EUROPEAN COMMISSION

Brussels, 13.7.2010
COM(2010)373 final

COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

Reaffirming the free movement of workers: rights and major developments

Introduction

Over the last 40 years the principle of the free movement of persons has developed constantly and grown steadily stronger. Originally intended for the active population, this fundamental freedom has gradually been extended to include other sections of the population, and now constitutes one of the most important individual rights that the EU guarantees to its citizens.

The principle of the free movement of workers is enshrined in Article 45 (ex-Article 39 EC) of the Treaty on the Functioning of the European Union (hereinafter 'TFEU') and has been developed through secondary law (Regulation (EEC) No 1612/68[1] and Directive 2004/38/EC[2], as well as Directive2005/36/EC[3]) and by the case-law of the Court of Justice of the European Union (hereinafter 'CJ'). The existing body of EU law (the *acquis*) in this area gives European citizens the right to move freely within the EU for work purposes and protects the social rights of workers and of their family members[4]. In this dynamic area, where change is driven by labour market policy, family structure and the process of European integration, it is free movement which not only contributes to the achievement of the single market but also has a significant social dimension, in so far as it fosters the social, economic and cultural inclusion of EU migrant workers within the host Member States.

According to the latest Eurostat data available[5], 2.3% of EU citizens (11.3 million persons) reside in a Member State other than the state of which they are a citizen, and many more exercise this right at some point in their life[6]. That number has grown by more than 40%[7] since 2001. According to a recent Eurobarometer survey, 10% of persons polled in EU-27 replied that they had lived and worked in another country at some point in the past, while 17% intended to take advantage of free movement in the future.

In principle, every EU citizen has the right to work and live in another Member State without being discriminated against on grounds of nationality. However, despite the progress that has been made, there are still legal, administrative and practical obstacles to exercising that right. Recent report[8] on the application of the Directive 2004/38/EC concluded that its overall transposition was rather disappointing and highlighted a number of problems EU citizens on the move, workers or not, faced abroad. The conclusion drawn from the European Year of Workers' Mobility in 2006 was that, in addition to the legal and administrative obstacles on which recent efforts have generally focused (e.g. recognition of qualifications and portability of supplementary pension rights), there are other factors that influence trans-national mobility. These include housing issues, language, the employment of spouses and partners, return

---

1 OJ L 257, 19.10.1968, p. 2, hereinafter 'the Regulation'.

2 OJ L 158, 30.4.2004, p.77, hereinafter 'the Directive'.

3 OJ L 255, 30.9.2005, p. 22.

4 EU law on free movement of workers applies to EU citizens and their family members, irrespective of their nationality.

5 Situation in 2008.

6 37% (11.3 million persons) of non-nationals in EU-27 are citizens of another Member State. The number of non-nationals in EU-27 has increased by 42% since 2001 (for further details, see Eurostat Statistics in focus 94/2009).

7 This covers the overall increase in the number of foreigners, including EU nationals from other Member States and nationals of non-EU countries. The report does not explicitly cite the percentage increase over the period 2001 to 2008 in the number of EU nationals residing in another Member State, but the increase was about 4 million, which translates into an increase of around 54%.

8 COM(2008) 840 of 10.12.2008.

mechanisms, historical 'barriers' and the recognition of mobility experience, particularly within SMEs. Tackling these problems therefore calls for a broader approach[9], combined with effective implementation of the principle of free movement. President Barroso stated in his political guidelines 'The principles of free movement and equal treatment for EU citizens must become a reality in people's everyday lives'[10]. This was followed up by the Commission proposal to facilitate and promote EU mobility under the Europe 2020 strategy, and in particular in the flagship initiative 'An Agenda for new skills and jobs'[11].

The aim of this communication is to:

– present an overall picture of the rights of EU migrant workers,

– update the Commission's previous communication on the subject[12] with regard to developments in legislation and case-law, and

– raise awareness generally and promote the rights of migrant workers who are in a more vulnerable situation than national workers (for instance, in terms of housing, language, employment of spouses and partners etc. as referred to above).

9 COM(2007) 773 of 6.12.2007.
10 http://ec.europa.eu/archives/commission_2004-2009/president/pdf/press_20090903_EN.pdf.
11 COM(2010) 2020 of 3.3.2010.
12 COM(2002) 694 of 11.12.2002.

PART I: Who can rely on EU rules concerning free movement of workers?

Defining the personal scope of EU law on free movement of workers and the conditions under which that law applies involves drawing a distinction between migrant workers and other categories of EU citizens (non-active persons and self-employed and posted workers). The free movement of workers gives every citizen the right to move freely to another Member State to work and reside there for that purpose, and protects them from discrimination as regards employment, remuneration and other working conditions in comparison to their colleagues who are nationals of that Member State. Free movement needs to be distinguished from the freedom to provide services, which includes the right of undertakings to perform services in another Member State for which purpose they may send ('post') their own workers there temporarily to carry out the necessary work. Posted workers in the context of the provision of services are covered by Directive 96/71/EC[13], which establishes a 'hard core' of clearly defined terms and conditions of work and employment for the minimum protection of workers, including minimum rates of pay, which must be complied with by the service provider in the host Member State.

This communication does not cover posted workers in the context of the provision of services to whom the specific rules laid down in the Posting of Workers Directive apply. Nor does it cover self-employed workers who enjoy the freedom to establish or to provide services in other Member States.

1. EU MIGRANT WORKERS

1.1. Definition

Every national of a Member State has the right to work in another Member State[14]. The term 'worker' has a meaning in EU law and cannot be subject to national definitions[15] or be interpreted restrictively[16]. It covers any person who undertakes genuine and effective work for which he is paid under the direction of someone else[17]. It does not cover third country migrant workers. It is the responsibility of the national authorities to undertake, in the light of that definition, a case-by-case evaluation to establish whether those criteria are met.

Remuneration

A worker under EU law must receive remuneration in return for services. The fact of having limited income does not prevent a person from being considered a worker[18], and benefits in

13 OJ L 18, 21.1.1997, p. 1.

14 Temporary restrictions may apply until 30.4.2011 at the latest to nationals of the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia and Slovakia, and until 31.12.2013 at the latest to nationals of Bulgaria and Romania.

15 Case C-75/63.

16 Case C-53/63.

17 Case C-66/85.

18 Cases C-53/81 and C-139/85.

kind are also considered as remuneration[19]. Only voluntary work without any form of remuneration is excluded.

Subordination

A relationship of subordination allows a distinction to be drawn between workers and self-employed persons. This distinction is important for the application of transitional measures[20] and access to benefits reserved for workers.

Work in a relationship of subordination is characterised by the employer determining the choice of activity, remuneration and working conditions[21]. Self-employed persons perform tasks under their own responsibility and may thus be liable for damage caused as they bear the economic risk of the business[22], for example in so far as their profit is dependent on expenses incurred on staff and equipment in connection with their activity[23].

Genuine and effective work

The key criterion for deciding whether a person is a worker is the nature of the work itself. The CJ has consistently held that a person must pursue an activity of economic value which is effective and genuine, excluding activities on such a small scale as to be regarded as purely marginal and accessory[24]. Short duration of employment, limited working hours or low productivity[25] cannot prevent an EU citizen from being considered an EU migrant worker. All circumstances of the case relating to the nature of the activities concerned and the employment relationship should be taken into consideration[26].

Part-time workers[27], trainees[28] and au pairs[29] fall within the EU definition if their activity is effective and genuine. In the case of short-term training, the number of hours needed to familiarise oneself with a task[30] and a gradual increase in remuneration during training may be an indication that the work performed is of growing economic value to the employer[31]. No account should be taken of the short-term nature of the employment in relation to the total duration of residence by the person concerned in the host Member State[32].

Part-time work must not be the person's principal activity. A person undertaking another activity at the same time (e.g. studies or self-employment) can rely on his EU status as a worker, even if the second activity is performed in another Member State[33].

---

19 Cases C-196/87 and C-456/02.

20 Transitional arrangements, usually imposed on citizens of new Member States during a certain period after accession, apply to access to the labour market and not to self-employed activities.

21 Case C- 268/99.

22 Case C-3/87.

23 Case C-202/90.

24 Case C-53/81.

25 Case C-344/87.

26 Case C-413/01.

27 Case C-53/81.

28 Case C-109/04.

29 Case C-294/06.

30 Case C-3/90.

31 Case C-188/00.

32 Case C-413/01.

33 Case C-106/91.

The nature of the legal relationship between the employee and the employer is of no consequence in terms of determining the former's status as a worker: public law status (civil servants and public sector employees with a work relationship under public law) and private law contracts (also in the public sector) are covered[34]; a person with a contract for occasional employment, such as an on-call contract[35], would also fall within the definition of a worker as long as the activities performed are effective and genuine and fulfil other conditions in the EU definition.

Furthermore, the CJ has held that sport is subject to EU law in so far as it constitutes an economic activity[36]. As a consequence, professional and/or amateur sportsmen and sportswomen involved in gainful employment may be included. Working activities of a rehabilitative nature as part of work-reintegration programmes are not necessarily excluded. However, determining whether they are effective and genuine activities will depend on what the social reintegration programme entails and the nature and details of performance of the services.

1.2. Cross-border link

In addition to meeting the above definition of a worker, a person must be a *migrant* worker in order to be covered by EU law, i.e. he or she must have exercised his or her right to free movement: EU rules apply when a person works in a Member State other than his or her country of origin or in his or her country of origin while residing abroad[37]. EU citizens who reside in one Member State and work in another Member State (frontier workers) are also covered by EU law on the free movement of workers in the Member State where they are employed[38]. Where such a frontier worker resides in a Member State of which he is not a national, he or she may rely on EU law as a self-sufficient non-active person in that Member State under the Directive

A person may be considered an EU migrant worker in his or her Member State of origin if he or she has exercised the right of free movement and then returns to his/her country of origin[39]. The reason why EU law covers such returning migrants is that preventing them from relying on EU law against their Member State of origin could discourage nationals of a Member State from exercising their right to free movement in the same way as migrant workers from other Member States.

1.3. Territorial scope

EU law on free movement of workers applies to the EU Member States (Article 52 TEU) and the territories listed in Article 355 TFEU.

It applies to professional activities carried out within the territory of a Member State or outside EU territory if the legal relationship of employment is located within the territory of a Member State or retains a sufficiently close link with that territory[40]. This may be the case of

---

34 Case C-152/73.
35 Case C-357/89.
36 Cases C-415/93 and C-519/04.
37 Case C-212/05.
38 Case C-357/89.
39 Case C-370/90.
40 Case C-214/94.

a person working in an embassy of another Member State in a non-EU country or a seafarer employed on board ships flying the flag of another Member State on the high sea, or aircraft personnel. Various points may be considered when determining whether the link with EU territory is sufficient[41].

2. OTHER BENEFICIARIES

Other categories of persons also fall within the scope of Article 45 TFEU.

2.1. Family members

Family members are defined as the spouse, under certain circumstances the partner with whom an EU citizen has contracted a registered partnership[42], direct descendants who are under the age of 21 or are still dependants, and the dependants' direct relatives in the ascending line as well as those of the spouse or partner.

2.2. People retaining the status of worker

Generally speaking, persons who have worked in the host Member State, but who no longer work there, lose the status of worker[43]. Nevertheless, EU law provides that EU citizens retain the status of worker in certain situations even where they are no longer employed[44], and therefore qualify for equal treatment.

2.3. Jobseekers

Under Article 45(3) TFEU, the right to move freely within the territory of the Member States is conferred upon workers for the purpose of accepting offers of employment actually made. However, if EU law applied only to those who had already obtained job offers before moving to another Member State, this would call the fundamental principle into question. As a consequence, the CJ explicitly rejected the idea that Article 45 TFEU applies only to EU citizens engaged in active employment and it extended its scope to include those seeking employment under certain conditions (the persons concerned must provide evidence that they are continuing to seek employment and have a genuine chance of being engaged; see below for further details)[45].

---

41 Such as where the person was hired, whether the contract of employment was concluded in accordance with the law of a Member State and whether the employment relationship is governed by that law, or whether the person is affiliated to a social security system of a Member State and is subject to income tax in that country.

42 Article 2(2) of the Directive.

43 Case C-85/96.

44 Article 7(3) of the Directive.

45 Case C-292/89.

PART II: What rights do migrant workers enjoy?

This Part addresses the rights enjoyed by migrant workers pursuant to the Regulation and the Directive. It does not deal with social security rights[46].

1. JOB-SEEKING AND ACCESS TO BENEFITS

EU citizens have the right to look for employment in another Member State and to receive the same assistance from the national employment office there as nationals of that Member State[47]. The EURES network provides information, advice and assistance for placement and recruitment, in addition to matching CVs and vacancies. These services are delivered by the EURES advisers in Public Employment Services and by other staff of the EURES partner organisations involved. EURES also has a website[48] where citizens can access vacancies online and upload their CVs.

While such jobseekers were previously considered as having to be treated on an equal footing with nationals as regards access to work alone[49], the CJ concluded that the introduction of Union citizenship means that they should also qualify for equal treatment with regard to access to benefits of a financial nature intended to facilitate access to employment on the labour market of the host Member State[50].

However, to limit the strain on social assistance systems, the CJ added that a Member State could require that there be a genuine link between the jobseeker and the geographic employment market in question, such as the person needing to have, for a reasonable period, genuinely sought work in the Member State in question. The CJ also considered that a proportionate residence requirement may be appropriate for the purpose of proving a link with the labour market.

While national legislators remain competent for determining the nature of the link with their employment market, they should respect the principle of proportionality. Criteria should not go beyond what is necessary to conclude that the person concerned is genuinely seeking work on the employment market of the host Member State. The protection of the rights of EU citizens also means that such criteria are known to them in advance and that they can seek redress of a judicial nature.

Article 24(2) of the Directive authorises the Member States not to grant jobseekers social assistance during the first three months of residence or for a longer period. However, the CJ made it clear in a further decision[51] that financial benefits to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of that Article. The CJ therefore concluded that jobseekers must enjoy equal treatment as regards

---

46 Regulation (EC) No 883/2004 (OJ L 166, 30.4.2004, p. 1) deals with social security rights from 1.5.2010; a first step in the area of supplementary pensions is Council Directive 98/49/EC of 29 June 1998 (OJ L 209, 25.7.1998, p. 46).

47 Article 5 of the Regulation.

48 http://ec.europa.eu/eures/.

49 Case C-149/79.

50 Cases C-138/02, C-258/04 and C-22/08.

51 Case C-22/08.

access to benefits that aim to facilitate access to the labour market. In order to determine whether a particular benefit under national law aims to facilitate access to the labour market, its objective must be analysed according to its results and not according to its formal structure[52].

The inclusion of jobseekers within the scope of the equal treatment principle as regards certain benefits is a guarantee of better protection for those who may find themselves in a more vulnerable situation for a certain period of time and represents a practical step towards achieving a social Europe.

2. ACCESS TO WORK UNDER THE SAME CONDITIONS AS NATIONAL WORKERS

EU citizens have the right to take up an activity in another Member State under the same conditions as those that apply to its own nationals. However, one restriction and several specific aspects apply.

2.1. Recognition of professional qualifications

An EU citizen who is fully qualified to exercise a profession in one Member State and who wishes to exercise that profession in another Member State where the profession is regulated must first apply for recognition of his or her qualification. A profession is regulated where access is subject by legal regulation or administrative provisions to the possession of a professional qualification. Access to the labour market depends on the granting of such recognition.

Directive 2005/36/EC applies to the recognition of professional qualifications obtained in a Member State with a view to exercising a regulated profession in another Member State[53].

The rules in that Directive vary according to whether the profession is exercised in the host Member State on a temporary basis (for instance by seasonal workers) or on a permanent basis (establishment, for instance under an open-ended or long-term contract). Where the profession is exercised on a temporary basis, no vetting of the worker's qualifications is authorised unless the profession has health or safety implications. However, the host Member State may require a declaration on an annual basis. In the case of establishment, the recognition regime varies according to the profession.

Directive 2005/36/EC does not apply, however, where the diploma does not attest to specific professional training, i.e. training specifically for a given profession. Posts in the public sector in a Member State often call for a different type of diploma that attests to a certain level of education (university degree, school-leaving certificate plus three years' higher education etc.) or a diploma attesting to a level of education that meets certain content-related criteria without the content in question constituting vocational training within the meaning of Directive 2005/36/EC (a requirement for a diploma in either economics, political science, science or social sciences, etc.).

Such cases fall under Article 45 TFEU rather than within the scope of Directive 2005/36/EC. The authorities of the host Member State are entitled to assess the level of the diploma but not

---

52 Ibid.

53 http://ec.europa.eu/internal_market/qualifications/index_en.htm and http://ec.europa.eu/internal_market/qualifications/docs/guide/users_guide_en.pdf.

its training content, where the only significant factor is the level of study for which a diploma is awarded.

When the diploma needs to meet certain content-related criteria in addition to being of a specific level, its equivalence should be recognised where it was awarded on completion of education or training in the required subject. No further assessment of training content is authorised.

2.2. Language requirement[54]

The CJ has held that any language requirement must be reasonable and necessary for the job in question and cannot constitute grounds for excluding workers from other Member States[55]. Employers cannot demand a particular qualification only by way of proof, and systematic language tests carried out in a standardised form are considered contrary to the principle of proportionality[56].

While a very high level of linguistic knowledge may be justifiable in particular situations and for certain jobs, the Commission considers that a requirement for the person to be a mother-tongue speaker is not acceptable.

2.3. Access to posts in the public sector[57]

In accordance with Article 45(4) TFEU, the Member State authorities may restrict access to certain posts in the public service to their own nationals. This is an exception to be interpreted restrictively. The CJ has consistently held that this exception covers posts involving direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities[58]. Those criteria must be assessed on a case-by-case basis with regard to the nature of the tasks and responsibilities covered by the post. In 2003 the CJ ruled that a Member State may reserve for its nationals the posts of captain and chief mate on private-sector ships flying its flag only if the rights under powers conferred by public law are actually exercised on a regular basis and do not represent a very minor part of their activities[59]. The Commission considers that this case-law must be taken into account by Member State authorities when determining which public-sector posts they may reserve for their nationals.

As Article 45(4) TFEU allows the Member States to reserve some posts for their nationals rather than requiring them to do so, the Commission calls upon them to open up their public sectors (at all levels, including local, regional and central government) as much as possible to citizens of other Member States as a contribution to modernisation and reform.

Once a public-sector post is open to migrant workers, the Member States must guarantee equal treatment as far as other aspects of recruitment are concerned. The CJ has held that the Member State authorities must take account of previous periods of comparable employment experience acquired by migrant workers in other Member States in the same way as professional experience acquired within their own system for the purpose of providing access

---

54 Article 3(1) of the Regulation and Article 53 of Directive 2005/36/EC.

55 Case C-379/87.

56 Case C-281/98.

57 A forthcoming Commission staff working document will discuss these issues in greater detail.

58 Recently in case C-290/94.

59 Cases C-405/01 and C-47/02; the Court confirmed this in four rulings.

to their own public sector[60]. The Member States must also give consideration to comparable diplomas as part of the recruitment process (e.g. where additional points are awarded for a diploma).

With regard to competitions to recruit persons for specific training with a view to filling posts in a certain field of public-sector activity, the CJ has held that migrant workers who are fully qualified in the field must be exempted from completing the specific training, given the training and professional experience they have already acquired in their country of origin[61]. The CJ decided that a Member State may not oblige those migrant workers to pass such a competition, but must provide for different methods of recruitment instead.

2.4 Sport and free movement of workers

The impact on sport, and in particular on football, of the EU rules on free movement of workers has been a highly topical issue, particularly as sport is increasingly taking on a European dimension. The Commission's 2007 White Paper on Sport makes it clear that, while it takes account of the special characteristics of sport, the Commission's action aims to achieve the main objectives of the Treaty and respect its fundamental principles in this area.

With the entry into force of the Lisbon Treaty, sport becomes a field in which the EU can contribute to the promotion of European sporting issues and encourage cooperation between the Member States (Article 165 TFEU). This new competence does not, however, preclude the application to sport of fundamental principles of EU law, such as free movement and competition rules.

The CJ has confirmed on several occasions that professional and semi-professional sportsmen are workers by virtue of the fact that their activities involve gainful employment[62].

The fact that professional sportspeople fall within the scope of Article 45 TFEU means that the equal treatment principle applies to sport, prohibiting any direct discrimination on grounds of nationality, requiring indirectly discriminatory measures to be necessary and proportionate to the achievement of their legitimate objective and calling for the abolition of unnecessary and disproportionate obstacles impeding the exercise of the right to free movement.[63]

3. EQUAL TREATMENT

Article 45(2) TFEU entails the abolition of any discrimination based on nationality between workers of the Member State as regards employment, remuneration and other conditions of work and employment.

3.1. Prohibition of discrimination and obstacles to free movement of workers

Article 45 TFEU prohibits any discrimination based on nationality as regards employment, remuneration and other working conditions. This includes not only direct discrimination

---

60 Case C-419/92.

61 Case C-285/01.

62 Cases C-36/74, 13/76, C-415/93, C-519/04 , C-176/96.and C-325/08.

63 The Commission intends to present in October 2010 a Communication on the implementation of the Treaty of Lisbon in the field of sport and the issue of the impact of free movement rules on sport will be dealt in a more detailed and integrated approach.

based on nationality, but also indirect discrimination which, by the application of other criteria of differentiation, leads in fact to the same result[64]. The CJ has concluded that even if certain criteria are applicable irrespective of nationality, they must be regarded as indirectly discriminatory if there is a risk of migrant workers being placed at a particular disadvantage[65]. Common examples of indirect discrimination are situations where a particular allowance[66] is conditional on a residence condition or language requirements for certain posts that may by definition be more easily satisfied by nationals than by non-nationals[67].

EU law on free movement of workers aims to facilitate the pursuit of paid employment in the EU by EU nationals. It therefore precludes obstacles to the free movement of workers, such as measures that may place at a disadvantage EU nationals seeking to pursue an economic activity under an employment relationship in the territory of another Member State, even where such measures apply irrespective of the nationality of the worker (e.g. high transfer fees for professional football players[68] and tax deductions[69]).

3.2. Working conditions

A migrant worker is subject to the laws and collective agreements of the host Member State when exercising his profession. Article 7(1) of the Regulation provides that a migrant worker must enjoy equal treatment as regards remuneration, stability of employment, prospects of promotion[70] and dismissal[71]. The CJ has held that Member State administrations must treat previous periods of comparable employment worked by migrant workers in other Member States in the same way as professional experience acquired in their own system for the purpose of determining working conditions (e.g. salary and grade)[72].

The Commission considers that Member State authorities must consider comparable diplomas in the same way as diplomas acquired in their own system for the purpose of determining working conditions and career prospects.

Article 8 of the Regulation extends equality of treatment to membership of trade unions: a migrant worker has the right to join a union, to vote and to be eligible for the administration or management posts of a trade union.

Moreover, EU legislation in the field of health and safety of workers facilitates trans-frontier employment, as workers enjoy at least a minimum level of protection of their health and safety in all Member States.

3.3. Social advantages

Article 7(2) of the Regulation entitles migrant workers to the same social advantages as national workers from the first day of their employment in the host Member State: this means

---

64 Case C-152/73.
65 Case C-237/94.
66 Case C-138/02.
67 Cases C-379/87 and C-424/97.
68 Case C-415/93.
69 Case C-136/00.
70 Case C-225/85.
71 Case C-44/72.
72 Case C-15/96.

that the receipt of such advantages may not be made conditional on the completion of a given period of occupational activity[73].

The CJ has held that social advantages cover all advantages, whether or not linked to a contract of employment, that are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory, and the extension of which to workers who are nationals of other Member States seems likely to facilitate their mobility within the EU[74].

The concept of social advantage is very broad and covers financial benefits[75] and non-financial advantages which are not traditionally perceived as social advantages. The CJ has decided, for example, that the right to require that legal proceedings take place in a specific language[76] and the possibility for a migrant worker to obtain permission for his unmarried partner to reside with him[77] must be regarded as falling within the concept of social advantage under Article 7(2) of the Regulation.

Member States often argue that, since frontier workers do not live in the State of employment, they and/or their family members should not enjoy the same social advantages as other migrant workers. The Court has rejected those arguments and held, for example, that no residence requirement can be applied to the child of a frontier worker, who is therefore entitled to tuition under the same conditions as those applicable to children of nationals of the Member State of employment[78].

3.4. Tax advantages

In the absence of harmonising measures at EU level, direct taxation remains essentially a national competence. However, the Member States may not introduce legislation discriminating directly or indirectly on the basis of nationality. There is a growing body of CJ case-law on the application of the Treaty freedoms to direct taxes, including Article 45 TFEU.

Transfer of residence

It is settled case-law that national tax rules deterring a national of a Member State from exercising his right to free movement may constitute an obstacle to that freedom[79]. Such unlawful restrictions include a refusal to allow EU citizens a refund of excess income tax if they have changed their residence during the year[80] or the application of immediate exit taxes on unrealised capital gains of EU citizens transferring their residence abroad[81]. EU law also protects against discriminatory tax treatment of other types of income, such as pensions, both public and private, and other social benefits[82]. The CJ has confirmed in several cases that

---

73 Case C-197/86.
74 Case C-85/96.
75 Such as a minimum subsistence or child-raising allowance, study grants and childbirth allowance, loans.
76 Case C-137/84.
77 Case C-59/85.
78 Case C-337/97.
79 Case C-385/00.
80 Cases C-175/88 and C-151/94.
81 COM(2006) 825 of 19.12.2006.
82 COM(2001) 214 of 19.4.2001.

workers should be able to deduct contributions to foreign occupational pension schemes in the same way as contributions to domestic schemes.

Frontier workers

The non-discrimination rule applies to advantages related to the personal and family situation of non-resident workers where their situation is comparable to that of a resident worker because they earn (almost) all of their income in the State of employment[83]. Moreover, national rules denying non-residents the right to deduct costs and expenses directly linked to the economic activity generating the taxable income are not permissible[84].

EU citizens' cross-border taxation problems

In situations where more than one Member State has taxing rights over income, the CJ has confirmed that Member States are free to allocate taxing rights between themselves[85]. They usually do so on the basis of bilateral double taxation conventions. However, these bilateral conventions do not resolve all double taxation problems caused by the interaction of the Member States' direct tax systems. The Commission considers that international double taxation is a major obstacle to cross-border activity and that such problems can be solved through better coordination of Member States' direct tax systems[86]. It launched a public consultation to obtain information from individuals, companies and tax advisers on real cases of double taxation on 27 April 2010 and, on the basis of the replies and further evidence that it is collecting of double taxation problems, may consider launching a Communication or other initiative in 2011.

More generally, the Commission is working to eliminate the range of direct and indirect tax problems that EU citizens face when crossing borders to work or do business or live. These problems which may prevent citizens from fully exercising their Treaty rights include not only double taxation but also discriminatory treatment of non-residents and non-nationals, lack of clear information on cross-border tax rules, the particular problems of cross-frontier workers , difficulties in communicating with foreign tax administrations and difficulties in obtaining tax relief due under double taxation treaties for example because of complicated claim forms, short deadlines for claiming relief and delays by foreign tax administrations in paying refunds. A Communication is planned late 2010 that will analyse these cross-border tax problems in detail and describe ongoing and planned measures to eliminate the problems.

3.5. Rights after the end of the employment relationship

EU citizens retain the status of worker after the end of the employment relationship if they are temporarily unable to work owing to illness, are in duly recorded involuntary unemployment, or satisfy one of the other conditions listed in Article 7(3) of the Directive, and they enjoy equal treatment with the nationals of the host Member State[87].

---

83 Case C-391/97.
84 Cases C-234/01 and C-290/04.
85 Case C-336/96.
86 COM(2006) 823 of 19.12.2006
87 Case C-22/08.

4. RESIDENCE RIGHTS

Historically, migrant workers have enjoyed better conditions as regards certain rights related to residence than non-active EU citizens[88]. The Directive, which brings together previous rules on EU citizens' residence rights, continues to distinguish between economically active and non –active EU citizens.

Migrant workers need fulfil no condition other than being a worker in order to have the right to reside in another Member State, but the Member States may require them to register if the period of employment is longer than three months. The family members of migrant workers, regardless of their nationality, have the right to reside with them in the host Member State. Migrant workers may acquire permanent residence after five years of uninterrupted lawful residence in the host Member State or after a shorter period if they meet the conditions in Article 17 of the Directive.

In addition to migrant workers, jobseekers enjoy the more beneficial treatment referred to above. Thus, whereas non-active citizens need to request a registration certificate for residence of more than three months, jobseekers have the right, in accordance with the case-law of the CJ [89] and recital 9 of the Directive, to reside in the host Member State for at least six months without any conditions or formalities other than to have a valid passport or identity card. After that period expires, if jobseekers provide evidence that they are continuing to seek employment and have genuine chances of being engaged, the Directive grants them the right to reside in the host Member State[90] on condition that they do not become an unreasonable burden on the social assistance system of that host Member State[91].

EU citizens retaining the status of workers may also continue to reside in the host Member under the same conditions as workers[92].

5. FAMILY MEMBERS

Family members of migrant workers, regardless of their nationality or whether they are dependent of the EU citizen, have the right to work in the host Member State[93]. Migrant workers' children, whatever their nationality, have the right to education in the host Member State on the same terms as its nationals[94].

Family members of migrant workers have access to social advantages, including study grants[95], without any residence conditions or previous periods of residence in the host Member State[96], while non-active EU citizens and their family members must have resided in

---

88 Directives 68/360/EEC for migrant workers and Directive 90/364/EEC for non-active persons.

89 Case C-292/89.

90 Article 14 of the Directive.

91 See 'Right of Union citizens and their family members to move and reside freely within the Union: Guide on how to get the best out of Directive 2004/38/EC at http://ec.europa.eu/commission_barroso/frattini/archive/guide_2004_38_ec_en.pdf

92 Article 7(3) of the Directive.

93 Article 23 of the Directive.

94 Article 12 of the Regulation.

95 Joint cases C-389/87 and C-390/87.

96 Cases C-310/08 and C-480/08. In its judgements of 23.2.2010 on these cases the CJ held that Article 12 of Regulation 1612/68 permits to recognise to the child of a migrant worker an independent right of residence in connection with the right of access to education in the host member state. The CJ also notes

the Member State for at least five years in order to obtain maintenance aid in the form student grants or student loans.

The CJ has also held that study grants constitute a social advantage for a migrant worker who continues to support a child and that, depending on national law, a dependent child may also rely on Article 7(2) of the Regulation as an indirect beneficiary of the equal treatment accorded to the migrant worker[97].

This also applies if the benefit is aimed at financing studies outside the host Member State[98].

6. BETTER ENFORCEMENT AND ADMINISTRATIVE COOPERATION

As shown by the foregoing, the legal framework for free movement of workers is substantive, detailed and well-developed.

The Commission considers that enforcement of these rights is increasingly important because they promote European integration.

To that end, EU citizens may rely directly on Article 45 TFEU and Regulation (EEC) No 1612/68 to challenge before the national courts and administrative authorities any national legislation or practice by public and private employers which they consider contrary to EU law. The Commission may bring an action against a Member State before the Court of Justice of the EU for the non-conformity of national legislation or administrative practice with EU law.

Furthermore, there are also a range of information and non-judicial services that help to enforce the provisions on free movement of workers. The new Your Europe portal offers clear information on the rights of citizens when they work, live or study in another EU country. It also gives direct access to the most relevant assistance service, such as SOLVIT[99], IMI[100] or EURES and other specialised websites[101]. Making workers, members of their families and stakeholders aware of the rights, opportunities and instruments that exist to promote and guarantee freedom of movement is a key point in enforcing EU law[102]. EU citizens need easily accessible, understandable information on their rights and adequate assistance when moving within the European Union[103]. The Commission is further conducting a broader exercise aimed at tackling comprehensively all obstacles European citizens encounter when they exercise their rights as Union citizens in all aspects of their daily lives. To this effect, the Commission has announced its intention to present a Report on Citizenship in its 2010 Work Programme.

---

that the right of residence of the child and the parent cannot be made conditional on financial self-sufficiency.

97 Case C-3/90.

98 Ibid.

99 http://ec.europa.eu/solvit/.

100 IT tools such as the Internal Market Information System (IMI) aimed at facilitating administrative cooperation between Member States' administrations are also helpful.

101 http://ec.europa.eu/social/main.jsp?catId=25&langId=en&furtherPubs=yes.

102 For example, see Guidelines on better application of Directive 2004/38/EC, COM(2009) 313 of 2.7.2009.

103 See the updated guide 'Do you want to work in another Member State? Find out about your rights!' at http://ec.europa.eu/social/main.jsp?catId=25&langId=en&pubId=215&type=2&furtherPubs=yes.

As for workers in particular, the Commission will look at how the social partners and NGOs can play a part in helping to strengthen their rights and to make them effective, with the support of the existing network of academic experts[104].

Despite the improvement brought about by recent developments, the issue of the enforceability of Regulation (EEC) No 1612/68 still needs attention. The Commission will explore ways of tackling the new needs and challenges (in particular in the light of new patterns of mobility) facing EU migrant workers and their family members, and in the context of the new strategy for the single market (following the presentation of the Monti report) will consider how to promote and enhance mechanisms for the effective implementation of the principle of equal treatment for EU workers and members of their families exercising their right to free movement.

[104] European Network on Free Movement of Workers within the European Union is available at: http://ec.europa.eu/social/main.jsp?catId=475&langId=en.