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Presentation of the report on social and tax advantages

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ANALITYCAL NOTE ON SOCIAL AND TAX ADVANTAGES AND BENEFITS UNDER EU LAW

Network on the Free Movement of Workers

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Vilnius
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Relevant provisions under EU law and their application on national level

- Article 7 (2) Regulation 492/2011 – *EU migrant workers have the right to the same tax and social advantages as nationals of the host Member States*
- Article 24 (1) Directive 2004/38 – *all EU citizens residing on basis of this Directive in the territory of the host Member States shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty*
- Article 24 (2) Directive 2004/38 – *possible derogation from the equal treatment rule – as regards social assistance and access to maintenance aid for students*

Social and tax benefits in the legislation of Member States

- No general definition on national level
- List of examples established on case by case basis
- Equal treatment rule applicable
- No national case law
- No national administrative practice

Social assistance

- No general definition on national level
- The aim is to cover all benefits for applicants being in need, so facing the risk of poverty, illness, homelessness – in general for those who do not have sufficient means on their own
- Existing relations:

1) two different concepts
2) social assistance and social advantages concepts are overlapping
3) social advantages is a wider concept than social assistance

Art. 24 (2) Directive 2004/38

- Majority of Member States make use of the possible derogation – therefore:

a) no right to social assistance during first three months (or longer)

b) no right to maintenance aid for studies prior acquisition of permanent residence right

Particular issues – jobseekers: general overview

- Approach towards jobseekers - examples:

1) Germany – the aim of stay
2) Luxembourg, Sweden - the planned period of stay
3) Denmark – limited access to social benefits
4) Poland – no financial assistance - other assistance open for job-seekers

Access to social advantages and benefits

- In general rule of equal treatment fully applicable
- Practical problems occur:

a) residence clauses

b) requirement of prior residency periods

c) requirement of prior education in a given Member State

d) quotas for non-residents

e) right to reside test

Access to social advantages for frontier workers

- No specific regulation on frontier workers in majority of Member States
- Main restriction – residence clauses

Access to study grants and frontier workers issue

- C-20/12 Giersch (June 20th, 2013) – requirement of residence – indirect discrimination – only acceptable if legitimate interest proven

a) Luxembourg – new law (July 9th, 2013)

b) Denmark – new law on export of study grants (September 12th, 2013)

c) Netherlands - three out of six years rule vs. maximum threshold

d) Poland – residence requirement

Practical problems – discriminatory measures (examples)

- Malta – bus fares, water and electricity tariffs
- Belgium – tideover allowances
- Denmark – public transportation for students
- Greece - special pension and free medical care
- Austria – complementary supplement (C-140/12 Brey)

Tax advantages

- Rather residency and not nationality criteria
- Joint or separate taxation of spouses
- Certain tax advantages:

1) Netherlands – 30% rule
2) Denmark – key employees and researchers
3) Hungary, Lithuania – tax relief for life insurance fees
4) Finland – tax incetives for frontier workers
5) Latvia – tax relief for dependants

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Access to Social Assistance Benefits for EU Citizens in another Member State

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ACCESS TO SOCIAL ASSISTANCE BENEFITS FOR EU CITIZENS IN ANOTHER MEMBER STATE

Radboud University Nijmegen

Introduction 1

- Directive 2004/38 makes a distinction between residence up to three months, residence from three months to five years and residence for longer than five years
- The Directive gives all EU citizens a right to entry to any EU state without any conditions or formalities other than the requirement to hold a valid identity card or passport for three months (Article 6). It is, however, explicitly stated in Article 24(2) that the host Member State shall not be obliged to confer any entitlement to social assistance during these first three months of residence.

Introduction 2

- According to Article 7(1) Directive 2004/38 Union citizens only have the right of residence on the territory of another Member State for a period of longer than three months if they (as far as relevant for my presentation):
- a) are workers or self-employed persons in the host Member State; or
- b) have sufficient resources for themselves and their family members **not to become a burden on the social assistance system** of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State.

Introduction 3

- Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This means that after five years, a right of permanent residence is given to Union citizens (and their family members), without any further conditions, even if these persons do not have sufficient resources. (Article 16(1) Directive 2004/38)

Entitlement to Social Assistance Benefits? 1

- Articles 14(1) and (2) of Directive 2004/38 regulate the retention of the right of residence.
- On the basis of Article 14(1) ‘Union citizens and their family members shall have the right of residence provided for in Article 6 (right of residence up to three months), as long as they do not become an **unreasonable burden** on the social assistance system of the host Member State’
- Article 14(2) reads: ‘Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein’.
- This wording seems to imply that an appeal to social assistance will lead to an ending of the right of residence for those inactive persons who stay in another Member State for less than five years. But this is not the case, because according to Article 14(3):
- ‘An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State’.

Entitlement to Social Assistance Benefits? 2

- ‘Unreasonable burden’ is not further defined in Article 14, but is described in Recital 16 of the Preamble:
- ‘As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. **The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion**. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security.’

Entitlement to Social Assistance Benefits? 3

- The above mentioned ambiguity of Directive 2004/38 can also be found in Article 24.
- On the one hand, Article 24, paragraph 1 provides for equal treatment for all Union citizens (and their family members) residing on the basis of this Directive in the territory of the host Member State. But, on the other hand, according to para 2 of this Article the host Member State shall **not** be obliged to confer entitlement to social assistance during the first three months of residence or for job-seekers looking for employment nor to grant maintenance aid for students, who have no right of permanent residence yet.

Entitlement to Social Assistance Benefits? 4

- ‘Guide on how to get the best out of Directive 2004/38/EC’:
- ‘If your right to reside is conditional upon having sufficient resources not to become a burden on the social assistance system of the host Member State during the period of residence (*i.e. when you study or are an inactive person there*), it might be terminated once you become an unreasonable burden on the social assistance system.
- **This does not mean that you cannot apply for social assistance there when you are in need**. However, in this case the host Member State is entitled to examine whether it is a case of temporary difficulties and after taking into account the duration of your residence, the personal circumstances and the amount of aid granted, it may consider that you have become an unreasonable burden on its social assistance system and proceed to your expulsion. An expulsion measure can in no case be the automatic consequence of recourse to the social assistance system’

Issues in some Member States

- No social assistance during the first three months?
- No access to social assistance for jobseekers ?
- When does a Union Citizen become an unreasonable burden ?

No social assistance during the first three months

- In many Member States the transposition of Directive 2004/38 was used as an occasion to introduce clauses in their social law explicitly excluding EU nationals and their family members from entitlement to social assistance during the first three months of residence in another Member State, referring to Article 24(2) of the Directive. A good example in this respect is *The Netherlands*.

No access to social benefits for jobseekers

- In some other Member States the implementation of Directive 2004/38 has been used to limit the access of job-seekers to social benefits. A good example is *Germany* where an amendment of the Social Code II (the Second Book of the Social Code) changed the rules on entitlement to social benefits as a job-seeker by making use of the restrictions of Directive 2004/38 under Art. 24(2).
- Judgment CJEU in *Vatsouras* and *Koupatantze* (C-22/08 and C-23/08, 4 June 2009): “Benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting ‘social assistance’ within the meaning of Article 24(2) of Directive 2004/38”

European Convention on Social and Medical Assistance 1

- An interesting other approach was followed in a case from the *Bundessozialgericht* (the highest Court in social security cases in Germany) delivered on 19 October 2010 (B 14 AS 23/10 R)
- French citizen who had worked for some time in Berlin, received a Social Code II benefit for six months. His residence right after that period was only based on EU law on the fact that he was still looking for work and therefore was a job seeker. Social Code II benefit was stopped.
- Court: In breach with ECSMA (Council of Europe Treaty of 1953) which gives lawfully residing nationals of Contracting Parties an entitlement to social assistance.

European Convention on Social and Medical Assistance 2

- The government of the Federal Republic of Germany on 19 December 2011 has registered this provision to the annex of this Convention, which lists provisions excluded from the scope of the Convention. The Convention now has stopped to apply to this section of the Social Code II.
- the Social Appeals Court (LSG) Mecklenburg-Vorpommern decided in 2012 that Austrian nationals may rely on the bilateral Austrian – German agreement on social assistance of 1966 in order to claim access to social assistance irrespective of section 7(1) Social Code II.
- German social courts continue to discuss the compatibility of this section 7(1) of the Social Code II with EU rules on free movement of workers and equal treatment.

When does a Union Citizen become an unreasonable burden? 1

- A third issue is the determination when a Union citizen becomes ‘an unreasonable burden’.
- In *The Netherlands*, the government has developed a kind of sliding scale to answer this question. The authorities in the *Czech Republic* use a ‘system of points’
- In *Finland* what constitutes an unreasonable burden to the social assistance system is decided case by case. Refusing an EU citizen entry on the ground of lack of resources comes into question only in very rare cases
- In *Belgium* in 2012 the residence permits of over 2,000 EU citizens has been withdrawn, because of receiving social assistance for more than three months

When does a Union Citizen become an unreasonable burden? 2

- Answer in the *Brey* case? Case C-140/12, 19 September 2013
- Is the Austrian compensatory supplement, which is a “special non-contributory benefit” – listed in Annex X of Regulation 883/2004 a “social assistance benefit ” within the meaning of Article 7(1) of Directive 2004/38? **YES**
- **BUT**: You cannot bar the grant of this benefit automatically to a national of another Member State who is not economically active, on the grounds that, ***despite having been issued with a certificate of residence***, he does not meet the necessary requirements for obtaining the legal right to reside on the territory of a Member State for a period of longer than three months, since obtaining that right of residence is conditional upon having sufficient resources not to apply for the benefit.

When does a Union Citizen become an unreasonable burden? 3

- Only under very strict circumstances a person as mr. Brey can be seen as an ‘unreasonable burden’.
- The competent national authorities cannot draw such conclusions without first carrying out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system **as a whole**, by reference to the personal circumstances characterising the individual situation of the person concerned (para. 64).
- In order to ascertain more precisely the extent of the burden which that grant would place on the national social assistance system, it may be relevant to determine the **proportion of the beneficiaries** of that benefit who are Union citizens in receipt of a retirement pension in another MS (para. 78).

Some questions on the Brey case (C-140/12)

- Can Austria refuse now the compensatory supplement during the first three months?
- Can the Austrian government refuse in the future to register persons who are in a similar situation as mr Brey (inactive person) and use this non registration as an argument to block the access to the compensatory supplement?
- What level of proportion would justify that one becomes an unreasonable burden on the system?
- Can all benefits, which are listed in Annex X of Regulation 883/2004 now be defined as social assistance benefits in the meaning of Directive 2004/38?

Conclusions

- “It can happen that the situation of a non-active EU citizen who initially had sufficient resources changes with time and the citizen will have to rely on the social assistance benefits of the host Member State. In such cases, Member States must show a certain degree of financial solidarity with EU citizens, but this solidarity is not unlimited (letter Com-mission to the Presidency” (24 May 2013;Doc 10316/13))

- So there can still be a right of residence under EU law for a period of more than 3 months which cannot be withdrawn automatically on the basis of a temporary reliance on social assistance.

Notion of the concept of Worker

Herwig Verschueren

To be or not to be a 'migrant worker'

Prof. dr. Herwig VERSCHUEREN
University of Antwerp
Vilnius – 18 October 2013

3 questions

- Does it still matter to be a ‘migrant worker’?
- Are all migrating working people ‘migrant workers’?
- Is it enough to be a ‘migrant worker’ to be entitled to equal treatment in the state of employment?

Does it still matter to be a 'migrant worker'?

- Being a 'migrant worker' triggers the application of Article 45 TFEU and of Reg. 492/2011
  - Equal treatment provisions of Articles 7-10
    - May even overrule other provisions such as the residence clause in Reg. 883/2004 for the special non-contributory benefits: *Hendrix*
  - *A 'worker' is not a 'self-employed person':* important legal consequences for the employment protection such as wage levels as well as for the implementation of transitional measures
    - See further discussion on bogus self-employed

Does it still matter to be a 'migrant worker'?

- Also equal treatment for family members, including 3rd-country nationals
- Residence rights above the Dir. 2004/38
  - See right of residence for the 'primary carer' of the children of a migrant worker via Article 12 Reg. 1612/68 (now Article 10 Reg. 492/2011)
    - *Teixeira, Ibrahim, Czop, Punakova, Alarape and Tijani*
    - Not applicable to the self-employed ?!?!: *Czop and Punakova* (6.9.2012)

Does it still matter to be a 'migrant worker'?

- Dir. 2004/38
  - No other conditions for the right of residence than being a 'worker':
    - No subsistence or sickness insurance condition
    - See 'right-to-reside' test in some MS for social benefits
  - Possibility to retain the status of 'worker'
    - See Sandra Mantu's presentation
  - Limitations in Article 24(2) Dir. 2004/38 and 'genuine link' citizenship's case law are not applicable
    - However: see 3rd question

Does it still matter to be a ‘migrant worker’?

- Under EU law, the status of a ‘migrant worker’ differs from the status of the ‘non-migrant worker’ (‘travailleur sédentaire’; *Van Munster*)
- Returning ‘migrant workers’
  - Not in a ‘purely internal situation’
  - Avoid reverse discrimination: *Singh; Eind*
  - Crossing the EU internal borders is still important in order to trigger rights

3 questions

- Are all migrating working people ‘migrant workers’?

Concept of ‘migrant worker’

- Apparently settled case law
  - Most recent *L.N.* (C-46/12; 21.2.2013)
- Autonomous meaning specific to EU law (to prevent MS to restrict its scope), defined in accordance with objective criteria, which must not be interpreted narrowly
  - “*The essential feature of an employment relationship is that, for a certain period of time, a person performs services* ***for and under the direction*** *of another person, in return for which he receives* ***remuneration***”

Concept of ‘migrant worker’

- Activities must be ‘effective and genuine’
  - Level or origin of the remuneration; nature of legal relationship with the ‘employer’; low productivity; small number of hours a week; short duration; personal motives;… do not preclude a person from being a ‘worker’
    - Part-time workers, trainees, ‘working’ students, au pairs, sex-workers, sportspeople, short-term employment, …..
    - Even receipt of supplementary funds is irrelevant
    - Confirmed in the EEC-Turkey association case law: *Genc, Payir, ….*
  - Broad definition typical for a pre-citizenship case

Concept of ‘worker’ in other EU instruments

- Not necessarily an autonomous EU concept
  - Gender discrimination:
    - Autonomous EU concept*: Allonby; Danosa (*analogy to the concept in the context of free movement for workers*)*
  - Reg. 883/2004
    - Article 1 (a) and (b): reference to the law of the MS
  - Dir. 96/71 (posted workers)
    - Article 2: reference to national law; see bogus self-employed persons
  - Other employment protection directives: mostly reference to national law of the MS

Patchiness and unclear borderlines

- Rehabilitative employment
  - *Bettray: "work merely as a means of rehabilitation and reintegration":* not a 'worker'
    - should be interpreted narrowly: *Birden*
    - However, recently used by the Belgian Alien's Dispute Council to deny worker's status to a person employed by a local authority in order to help him integrate into society
    - Danger of wide interpretation excluding 'sheltered', 'adapted' or 'social economy' employment
    - See AG in *Effing*: work in a prison has a '*resocialising function*': prisoners are not 'migrant workers'

Patchiness and unclear borderlines

- Part-time workers
  - Last year's report showed divergent practices in MS concerning minimum requirement on working hours, duration of employment and/or level of income
- Researchers
  - 'working' on a grant or on an employment contract
  - *Raccanelli* : 'subordination' and 'remuneration' are central:
    - a 'grant' researcher is not necessarily a 'worker'

Patchiness and unclear borderlines

- Chores in return for food, lodging and pocket money
  - *Steymann*: is sufficient to become ‘worker’
  - AG in *Trojani*: is not sufficient in this case
  - what about a person who helps another person with the housekeeping in return for food, lodging and pocket money?

Patchiness and unclear borderlines

- Volunteers
  - Not for remuneration, so no ‘workers’
  - Remain subject to residual status of citizen
  - However, migrant volunteers might deliver an economic contribution to the ‘employer’ and the host State

Posted workers

- See definition of 3 categories in Art. 1 of Dir. 96/71
- *Finalarte:* posted workers are not 'migrant workers' within the meaning of Article 45 TFEU
  - *"… workers employed by a business established in one Member State who are temporarily sent to another Member State to provide services* ***do not, in any way, seek access to the labour market*** *in that second State if they return to their country of origin or residence after completion of their work"*
- What is the difference with *Kranemann, Wallentin?*
- Important consequences for employment protection as well as for the implementation of transitional measures

Posted workers

- *Vicoplus* (11.2.2011):
  - Workers posted and hired-out by temporary employment or placement agency "*gain access to the labour market of the host MS*"
    - *May be covered by Article 45 TFEU and subject to transitional measures*
- *Hudzinski (12.6.2012)*
  - CJ refers to Article 45 TFEU as being applicable in the case of posted workers
- 5th recital to Reg. 492/2011
  - "*Such right should be enjoyed without discrimination by permanent, seasonal and frontier workers and by* ***those who pursue their activities for the purpose of providing services***"

Workers vs. self-employed persons

- Strict and narrow subordination test: if subordination is lacking: person is self-employed (*Jany)*
  - MS cannot apply its employment protection for these 'workers' since that would be against Article 49 and 56 TFEU
    - restrictions to the free movement of service providers are prohibited (in order to allow competitive advantage)

      vs.
    - Right/obligation to equal treatment for 'migrant workers' (protective function)

Self-employed persons

- Problem of bogus or false self-employment in order to circumvent the principle of equal treatment and benefit from the competitive advantage (or to circumvent the transitional measures)
  - Com. v. France (C-255/04)
    - Difficulty to rebut presumption of salaried status : is an obstacle to the free movement of self-employed artists
    - Even if objective is combating concealed employment
  - *Com. v. Austria (C-161/07)*
    - Presumption that 'minor partners' in a limited liability company are workers: 'bogus partners'
  - ECJ allows control measures, but not "presumptions"

Self-employed persons

- No room for in-between categories as they exist in the MS legislation: quasi-self-employed:
  - not in a subordination position but nevertheless economically dependent
  - See DE: 'employee-like persons' (*Arbeiterähnliche Personen);* IT: 'Parasubordinati'; 'dependent self-employed'; persons working for only one 'client'
  - excluded from 'worker' concept and thus from employment protection and social protection for workers
  - 'economic independence' test would fit better

3 questions

- Is it enough to be a ‘migrant worker’ to claim equal treatment in the state of employment?

Are all ‘migrant workers’ equal?

- Traditionally almost mechanical application of the right to equal treatment of Art. 45 TFEU and Art. 7 Reg. 492/2011
  - Rule of reason rarely an escape route for MS
- Very few exceptions
  - *Baldinger* (an allowance in favour of former prisoners of war)
- However a recent tendency not to apply automatically the right to equal treatment

Geven (C-213/05; 18.7.2007)

- German residence based child-raising allowance
- CJ accepts residence condition to be applied to a frontier worker in minor employment (between 3 and 14 hours a week) because her link with the MS of work is too tenuous
- CJ endorses objective to grant a child-raising allowance **only to persons who have a sufficiently close connection** with German society, which may not be the case for workers in minor employment

Com vs. NL (C-542/09; 24.6.2012)

- NL: “three out of six years” residence test for entitlement to study finance for children of migrant workers
- CJ accepts that “*the justification relating to **encouraging student mobility** constitutes an overriding reason relating to the public interest capable of **justifying a restriction on the principle of non-discrimination on grounds of nationality*** (para 72)
- “… *the ‘three out of six years’ rule prioritises an element which is **not necessarily the sole element** representative of **the actual degree of attachment between the party concerned and that Member State***” (para 86)
- Opens the door for other “**elements**” that could justify such a residence condition

Caves Krier (C-379/11;13.12.2012)

- On LUX residence condition for the subsidy for the recruitment of older unemployed persons and the long-term unemployed
- "… *a condition of residence is, **as a rule**, inappropriate as regards migrant workers and **frontier workers** since, having participated in the employment market of a Member State, 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 … 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 and frontier workers also **contribute to the financing of the social policies** of that State…" (para 53)*
- What if the frontier worker does not pay taxes in the MS where he/she works or does only to a minor extend or not at all contribute to the financing of social policies?

Giersch (C-20/12; 20.6.2013)

- Residence condition in LUX for financial aid for higher education studies
- To ensure that its resident population is highly educated: a legitimate objective which can justify indirect discrimination on grounds of nationality *(para 56)*
- *"…. In that regard, it must be noted that* ***the frontier worker is not always integrated*** *in the Member State of employment in the same way as a worker who is resident in that State." (para 65)*

Giersch, para 80

- "Above all, in order **to avoid the risk of 'study grant forum shopping'** … and **to ensure that the frontier worker** who is a taxpayer and who makes social security contributions in Luxembourg **has a sufficient link with Luxembourg society**, the financial aid could be made **conditional on** the frontier worker, the parent of the student who does not reside in Luxembourg, **having worked in that Member State for a certain minimum period of time**. In another context, Article 24(2) of Directive 2004/38 provides that, by derogation from Article 24(1) …. the host Member State is not to be obliged to grant maintenance aid for studies before the acquisition of a right of **permanent residence** which, under Article 16(1) of Directive 2004/38, is subject to a condition of residence of **five years** in the territory of the Member State concerned."

- **Risk of pollution of the ‘migrant workers’ case law by the ‘genuine link’ citizenship’s case law**

To conclude

- Does it still matter to be a ‘migrant worker’?
- Are all migrating working people ‘migrant workers’?
- Is it enough to be a ‘migrant worker’ to be entitled to equal treatment in the state of employment?

Thank you for your attention

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Retention of the status of Worker

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Retention of EU worker status

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Vilnius – 18 October 2013

The topic

- Analytical note at the request of the European Commission on retention of worker status, especially Article 7(3)(b) Directive 2004/38
- Can retention of EU worker status be limited?
- Pending case Jessy Saint Prix: Case C-507/12
- Legal framework
- Case law of the Court of Justice
- Literature review
- Questionnaire on national implementation and practices
- Conclusions

Legal framework (1)

- **Article 45 TFEU**: the right of free movement of EU workers
- **Article 45(3) TFEU**: accept offers of employment actually made; to move freely within the territory of the MS for this purpose; to stay in a MS for the purpose of employment and to remain in the territory of a MS after having been employed there subject to conditions to be drawn up by the Commission
- **Secondary legislation**: Directive 2004/38; Regulation 492/2011 (former 1612/68) and repealed Directive 68/360

➢ Article 7 of Directive 68/360

➢ Article 7(3) Directive 2004/38

- **Case law** of the Court of Justice

Legal framework (2)

- **Article 7 Directive 2004/38**

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

Legal framework (3)

- **Article 7 Directive 68/360**

1. A valid residence permit may not be withdrawn from a worker solely on the grounds that he is no longer in employment, either because he is temporarily incapable of work as a result of illness or accident, or because he is involuntarily unemployed, this being duly confirmed by the competent employment office.
2. When the residence permit is renewed for the first time, the period of residence may be restricted, but not to less than twelve months, where the worker has been involuntarily unemployed in the Member State for more than twelve consecutive months.

General position on retention of EU worker status

- **Directive 68/360**
  - no protection for voluntary unemployment + restrictions upon the first renewal of the residence permit (after first 5 years)
  - employment for longer than one year = residence for at least six years
- **Directive 2004/38**
  - no worse treatment than under previous legislation repealed or modified by the Directive
  - the right to reside is retained for as long as the EU citizen fulfils the conditions set out in Article 7(3)
  - the right to permanent residence

Case law of the Court of Justice (1)

- Case 75/63 *Hoekstra (Unger)*: 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."
- Case C-85/96 *Martinez Sala:* "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."
- Retention of worker status and studies: continuity between the former employment and the course embarked upon (*Lair*, *Raulin*, *Ninni-Orasche*)
- Retention of worker status and former frontier workers: only in relation to benefits connected with the former employment and the person's objective status as a worker (*Leclere*, *Meints*)

Case law of the Court of Justice (2)

- Time limits and retention of worker status
  - ➢ *Collins:* “no link can be established between the activity and the search for another job more than 17 years after it came to an end”
  - ➢ *Antonissen*: if a person can show that he is still looking for employment and has genuine chances of being engaged, he cannot be required to leave the territory of the host state
- Privileged treatment of former workers v. treatment of first time jobseekers or inactive EU citizens
- Why? If no protection is available, a possible deterrent effect
- Voluntary v. involuntary unemployment (*Ninni-Orasche*)
- Relevant issues: involuntary unemployment + willingness to look for a job + maintain links with the labour market of the host state
- Case C-507/12 *Saint Prix*: gaps in protection – does an EU citizen who gives up work or seeking work because of the physical constrains of the late stages of pregnancy and the aftermath of childbirth retain worker status?

The questionnaire

- What is the national legal provision implementing Article 7(3) (b) of Directive 2004/38?
- Are there differences between the implementing national measure and the measure that implemented Article 7 of Directive 68/360?
- 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?
- 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?
- In your national legislation what conditions must be met in order to be considered in duly recorded involuntary unemployment?
- 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?
- If available, please provide information about case law and literature.
- What is your own opinion in relation to retention of worker status?

National practice – Article 7(3)(b) Directive 2004/38

- **Issues of transposition:**
  - what is retained: the right to reside or the status of worker?
  - the personal scope of the provision: workers v. self-employed persons
- **Relationship with Directive 68/360**: improvements?
- **Equality of treatment with national unemployed citizens**
- **Duly registered with the employment office:**
  - Unemployed + able/willing/available to work+ actively seeking work + agreement with the employment office
  - Other conditions
- **Failure to comply with registration requirements or refusal of job offers – Consequences**
  - Registration
  - Unemployment benefits
- **Voluntary v. involuntary unemployment**
- **Extra conditions?**

Conclusions

- Retention of worker status: residence v. social benefits
- What type of employment relations are protected?
- Duration of employment relation
- Voluntary v. involuntary unemployment
- Obligation to register with the employment office
- Further limitations?
- Lack of clarity as to what happens to a person who no longer retains worker status