limited. An EU citizen would receive after a maximum of 5 months of residence an unlimited right of residence that could be withdrawn only for reasons of public policy or public security. The Belgian authorities decided to make use of the possibilities contained in Directive 2004/38 to end the right of residence of an EU citizen prior to the acquisition of the right to permanent residence. Although this approach has consequences for all EU citizens, it also affects the situation of an EU worker who finds

⁶⁹ Article 7(3)(b) of Law 37/2006 of 9 august 2006.

himself involuntarily unemployed since under the previous legal regime he would have enjoyed a more favourable treatment.

In the *Czech Republic*, the possibility to terminate the right of residence in case of voluntary unemployment has been deleted from the legislation.

In *Denmark*, the provision implementing Article 7 of Directive 68/360 did not require that the involuntary unemployment be duly recorded nor that the EU citizen had to be registered as a job seeker, as opposed to the provision implementing Article 7(3)(b) of Directive 2004/38. The possibility to limit the validity of the residence certificate upon first renewal was part of the legislation implementing Directive 68/360.

In *Finland*, the provision implementing Article 7 of Directive 68/360 did not specify the amount of time a person had to have been employed before retaining worker status and the right of residence, nor did it expressly cover situations where the EU citizen would embark upon vocational training.⁷⁰ Equally, the rule provided that the EU citizen would retain worker status for two years after becoming involuntarily unemployed, whereas the provision implementing Article 7(3) of Directive 2004/38 does not set a time limit for retention of worker status, in case of employment longer than one year.

In *Latvia*, the provision implementing Directive 68/360 imposed less conditions for retention of the right of residence. It provided that the temporary residence permit could not be withdrawn in case of involuntary unemployment.⁷¹

In *Luxembourg*, the provision transposing Article 7(3) Directive 2004/38 is considered more clear in comparison with the previous legal framework since it indicates clearly that an involuntary unemployed EU worker retains worker status provided that the other conditions are also met (employment for longer than one year and registration). The previous legal provision only stipulated that the valid residence permit could not be withdrawn from a worker solely on the ground that he was temporarily incapable of work as a result of illness or accident.

In the *Netherlands*, the issue of retention of worker status has always been regulated in great detail in relation to how involuntary unemployment should be determined and by what authorities⁷² and also in relation to the type and duration of residence permit a worker in involuntary unemployment could obtain. Under the legal framework transposing Directive 68/360 the right to remain in the Netherlands as a job-seeker was clearly spelled out in case a

⁷⁰ Article 160 of the Aliens Act 301/2004

⁷¹ Point 43.1 of Regulation 297, Kārtība, kādā Latvijas Republikā ieeļo un uzturas Eiropas Savienības pilsoņi un viņu ģimenes locekļi, OG No.66, 28 April 2004, effective from 1 May 2004 (accession to the EU) effective until 13 November 2004. Point 52.1 of Regulation 914, Kārtība, kādā Latvijas Republikā ieeļo un uzturas Eiropas Savienības pilsoņi un viņu ģimenes locekļi), OG No.180, 13 November 2004, effective until 1 March 2006.

⁷² According to the Vreemdelingencirculaire 1982 involuntary unemployment was to be established by the labour office, while the head of the municipal police had to refer to the competent labour authorities to obtain information. According to the 1994 rules the authorities that could establish the existence of involuntary unemployment were the Regionaal Bureau voor de Arbeidsvoorzieningsorganisatie [Regional Office for the Employment Services], the Gemeentelijke Sociale Dienst [Municipal Social Services] or the uitvoeringsorgaan van de sociale verzekering [implementing agency for the social insurances]

person did not qualify as involuntary unemployed. In case unemployment was voluntary the residence permit was *ex lege* no longer valid. Under the *Vreemdelingen*circulaire 2000 (old), it was clear that full reliance on public funding does not detract from the right to remain as a former worker or self-employed person, and that if established that a former worker or self-employed person does not qualify as involuntary unemployment, there was a right to seek employment. The new policy rules provide no guarantee that a former worker's or self-employed person's right of residence will not be terminated because they rely on public benefits along the lines set out in *Vreemdelingen*circulaire (new) B10/2.3.

In *Poland*, prior to the transposition of Article 7(3) of Directive 2004/38, there were no provisions dealing with the retention of the right of residence in cases of temporary incapacity to work as a result of illness or accident.

In the *United Kingdom*, the national measure implementing Article 7 of Directive 68/360 was less restrictive than the wording of Directive 2004/8 to the extent that it stated that a worker did not cease to be a qualified person if he was involuntarily unemployed and this fact was duly recorded by the relevant employment office.⁷³

It can be concluded that the transposition of Article 7(3) Directive 2004/38 has brought more clarity in relation to the conditions that must be met in order to retain worker status in the *Czech Republic, Luxembourg, Finland, and Poland*. In other Member States, it has brought about a more restrictive regime (*Belgium, Denmark, Latvia, Netherlands, and United Kingdom*).

5.3 Equality of treatment with national unemployed citizens

A significant number of Member States have reported that no differences exist between an EU and a national who loses his employment in terms of rights given to unemployed persons under national law. It goes without saying that in terms of residence, national and EU workers are not in a comparable situation: a national worker has a right to reside in his own state based on his citizenship while an EU worker will have a right to reside as long as he fulfils the conditions set out in EU law. No difference in treatment between national and EU unemployed persons are mentioned by: *Austria, Bulgaria, Croatia, Czech Republic, Cyprus, France, Hungary, Greece, Ireland, Italy, Malta, Netherlands, Poland, Portugal, Romania, Slovak Republic, Sweden, and the UK*.

Issues in relation to equal treatment can be identified in the following states:

The *Italian* report mentions that although the same requirements apply to national and EU workers who want to register with an unemployment office, in practice only 55, 5% of EU jobseekers have registered with an unemployment office as opposed to 77, 8% Italian jobseekers. Based on available data, it seems that unemployment offices are not very effective in

⁷³ Article 7(1) Immigration (European economic Area) Order 1994

helping unemployed persons to find a new job: only 2% of Italian and 0,5% of EU job seekers registered with the employment office received a job offer.⁷⁴

In *Hungary*, there seems to be an overall lack of information regarding the benefits of being registered with the employment agency, but this affects equally national unemployed persons. Bearing in mind that most information is available only in Hungarian, EU citizens unfamiliar with this language may have extra difficulties in obtaining information about the various services offered by the relevant authorities in case of unemployment.

The *Danish* report mentioned problems in relation to access to social assistance: EU-10 workers were reported to have experienced problems in a number of cases where they, upon dismissal from jobs in which they had been working for a longer period, applied for social assistance while seeking new jobs in Denmark. The social administration in some municipalities seem to have very precise information about EU citizens' entitlement to social assistance and to administer the rules accordingly, whereas other municipalities seem to base their practice on an incorrect understanding of the rules, probably confusing the Danish provision on first-time job seekers and the general rules concerning EU workers' access to social assistance on equal terms with Danish citizens (or possibly due to the EU citizen concerned not being considered as having acquired and/or retained the status of worker). The National Directorate of Labour apparently suggested patience towards the municipalities, but stated its preparedness to consider the need for additional guidance on the applicable law. More general guidelines concerning the right of EU/EEA citizens to cash benefits under the Act on Active Social Policy were issued by the National Directorate of Labour in April 2008. As the guidelines appear less than clear on various aspects of law, and they do not take heed of the abolishment of the transitional rules concerning EU-10 workers as well as the abolishment of the residence requirement in the Act on Active Social Policy, they should be expected to become updated.

The *Spanish* report also mentions possible issues in relation to reliance on social assistance. Since 2012, the Spanish legislation requires EU citizens to register with the Central register of Foreigners in order to have access to the Spanish system of health and social benefits.⁷⁵ The same Act has opened up the possibility to launch expulsion proceedings on a case-by-case basis for abuse of social assistance in Spain. The extent to which this provision may be applicable to EU citizens not registered in the central register for foreigners remains to be assessed.

In *Latvia*, unemployed Union citizens do not have access to benefits falling outside the scope of Regulation 883/2004 while they do not have permanent residence irrespective of whether or not they are economically active.⁷⁶ The State Social Insurance Agency which is the administrative institution in charge of the award of social benefits and assistance confirmed that these benefits are not provided to EU citizens irrespective of their status (economically

⁷⁴ Direzione generale dell'immigrazione e delle politiche di integrazione, Secondo rapporto annuale sul mercato del lavoro degli immigrati, 2012

⁷⁵ Royal decree 1192/2012, August 3, introducing new conditions for access to health care,

⁷⁶ The Law on State Social Allowances OG No.168, 19 November 2002 and the Social Assistance and Social services Law OG No.168, 19 November 2002.

active or not).⁷⁷ Unemployed EU citizens will also have difficulties in relation to the right to state paid medical services. The Medical Treatment Law provides for the right to state paid medical treatment for economically active EU citizens and their family members.⁷⁸ In practice, an EU citizen loses the right to state paid medical treatment once he/she loses employment, because an employer is under an obligation to inform the National Health Care Service of the termination of the employment relationship within 5 working days. The Service excludes the EU citizen from the database that provides a list of the persons entitled to the state paid medical treatment.⁷⁹ Latvian citizens (employed or otherwise) remain entitled to the state paid medical services as long as they are officially considered as residents of Latvia (obligation to declare a place of residence in Latvia or inform OCMA on residence in other country).

5.4 National conditions relating to being “duly registered with the employment office

Most Member States have in their national legislation provisions detailing the requirement of being duly registered with the relevant employment office. This does not seem to be the case in *Ireland*, where the term “duly registered with the employment office” is not defined in the national legislation and has not been the subject of interpretation in any case law. However, generally a registration with FÁS, the national training and employment agency, is required in order for a worker to fulfil the “due registration” requirement. In *Germany*, the relevant issue is not whether one is registered with the employment office, which is assessed to be a purely formal requirement, but whether one is involuntarily unemployed.

The remaining Member States have detailed provisions regarding the steps a person must take and the conditions he/she must fulfil in order to be registered with an employment office. These provisions differ from state to state, but, at a minimum, they can be said to require that the person be (1) unemployed; (2) able, available and/or willing to work; (3) be actively seeking work and (4) enter into an agreement with the jobcentre or agree to a professional plan/ job plan listing the steps to be taken towards finding a new job. This agreement or job plan usually details the obligations that a jobseeker has in relation to making job applications, attending courses, vocational training and other measures aiming to facilitate his/her reintegration in the labour market. Moreover, based on the national replies it is possible to assert that jobseekers have a general obligation to provide the employment office with relevant information when asked to do so.

In addition to these general conditions, the legislations of some Member States stipulate what could be labelled as “other conditions”. This may include not possessing a registered company or other legal entity (*Croatia, Estonia*), not engaging in freelance activities, registered trade or agricultural activities (*Croatia, Estonia, Romania, Slovenia*). In some

⁷⁷ Telephone interview with an official of the Union of Methodological Management of the Allowances of the State Social Insurance Agency, 25 June 2013.

⁷⁸ Article 17 of the Medical Treatment Law (*Ārstniecības likums*), OG No.15, 7 August 1997.

⁷⁹ Telephone interview with the International Cooperation Union of the National Health Care Service, 25 June 2013.

Member States, the legal provision applicable stipulates that the person be older than 15 or 16 years of age (*Bulgaria, Estonia, Romania*) or free from school obligation (Belgium) and not be older than the age of pension (*Croatia, Estonia, Romania, Slovenia*).

Residence related conditions are mentioned in the following national replies: *Belgium* (residence in the region), *Bulgaria, Cyprus and Poland*. In *Poland*, an unemployed person who leaves Poland for a period not longer than 10 days or is in any other situation which makes it impossible to be ready to take up employment, shall not be deprived of the status of the unemployed, if he informed about such situations the relevant employment office work. However, he is not entitled to unemployment benefit for this period. He is, however, entitled to report only 10 days during a calendar year of such non-readiness to take up employment. An unemployed person, who acquires in Poland the right to unemployment benefits and departs to another Member State in order to seek employment, shall retain the right to unemployment benefit according to provisions on coordination of social security systems. In *Cyprus*, if the unemployed person is no longer resident there, he/she will no longer be considered as duly registered. In the *Czech Republic*, although the Employment Act requires a registered place of residence in the Czech Republic in order to be treated as a jobseeker, in the case of EU citizens and their family members the place where they usually reside in the Czech Republic will be taken into account. In *Denmark*, the person must be available to the Danish labour market and job applications submitted abroad are not taken into consideration.⁸⁰

5.5 Failure to comply with the requirements of the employment office or failure to take up a job offer

Based on the national replies, it seems that in most states, failure to comply with the requirements of the employment office or rejection of a job offer will have consequences in terms of one's registration status and/or access to unemployment benefits. For example, in *France* two refusals to accept reasonable job offers may lead to deregistration with the employment office. In *Cyprus*, two refusals to take on employment offers will also end registration as a jobseeker with the Public Employment Office. In *Bulgaria*, refusal to take on a suitable job will result in ending the registration as a jobseeker.⁸¹ In *Denmark* and *Finland*, failure to fulfil the conditions imposed by the job centre may equally lead to the termination of the registration as a jobseeker. Denmark requires that the person confirm his/her status as jobseeker as a minimum once every 7 days and submit a minimum number of job applications. Applications submitted abroad do not count towards retaining the status of unemployed in Denmark. *Greece* requires a systematic refusal of jobs available and suitable (three times) before the person is considered as not duly registered with the employment office.

In *Estonia*, the Unemployment Insurance Fund shall make a decision on termination of a person's registration as unemployed in several situations: unjustified refusal of a suitable job

⁸⁰ Beskæftigelsesudvalget 2011-12, BEU alm. del, endeligt svar på spørgsmål 432, 12 October 2012. Reply of the Minister of Employment to questions in Parliament

⁸¹ Article 20(4)(4) of the Law on Employment Promotion

offer for the third time, refusal to comply with the Individual Action plan for a third time, refusal to approve the action plan or failure to appear at the Unemployment Insurance Fund for a visit for a third time or failure to visit the Unemployment Insurance Fund within a period of thirty days. If the Fund has taken the decision to terminate the status as unemployed, the person is no longer considered to be registered with the employment office.

In *Italy*, the person concerned is no longer considered to be duly registered and therefore unemployed, if s/he does not appear when called, or refuses to accept an offer of adequate employment, or does not comply with the agreement entered with the employment office, or states that s/he refuse to be assisted by the employment office.

In *Lithuania*, the status of unemployed and the registration with the labour office may be lost in several situations: (1) refusal to accept an appropriate job; (2) refusal to participate in active employment measures assigned to him/her in the individual activity plan without justifying reasons; (3) failure to arrive at the labour office at assigned time without a valid reason; (4) refusal of a health check suggested by the territorial labour office with a view to determining suitability for work.

In *Poland*, a person will not be qualified as duly registered, inter alia, if he unreasonably refuses to accept: a proposal for suitable employment, other paid work, training, apprenticeship, adult vocational training, undertake public works or refuses to undergo a medical or psychological examination designed to determine his ability to work or refuses to participate in other forms of assistance specified in law. Failure to appear on a regular basis at the relevant employment office has the same effect. In 2008, the Supreme Administrative Court has clarified what it is meant by an unreasonable refusal of a job offer. A refusal is reasonable if the unemployed person specifies the circumstances that make it impossible to perform objectively a specific job under the proposed conditions. The explanation of the unemployed person that he did not accept the job offer because work had to be performed in a chemical environment was not considered as justified refusal.⁸²

Failure to actively seek work or accept appropriate work will equally end registration in the jobseekers register in *Slovenia* and *the Slovak Republic*. Slovenia allows for this sanction when it is considered that the unemployed person did not make enough efforts during the job interview to get the job.

In the *UK*, benefits (Income Based Jobseeker's Allowance) may be cut if the Jobcentre feels that the applicant is not complying with the agreement or he/she fails to 'sign on' at the Jobcentre at least every two weeks. The applicable rules place considerable emphasis on the applicant actively seeking work and having a reasonable prospect of securing employment. In deciding whether a person has 'reasonable prospects of securing employment', regard shall be had to: (1) their skills, qualifications and experience; (2) the type and number of vacancies within daily travelling distance from their home; (3) the length of time for which they have been unemployed; (4) the job applications which they have made and their outcome, and (5) if they wish to place restrictions on the nature of the employment for which they are available, whether they are willing to move home to take up employment.

⁸² File no. I OSK 1271/07.

It is important to note that in most states where refusal of a job offer will have repercussions on registration with the employment office or entitlement to benefits, usually the refusal must relate to a job that is suitable/adequate/reasonable (*Austria, Belgium, Croatia, Cyprus, Estonia, France, Greece, Italy, Latvia, Lithuania, Malta, Netherlands, Romania, Slovenia, Germany and Sweden*). The criteria used to assess whether a job is suitable or acceptable usually relate to the person's education and qualifications, level of salary or travel time. For example, in *Slovenia*, a difference is made between appropriate and suitable employment based on the person's level of education. Suitable employment relates to a job that requires one level lower than the person's education.⁸³ In the *UK*, this issue relates to the requirements of actively seeking work and having a reasonable prospect of securing employment. Although, an applicant must be willing and able to take up employment at least for 40 hours per week, he may restrict his availability for employment by placing restrictions on the nature of the employment for which they are available (including rate of remuneration) and the locality or localities within which they are available, providing they can show that they have 'reasonable prospects of securing employment'. After a period of several months of unemployment, the applicant may have to broaden the types of jobs that they are applying for, and also have to undertake some work training or placements. In comparison with the above mentioned states, *the Czech Republic* seems to be an exception as it refers to refusal of any available job.

In terms of registration status, there are several states where it is not possible to terminate the registration status of an unemployed person without his/her consent. However, there will be consequences in terms of entitlement to unemployment benefits and other services. For example, in the *Netherlands* only the unemployed person can ask to be registered as a jobseeker or have this status prolonged. The relevant authority (UWVWerk) cannot delete the registration even if the person refuses to accept offers of employment or fails to apply for jobs. Although, such behaviour will lead to sanctions in relation to unemployment benefits and social assistance benefits, the registration as a jobseeker is unaffected. In *Luxembourg*, the refusal to take up a job may lead to the removal of unemployment benefits or suspension of the file of the unemployed person and loss of access to services provided by the employment office (ADEM) but, in principle, it will not lead to the conclusion that the person is no longer duly registered. A similar situation exists in *Portugal*, where the cancellation of the registration with the employment office is not foreseen by the applicable legislation, but the refusal to take on jobs may be relevant for the suspension of the unemployment benefit.

Several Member States link the requirement of being registered with the employment office with the right to obtain unemployment benefits. This is applicable to both national and EU unemployed persons. This seems to be the case in *Austria, Belgium, Croatia, Cyprus, Czech Republic, Denmark, Finland, Germany, Hungary, Malta, Netherlands, Portugal* and *the United Kingdom*. Thus, failure to fulfil one's obligations as a jobseeker will have an impact upon one's entitlement to unemployment benefits.

⁸³ Article 8(1) of Labour Market Regulation Act (Official Gazette of the Republic of Slovenia No. 80/2010, 40/2012, 21/2013).

In some states, an intermediate situation is observable as there are two categories of unemployed persons, one category comprising persons entitled to unemployment benefits and a second category comprising jobseekers without benefits. In these states, failure to comply with the requirements of the employment office or refusal to take up a job will result in the unemployed person being treated as a jobseeker without benefits, but who remains registered with the employment office.

For example, in *Croatia* according to the Act on Employment Mediation and Unemployment Rights, one can register with the Croatian Employment Service as an 1) “unemployed person” or as 2) “other jobseeker”. Only the first category benefits from unemployment rights. Because of the refusal to take on an available job offered within person’s qualifications and working experience or drafted individual professional plan, or for those unemployed longer than 12 month because of the refusal to take available job corresponding to person’s assessed mental and physical abilities, a person will no longer be regarded as an “unemployed person” (Article 17 paragraphs 2 to 4), yet he/she may register as “other job-seeker”.

In *Latvia*, there are also two different statuses: a) “unemployed person” and b) “jobseeker”. A person classified as a jobseeker is not entitled to unemployment allowance either because he/she does not meet the conditions or has already received unemployment allowances for the maximum period provided for by law (9 months).⁸⁴ Refusal to take on appropriate jobs twice may be a reason for the deprivation of the status of “unemployed”.⁸⁵ However, a person who has been deprived of a status of unemployed can register as a jobseeker. Consequently, a person may retain the status of jobseeker forever.

A similar situation exists in *Romania*, where it is also possible to be regarded as an unemployed person without benefits. According to Article 42 (1) of Law no. 76/2002 regarding the unemployment insurance system and stimulation of employment, a person who refuses a job suitable to his/her training or education or refuses to participate in services and training provided by employment agencies will not be awarded unemployment benefits. However, a person in this situation will be considered to fall under the category of unemployed without benefits. His/her registration with the employment office is not affected.

In *Malta*, the Employment and Training Corporation (ETC) is responsible for the registration of persons who are seeking employment. There are three distinct categories: (1) persons who are unemployed; (2) persons who without a good and sufficient cause, terminate or refuse an employment opportunity, refuse to attend a training course or participate in a scheme and (3) persons who are already in employment, but wish to seek alternative employment. A person, who fails to provide any information requested by the ETC, forfeits his right to registration or to referral for employment and shall be notified accordingly in writing. Similarly, when a person who registers with the ETC refuses to take on a job or attend training courses, s/he will lose the right to further referrals and to unemployment benefits. However, these sanctions do not apply to persons registered under categories (2) and (3). Thus, it is possible to fail to

⁸⁴ The Law on Insurance for the Case of Unemployment (*Par apdrošināšanu bezdarba gadījumam*), OG No.24, 30 December 1999.

⁸⁵ The Law on Support of Unemployed and Jobseekers (*Bezdarbnieku un darba meklētāju atbalsta likums*), OG No.80, 29 May 2005.

comply with the requirements of the employment office without having one's registration voided.

6. Voluntary v. involuntary unemployment

As discussed in relation to the Court of Justice case law on retention of worker status, the difference between voluntary and involuntary unemployment is a relevant aspect of Member States' capacity to find that a person does not fall under the provisions allowing for retention of worker status. Based on the national replies to the questionnaire, several Member States make a distinction between voluntary and involuntary unemployment (*Belgium, Croatia, Denmark, Finland, France, Germany, Luxembourg, Netherlands, Portugal, Slovenia and Sweden*). Although it is difficult to speak of a common definition of **voluntary unemployment**, several common factors seem to play a part in the majority of the national provisions addressing this issue: (1) the unemployed person leaves his/her job out of own volition, (2) his/her conduct is the cause of the termination of employment, and in some cases (3) the employment comes to an end due to mutual agreement.

In *Belgium*, the **involuntary** character of unemployment is checked based on the reason stated for the end of the employment relationship in the form given to the worker by the employer at the end of the employment relationship.

In *Croatia*, voluntary or involuntary unemployment is determined based on provisions found in the Labour Act and the Civil Servants Act. **Involuntary** unemployment occurs (1) if employment ends because the need to perform certain work ceases due to economic, technological or organisational reasons ("dismissal due to business reasons") and (2) if the employee is not capable of fulfilling his or her employment-related duties because of some permanent characteristics or abilities ("dismissal due to personal reasons").

The *Danish* rules provide that the assessment of the **involuntary** character of unemployment needs to be made on a case-by-case basis in order to ascertain that the circumstances which objectively speaking are beyond that person's control resulted in the person concerned losing his/her work.⁸⁶

The *German* rules can be described as more complex since the **involuntary** character of unemployment will be assessed in relation to its origin (as a rule, it should not be imputable to the unemployed person) and to its continuation. Unemployment will be assumed to be involuntary if the job-seeker does not deny taking on another reasonable job or takes all necessary measures to end his/her unemployment (No. 2.3.1.2.). If he/she consistently denies following the instructions of the employment office, the involuntary character of his/her unemployment would not be confirmed, which would then end his prolonged worker status.

A similar situation can be noted in *Finland*, where a person who fails his/her obligations as jobseeker will be considered **voluntarily** unemployed.

⁸⁶ *Guidance on Residence under the EU Residence Order to the Regional State Administration* para. 1.1.1.2.2

In the *Netherlands*, the rules stipulate when a person is **not involuntarily** unemployed: (1) he/she is fired because of culpable behaviour; (2) he/she does not appeal against summary dismissal (ontslag op staande voet); (3) he/she quits the job; (4) he/she is not registered as jobseeker at the UWV Werkbedrijf and (5) he/she has refused to accept more than once suitable work⁸⁷

The *Portuguese* rules in relation to the involuntary character of the employment are also quite detailed. Unemployment is **involuntary** when the work contract expires or terminates: (i) on the initiative of the employer, unless the dismissal is grounded on the breach of the employer's obligations ("justa causa") or (ii) if the dismissal by the employer did not respect the formalities foreseen in the Labour Code; (iii) on the initiative of the employer based on the breach of the employee's obligations ("justa causa"); (iv) based on a revocation agreement between the employer and the employee concluded.⁸⁸

In *Slovenia*, **involuntary** unemployment occurs when the person loses her/his job due to ordinary termination of employment contract for economic reasons or for reasons of incapacity, and when due to extraordinary termination of employment contract by the worker on grounds connected with the employer.

The difference between voluntary and involuntary unemployment is not relevant in several Member States. For example, *Bulgaria* does not require unemployment to be involuntary in order to benefit from retention of worker status. In the *Czech Republic*, *Malta* and the *Slovak Republic* being registered with the employment office leads to an automatic assumption that unemployment is involuntary. In *Italy*, there is no difference between voluntary and involuntary unemployment as long as the person has met the conditions of registration with the employment office. *Hungarian* law does not define involuntary unemployment, while the Unemployment Act uses a neutral term, 'job-seeking person', and no consequences are attached to the reason for unemployment.⁸⁹ Access to the services of the employment agency and to benefits does not depend upon the voluntary or involuntary character of the unemployment; it depends upon the person having been previously employed and his/her cooperation with the employment agency. In *Austria*, there are no clear guidelines as to how to record involuntary unemployment. According to Sect. 51 (3) SRA the Federal Minister of the Interior is authorized to determine in an implementation order how the involuntary unemployment is to be confirmed. No such implementation order has been issued so far and according to information given by the Federal Ministry of the Interior, no such implementation order is planned. The migration authorities have been instructed by the Federal Ministry of the Interior to regard a worker, as "in duly recorded involuntary unemployment" is he/she is registered at the employment agency. No further certificates are demanded.⁹⁰ The employment agencies are ready to certify that a person is recorded as

⁸⁷ Vc2000 B10.2.2 new

⁸⁸ Articles 9 and 10 of Decree-Law 220/2006, as amended by Decree-Law 64/2012.

⁸⁹ The Hungarian labour Code differentiates between the termination of the labour relation or contract at the initiative of the employer or of the employee but this has implications only in relation to entitlement to severance pay/ redundancy payment.

⁹⁰ Information given by the Federal Ministry of the Interior via e-mail, 7 June 2013.

unemployed or is receiving unemployment benefits if asked to do so, but in practice, there are no such requests.⁹¹

7. Other conditions/ limitations set by national legislation

Based on the answers received to the questionnaire, it can be concluded that in the majority of the Member States no extra conditions are attached to retention of EU worker status, except for those expressly mentioned in the text of article 7(3)(b) of Directive 2004/38. Time limits in relation to retention of worker status are not mentioned in any report. The *Danish* reply mentions that this issue has been raised in the Danish parliament. The government has stated that it is not possible to provide any statistical information on the amount of time that passes before an EU citizen loses his status after as EU worker after having become unemployed.⁹²

This issue should be distinguished from the amount of time a person is entitled to receive unemployment benefits. For example, in *Hungary*, a person is entitled to assistance for a maximum of 90 days, provided that he has registered with the employment office and in the past four years has worked for at least one year. *Polish* legislation also sets time limits in relation to entitlement to unemployment benefits, without limiting retention of worker status in the circumstances of Article 7(3)(b) of Directive 2004/38. For the purpose of the Act on entry, an applicant shall retain the status of worker in order to be entitled to stay in Poland on basis of the Act, whereas for the purposes of the legislation dealing with unemployment, he will be qualified as unemployed and not a worker. A similar situation occurs in *Lithuania*, where entitlement to unemployment benefits depends upon the period worked before registration with the employment office.

Specific issues in relation to retention of worker status were mentioned in the following replies:

The *Austrian* reply mentions that although the national measure corresponds literally to the text of Directive 2004/38, there is the additional obligation to report relevant circumstances and the cessation of the preconditions for retention of worker status.

The *Bulgarian* legislation does not impose extra conditions but it does require quite an extensive list of documents that need to be provided in order to register with the employment office. For example, school diplomas, vocational training certificates and any other papers showing work experience need to be translated and the translation should be authenticated by a notary public or in case they are issued by a country that has signed the Convention abolishing the legislation requirements for foreign acts, to have an apostille.

The *UK* reply stressed that in practice issues are reported to exist in relation to a benefit called Income Support. Under relevant UK benefits legislation, persons who retain worker status will have a 'right to reside' and are able to obtain particular benefits on that basis providing

⁹¹ Information given by the employment agency Salzburg via e-mail, 3 June 2013.

⁹² Udvalget for Udlændinge- og Integrationspolitik 2009-10, UUI Alm. del, endeligt svar på spørgsmål 230, 24 June 2010.

that they are habitually resident in the UK.⁹³ Income Support is intended for the limited categories of persons who can get benefit without having to be available for work. They must either be not in employment or working for less than 16 hours per week. Eligible persons can include a lone parent under the age of 18 or who is looking after a child under 5 on their own, a person caring for another person, and a woman who is incapable of work by reason of pregnancy or is pregnant from the 11th week before her expected week of confinement and ending 15 weeks after the date of the end of pregnancy. Despite the fact that Income Support is primarily intended for the economically inactive who are not work seeking, benefits advisors have previously reported a pattern of Jobcentres advising EEA nationals who are not working to claim income support in circumstances where this is inappropriate, eg where they are work seeking. In the case of *Elmi*, the French national claimant had come to the UK with a young child and commenced employment, but then was been made redundant after 6 months. She made a claim at a Jobcentre for Income Support (in which she ticked a box confirming that she was seeking work), which was taken in, but then refused on the basis of her not having a right to reside as a retained worker. The Secretary of State asserted that her claim for Income Support did amount to ‘duly recorded involuntary employment with the employment office’, but she had not ‘registered as a jobseeker’ (which the SoS argued meant for these purposes applying for Jobseeker’s Allowance, with its ‘control mechanisms’ for ensuring that a person is genuinely seeking work). This was not accepted by the Court of Appeal who noted that she had been invited by the Jobcentre official to claim Income Support and that her tick in the box was sufficient confirmation of her jobseeking for the purposes of art 7(3)(c).

8. Information regarding the situation of a person who no longer retains worker status

There is little information available on what happens to a person who no longer retains worker status. Although national legislations provide that non-compliance with the instructions of the employment office or refusal to accept job offers may have the consequence that the person is no longer registered with the employment office, they do not expressly regulate what happens after the person no longer fulfils the condition of registration in terms of retention of EU worker status and of the right of residence. For example, the *Belgian* report mentions that the issue is not expressly regulated by legislation.

The *Finnish* reply mentions that according to information received from the Ministry of Interior, the worker status is not regarded to be retained forever, but instead comes to its end at some point. When this happens is to be decided on a case-by-case basis, although there is no clarity as to how to assess this. There is no legal, judicial or administrative practice on this. Furthermore, there is no legislation or administrative guidelines or practices clarifying the legal situation of persons who are no longer regarded to retain their worker status are treated. Regarding social benefits, persons who are no longer regarded to retain their worker status fall

⁹³ Jobseeker's Allowance Regulations 1996 (SI 1996/207, reg 85A(4)(c) in relation to Income Based Jobseekers Allowance and the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 SI 2006/1294, reg 6(2)(a) in relation to housing assistance)

outside the scope of the social security system unless they meet the preconditions for being registered on the basis of their residence in Finland.

In *Lithuania*, the legal situation of the person will probably depend on whether the residence certificate is still valid or not. In case of validity of the residence certificate, the authorities will not likely question the status. As a rule, the certificate is valid for 5 years and it is valid until it expires or is revoked; revocation is possible on the ground that the person no longer meets the conditions for residence established by the Law, but there are exceptions for (1) persons who have concluded labour contracts and are about to start working, or (2) submit documents that they will start self-employment activity, or (3) are registered at the labour exchange office as unemployed person, are looking for a job and have real chances to get employed. Because the retention of worker status has been introduced only in 2012, there is no clear guidance on how administrative authorities would treat a person who no longer meets the conditions of article 7(3)(b) Directive 2004/38.

9. Other issues

In *Germany*, the issue of retention of worker status is not considered problematic since the yardstick is involuntary unemployment, which is assessed on a case-by-case basis. The issue that raises problems is whether persons working a minimum number of hours per week (5-6h) qualify as workers in the first place.

In *Italy*, Article 7(3) (b) of the Directive and the implementing legislation are not considered problematic. A recent survey shows that during 2011, 99.000 EU workers were unemployed, but only 55.000 contacted an employment office. Registration with the employment office and the subsequent conditions are mere formalities and not complying with them does not entail any major difficulties.

The *Croatian* expert has raised an interesting point: based on Croatian legislation, a person who is not actively looking for employment continues to be registered with the employment office. Such a person would be caught by the scope of Article 7(3)(b) of the Directive. The Croatian expert suggests that the right to retain the status of worker or self-employed should be limited only to those actively seeking for a job and being available for work.

Some of the national experts have voiced concerns regarding the link between retention of worker status and the right to social benefits and possible misuse of rights. Other experts have emphasized the need to assess retention of worker status in a flexible manner that respects the overall objective of Directive 2004/38 of strengthening the rights of EU citizens. This applies equally to the distinction between voluntary and involuntary unemployment.

10. Conclusions

This note has examined the scope and meaning of retention of EU worker status in the circumstances prescribed by Article 7(3)(b) of Directive 2004/38 in relation to relevant jurisprudence, literature and national practice.

Article 7(3)(b) Directive 2004/38 has introduced clear limits to the possibility of retaining worker status. It requires the existence of an employment relationship of at least one year, involuntary unemployment and registration with an employment office as evidence of the EU worker's intention to resume employment. Employment relationships shorter than one year receive less protection since worker status will be retained for no less than six months. The possibility of introducing time limits in relation to employment relationships longer than one year has been proposed during the negotiation process of Directive 2004/38 but it was eventually abandoned. The legislator has limited the retention of worker status in time only in relation to Article 7(3)(c). In my opinion there is no possibility of reading in time limits in relation to Article 7(3)(b). Regarding employment relationship that have lasted for longer than one year, the possibility to limit retention of worker status is achieved not through time limits but through the insertion of the conditions that the person must register with the relevant employment office as a jobseeker and that unemployment must be involuntary. As explained below, this approach expresses the Court's approach to this issue and the emphasis placed on the person continuing to seek work and maintaining a link with the labour market of the host state. Based on Directive 68/360, the previous piece of secondary legislation addressing this issue, a Community national who had worked for longer than one year in a host state and found himself involuntarily unemployed at the end of his first residence permit, in fact enjoyed a right to reside in that state for a maximum of six years. It seems obvious that former workers enjoyed a privileged position in terms of retention of their right of residence. Bearing in mind that Directive 2004/38 is meant to strengthen the rights so EU citizens generally and at least not lower the level of protection offered by previous measure of Community law, the current formulation of Article 7(3)(b) expresses this principle.

In its case law, the Court of Justice has recognised that an employment relationship may produce certain effects even after it has terminated. This recognition stems from the idea that EU nationals may not be willing to exercise free movement rights as workers should they not be entitled to protection in cases of involuntary unemployment. Bearing in mind that the Union's objective is to ensure that all obstacles to the exercise of the free movement rights of workers are removed, affording protection to this category of persons is justifiable. The jurisprudence suggests that the involuntary character of the unemployment coupled with the person's willingness to find another job are the main factors that explain why EU law allows for the retention of worker status in the first place. The Court's case law reviewed in this contribution has not revealed any grounds to suggest that time limits may be imposed in relation to retention of worker status beyond those expressly mentioned by Article 7(3) of Directive 2004/38.

Based on the literature surveyed and the number of cases identified by the national experts, the topic of retention of EU worker status does not seem to raise significant issues at the national level. There are two Member States (Ireland and the UK) where retention of status by self-employed EU nationals has raised significant issues. However, the same issue plays no role in other Member States where the national provisions transposing Article 7(3) Directive 2004/38 expressly include self-employed persons within their personal scopes.

Regarding the transposition of Article 7 at the national level, the problems identified by the Commission in its 2008 report continue to exist. They are relevant in as much as retention of a right to reside for longer than three months is not conceptually the same thing as retention of EU worker status, which has implications in terms of security of residence, equal treatment in relation to social rights and acquisition of the right to permanent residence. However, in a series of Member States the transposition of Article 7 has brought more clarity in terms of the conditions that need to be fulfilled to retain worker status.

In order to come within the scope of Article 7(3)(b) a person must not only be involuntarily unemployed but also duly registered with the relevant employment office. Based on the national replies we can conclude that all Member States have such an obligation in their national laws. It is important to stress that in the majority of the Member States, this is not a purely formal obligation. At a minimum, it implies that the unemployed person (1) be able, available and/or willing to work; (2) be actively seeking work and (3) enter into an agreement with the jobcentre or agree to a professional plan/ job plan listing the steps to be taken towards finding a new job. Failure to comply with these requirements or refusal of a job offer will have an impact on the person's registration with the employment office and/or right to unemployment benefits. It is at this point that differences can be identified between the Member States. The issue is further complicated by the fact that some states link the registration with the employment office to entitlement to unemployment benefits. In one group of states (*Netherlands, Luxembourg and Portugal*) when a jobseeker fails to meet the conditions of his job plan or refuses to take up a job offer, there is no possibility to terminate his registration status. Sanctions can be applied in relation to his/her right to benefits. A second group of states (*Croatia, Latvia, Romania and Malta*) applies a similar system. In these states, there are two categories of unemployed persons, jobseekers entitled to unemployment benefits and "other" jobseekers. An unemployed person who cannot be considered to be actively seeking for work can retain his registration with the employment office under the category of "other" jobseekers, but his right to unemployment benefits is terminated. Finally, in the majority of the Member states, there are possibilities to terminate the registration with the employment office (*Austria, Bulgaria, Czech Republic, Denmark, Finland, Estonia, France, Greece, Italy, Germany, Lithuania, Poland, Slovak Republic and Slovenia*).

The report has shown that there are important differences in what counts as a failure to comply with the conditions imposed by the employment office. Some states consider that the refusal of one job offer leads to sanctions, whereas other states require a systematic refusal to take up employment offers. Not in all states is this related to the refusal of a reasonable or adequate job. In some states, one must visit the employment office weekly or confirm his jobseeker status at a minimum every 7 days. Excessive documentation requested in order to meet the registration requirement (*Bulgaria*) seems questionable. In this context, it should be noted that the Court has put forward a flexible approach towards determining whether unemployment is voluntary or not, by loosening the link between the end of a short-term contract and the voluntary character of such unemployment. This approach recognises the fact that modern working life is no longer premised upon long-term employment in the same job. In light of the Court's approach to voluntary unemployment, some of the national replies

according to which unemployment will be considered voluntary if the person does not challenge his/her summary dismissal (*Netherlands*) or the person does not make enough efforts during a job interview (*Slovenia*) seem questionable.

To conclude, Member States enjoy sufficient flexibility in deciding when a person is no longer seen as registered with the employment office or no longer involuntarily unemployed. It is important to underline that the retention of worker status provided for under Article 7(3)(b) Directive 2004/38 is conditional and therefore already limited to those former EU workers who fulfil the requirements set by the Directive.

Annexes

Table 1: Transposition of Article 7(3) Directive 2004/38

Member State	National measure implementing Article 7(3) Directive 2004/38
Austria	Section 51(2) Settlement and Residence Act 2005
Belgium	Article 42bis, para 3 Aliens Law
Bulgaria	Article 8, para 3, subpara 2 Law on the Entry, Residence and Departure of the Republic of Bulgaria of EU citizens and their family members
Croatia	Article 159(1)(2) Aliens Act 2011
Cyprus	Article 9(4) of Law 7(I) 2007
Czech Republic	Section 87a of Act 326/1999 Act on Residence of Foreigners
Denmark	Section 3(2)(2) of EU Residence Order No. 474 of 12 May 2011
Finland	Section 160 of Aliens Act 301/2004 (as amended by Act 360/2007)
France	Article R 121-6 CESEDA based on Decree no 2011-1049
Germany	Section 2(3) Act on Freedom of Movement for EU citizens of 30 July 2004
Greece	Article 7(3) of P.D. 106/2007
Estonia	Section 21 of Citizens of European Union Act
Hungary	Section 9(1)(b) FreeA
Ireland	Regulation 6(2)(c)(ii) of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006
Italy	Article 7(3)(b) of Decree no. 30 of 2007
Latvia	Section 29 of Cabinet of Ministers Regulation No. 675 (7 September 2011).
Lithuania	Article 101(1) of Aliens of 30 June 2012
Luxembourg	Article 7(1)(2) of Law of 29 August 2008
Malta	Article 8(8)(a) of Free Movement of European union Nationals and their Family Members Order (Legal Notice 191/2007)
Netherlands	Article 8.12(2)(a-d) of the Aliens Decree 2000 (Aliens Circular B.10.2.2)
Portugal	Article 7(3) of Law 37/2006, of 9 August
Poland	Article 17 of the Act of 14 July 2006 on the entry, residence and exit from the Republic of Poland of nationals of EU Member States and their family members
Romania	Article 12 of Emergency Ordinance 102/2005
Slovenia	Article 120(2) and (3) of Aliens Act

Slovak Republic	Article 65(3)(b) of the Law on residence of foreigners 404/2011
Spain	Article 7(3) of Royal Decree 240/2007
Sweden	Chapter 3a para 3.1 of Aliens Act (2005:716)
United Kingdom	Regulation 6(2)(b) of Immigration (European Economic Area) regulations 2006

Table 2: National case law

Country	Case Law
Austria	<p>1) Administrative Court [Verwaltungsgerichtshof] 13 May 2011, 2009/10/0112 [concerning the refusal of social welfare benefits for a polish citizen who had lost worker status because he was not duly registered with the unemployment agency]</p> <p>2) Supreme Court [Oberster Gerichtshof] 14 February 2012, 10 Ob S 1/12p [Reference for a preliminary ruling on the question whether compensatory allowance is to be qualified as a form of social assistance for the purpose of Article 7 (1) (b) of Directive 2004/38/EC; registered as C-140/12, <i>Brey</i>]</p> <p>3) Supreme Court [Oberster Gerichtshof] 30 October 2001, 10 ObS 181/10f [concerning the claim of a retired EU worker for compensatory allowance in Austria]</p> <p>4) Constitutional Court [Verfassungsgerichtshof], 18 June 2012, U1553/11 [concerning the continued right to residence of a Turkish national married to a Union citizen after the death of his wife]</p>
Belgium	NA
Bulgaria	NA
Croatia	NA
Cyprus	NA
Czech Republic	Judgment of the Constitutional Court No. Pl. ÚS 1/12 from November 27, 2012, http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=1814&cHash=da4ccfa835ec017dd7db8a124460297f (accessed on April 7, 2013), published as judgments No. 437/2012 Sb - failure to accept an offer to perform public service by a registered job seeker leading to de-registration from the register of job-seekers; compatibility with the prohibition of forced work under the Czech Constitution
Denmark	NA
Estonia	NA
Finland	NA
France	NA
Germany	VG Oldenburg: decision of 27.01.2012 – 11A 2117: the Labour Office cannot ask Union citizens to undertake more efforts to integrate into the labour market than it

	may require German nationals to do
Greece	NA
Hungary	NA
Ireland	1) <i>Solovastry & Anor v. The Minister for Social protection & Ors</i> [2011] IEHC 532: self-employed person and duly recorded unemployment 2) <i>Galian Genov, Florae Gusa v. Minister for Social Protection & Ors</i> [2013] IEHC 340: self-employment
Italy	NA
Latvia	NA
Lithuania	NA
Luxembourg	NA
Malta	NA
Netherlands	Centrale Raad van Beroep 16 march 2012, LJN BV9903: UWV does not have to register as a jobseeker a Bulgarian citizen who did not have a labour permit because Article 5 Regulation 492/2011 was not yet applicable
Poland	NA
Portugal	NA
Romania	NA
Slovak Rep	NA
Slovenia	NA
Spain	NA
Sweden	NA
United Kingdom	1) <i>Mohamed Barry v London Borough of Southwark</i> [2008] EWCA Civ 1440 in relation to Article 7(3)(c) 2) <i>St Prix v Secretary of State for Work and Pensions</i> [2011] EWCA Civ 806 (Court of Appeal); [2012] UKSC 49 (Supreme Court)

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