

Free movement of persons and European citizenship

Dr. Nicolò Nisi
nnisi@liuc.it

EU Internal Market

- Free movement of:
 - Goods
 - Services
 - (Freedom of) Establishment
 - Persons
 - Capital
- Positive vs negative integration

Removal of obstacles

- Obstacles can be:
 - Directly or indirectly discriminatory
 - liable to hinder or to make less attractive the exercise of fundamental freedoms
- Justified on grounds of public policy, public security or public health (arts. 36*, 45.3, 52, 62 TFEU)
- *Gebhard test* (C-55/94)
 - Justified by imperative requirements in the general interest
 - Suitable for securing the attainment of the objective which they pursue
 - Must not go beyond what is necessary in order to attain it

Article 45: free movement of workers

- Content of Article 45:
 - Abolition of any discrimination on the grounds of nationality: 45(2)
 - defines scope of the freedom: 45(3)
 - includes expressly stated limitations on the freedom: 45(3)
 - limits scope of article in respect of work in the public service: 45(4)
- Direct effect of Article 45: including horizontally against employers
- Purely internal situations excluded

Secondary legislation

- Art 45 is supplemented by Art 46, which allows the European Parliament and the Council to adopt directives or regulations setting out the measures required to bring about freedom of movement for workers:
 - Directive 64/221/EEC (derogations)
 - Directive 68/360/EEC (entry formalities and residence permits)
 - Regulation 1612/68/EEC (equal treatment)
 - (...)

Scope of the term 'worker'

- Worker must be a national of a MS
- not defined in Treaty
- not to be defined by national law
- definition is a matter of EU law -Case 75/63 Hoekstra-"if the definition were a matter...of national law, it would...be possible for each Member State to modify the meaning...and eliminate at will the protection afforded by the Treaty."
- Generously interpreted by ECJ

Workers (Article 45)

- Case 53/81, *Levin*
 - includes part time employment providing it involves effective and genuine activities.
 - Does not include activities which are marginal and ancillary
- Case 139/85, *Kempf*
 - irrelevant that the worker had to top up his salary from public funds
- Case 66/85, *Lawrie-Blum*
 - “Objectively defined, a worker is a person who is obliged to provide services for another in return for monetary reward and who is subject to the direction and control of the other person as regards the way in which the work is to be done.”

Work seekers (Article 45)

- No specific reference in Treaty
- CJEU gives purposive interpretation and holds that Article 39 includes work seekers
- Case 48/75, *Royer*
- Case C-292/89, *Antonissen* → person must demonstrate that he is continuing to seek employment and has genuine chances of being engaged.

The worker's family (Article 45)

- Worker's family may also enter the host State
- See Article 10 of Regulation 1612/68, which states that the following members of the workers family may accompany the worker (irrespective of their nationality)
 - the worker's spouse
 - his (and his spouse's) descendants under the age of 21
 - his (and his spouse's) descendants over the age of 21 who are dependent on him
 - his (and his spouse's) ascendants who are dependent on him
- In addition Art 10(2) also states that MS must facilitate the admission of any member of the family not coming with the above definition if that family member is dependent on the worker or lives under his roof in the country from where he comes

The worker's family (Article 45)

- Case 59/85 *Netherlands v Reed Case*
 - spouse, marital relationship
- Case 267/83, *Diatta*
 - separated spouses
- Case C-413/99, *Baumbast and R*
 - a divorced spouse is entitled to remain if he/she is the primary carer of the worker's children
- Case 316/85, *Lebon*
 - dependency a factual question

Rights of the worker under Article 45

- Right to accept offers of employment
- Right to move freely within the territory of a MS
- Right to remain after the employment has finished
- Right to stay in a MS for the purpose of employment
- Right to be treated without discrimination on grounds of nationality
- Etc.

Prohibition against discrimination

- Prohibition of discrimination on grounds of nationality (Articles 18 and 45 TFEU)
- Prohibition against both direct and indirect discrimination
 - Indirect: where a rule applies irrespective of nationality but in practice it is much easier for nationals of the host state to satisfy (examples: residency rules/qualification rules)

The public service exception

- Art 45(4): The provisions of this Article shall not apply to employment in the public service.
- Case 152/73, *Sotgiu*
 - “the exception will only be applicable if [the] person possesses a power of discretion with regard to individuals or if his activity involves national interests-in particular those which are concerned with the internal or external security of the state”
- Case 149/79, *Commission v Belgium*
 - “posts which involve 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. Such posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality”

Summary

- Article 45 prohibits discrimination on grounds of nationality
 - includes direct and indirect discrimination
 - indirect discrimination may be permitted if it is objectively justified and proportionate
 - Secondary legislation provides “flesh” to Article 45 (e.g. extending rights to the worker’s family members)
 - Exceptions to the free movement of workers still possible

Economic nexus

- To fall within Article 45 TFEU the migrant must be engaging in an economic activity – they must be a worker’ – i.e. factors of production
- Soon became clear that this policy area, which directly benefits human beings, must have implications beyond the economic of market integration

Breaking the economic nexus

- This has been done incrementally, over time
- CJEU and the legislature began to reflect the human dimension of this field
- A range of “ancillary” rights – in order to remove disadvantages associated with exercising free movement rights, e.g.:
 - Right to receive social advantages under the same terms and conditions as host state nationals
 - Right of entry and residence for family members of the worker

A breakthrough – “Residency directives” – early 1990s

- Designed to extend protection of Community law by offering residency rights to certain specific categories of persons
 - Directive 90/365 –retired workers
 - Directive 93/96 – students
 - Directive 90/364 – financially self-sufficient
- No need to be a worker/economically active but must be economically self-sufficient

EU citizenship: from free movement of workers to free movement of persons

- Articles 17-22 EC inserted into EC Treaty by the EU Treaty (Maastricht)
- Complementary status to nationality of MS
- Raft of rights
- Free movement of persons ≠ Schengen Area

Citizenship

Definition: a legal and political status which allows the citizen to acquire some rights (e.g. civil, political, social) as an individual and some duties (e.g. taxes, military service, loyalty) in relation to a political community, as well as the ability of intervening in the collective life of a state.

- Citizens have a series of rights, granted by their constitutions, but also have obligations, with regard to their national community.
- Citizenship is restricted to people who legally satisfy conditions for becoming a citizen of a state.

Citizenship of the Union (I)

- In 1993, the Maastricht Treaty defined EU citizenship and granted a set of rights to all EU citizens, whether economically active or not.
- Treaty of Amsterdam added that Every citizen of the Union may write to any of the institution of bodies referred to in this Article or in Article 7 in one of the languages mentioned in Article 314 and have an answer in the same language (art. 21 TCE)
- The Lisbon Treaty and the EU Charter of Fundamental Rights reinforced EU citizens' rights.

Citizenship of the Union (II)

TITLE II

PROVISIONS ON DEMOCRATIC PRINCIPLES

Article 9 (TEU)

In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

These phrases are repeated in article **20 (1) TFEU**.

Article 20 TFEU 'establishes' the legal construction, therefore it is arguably the more important of the two.

Citizenship of the Union (III)

Title II TEU ('Provisions on democratic principles')

Art. 10 (2) TEU

Citizens are directly represented at Union level in the European Parliament.

Art. 10 (3) TEU

Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.

Art. 11 (4) TEU

Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties. The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union.

Who is an EU Citizen?

- Any person who holds the nationality of an EU country is *automatically* also an EU citizen.
- Each EU country lays down the conditions for the acquisition and loss of nationality of that country.
- Citizenship of the Union is conferred directly on every EU citizen by the Treaty on the Functioning of the EU.

Rights of Union Citizens

The provisions of Arts 21-25 primarily determine the **substance** of EU Citizenship. In particular, EU citizens have the right:

1. to move and reside freely within the EU
2. to vote and stand as candidates in municipal and European Parliament elections wherever they live in the EU, under the same conditions as nationals
3. to be assisted by another EU country's embassy or consulate outside the EU under the same conditions as a citizen of that country, if their own country is not represented
4. to petition the European Parliament, apply to the European Ombudsman and address the EU institutions (in any official EU language) and
5. to organize or support, together with other EU citizens, a citizens' initiative to call for new EU legislation
6. not to be discriminated against on the grounds of nationality (art. 18 TFEU).

Political rights: Art. 22 TFEU, art. 10 TEU, art. 14§2 TEU,
art. 223§1 TFEU, art. 39 & 40 CFR

- Rights that gave political dimension at the new born citizenship.
- The European citizen is entitled to a minimum of political rights, wherever he lives all over the territory of the Union: he can vote and stand as a candidate in municipal elections in the city he lives and vote and stand as a candidate in European elections in the State of his residence.
- These rights reinforce the democratic legitimacy of the Union.
- They are an application of the principle of non-discrimination (art. 18).

Protecting the European citizen abroad

art. 23 TFEU, art. 46 CFR

- Art. 23 TFEU opens up a completely different dimension of personal rights.
- Union States diplomatic and consular authorities must grant all Union citizens protection in states outside the Union in which their home state is not represented.
- Recognition of the consular protection, disconnected from nationality.
- According to International Public Law the diplomatic and consular protection is an exclusive competence of States. The treaty by establishing this right to protection in a non-EU country when a citizen's MS is not represented, questions the traditional link nationality / citizenship / diplomatic protection.

Protecting the European citizen within the EU Art. 24 TFEU, art. 227 TFEU, art. 228 TFEU, art. 43 & 44 CFR

Petition, Information and Access to Documents

- The right to petition to the European Parliament (Art. 24 (2) TFEU, art. 227 TFEU, art. 44 CFR)
- The right to apply to the European Ombudsman (art. 24 (3) TFEU, art. 228 TFEU, art. 43 CFR)
- The right of information and access to documents (art. 15 (3) TFEU, art. 42 CFR)
- Citizens' initiative within the meaning of Article 11 of the Treaty on European Union (art 24 (1) TFEU, art. 11 TEU)

These rights appear as a mean to remedy the few possibilities of the European citizen benefits to complain directly to the ECJ and protect oneself against European acts.

The right to petition the European Parliament

- The right to petition to the European Parliament and the right to complain to the European Ombudsman : symbolic and practical importance.
- They can be considered as a new mechanism of protection against abuses or weaknesses of European Institutions and Member States.
- Forms of the petition: it can be a request arising from a general need, for example the protection of a cultural monument or an individual grievance, such as the recognition of family allowance rights or even an application to Parliament to take a position on a matter of public interest, like human rights.

The right to appeal to the European Ombudsman

- The right to appeal to an Ombudsman stresses the protective aspect of the right to complain.
- Wrongs committed by Union institutions can be investigated.
- This right serves to control the administration.
- As far as the Ombudsman is concerned it can be considered also as a new mechanism of protection
- The right is open to every person to complain about an act of mal- administration(administrative irregularity, unfairness, discrimination, abuse of power, lack or refusal of information or unnecessary delay) by an EU institution or body, with the exception of CJEU and the General Court.

Article 24 (4) TFEU

- Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 13 of the Treaty on European Union in one of the languages mentioned in Article 55(1) of the Treaty on European Union and have an answer in the same language.
- This right represents also a right to information, the content of which will depend not only on the matter in question but also on legitimate interests in confidentiality.

The right of access to documents

- The right of access to documents of EU institutions, bodies, offices and agencies (art. 15 (3))
- New instrument of monitoring the administrative practice.
- The right is further defined in the Transparency Regulation (EC) 1049/2001/EC regarding public access to European Parliament, Council and Commission documents.

Duties of the Union Citizens?

- Art. 20 TFEU implies that Union citizens have rights as well as duties.
- European Union law does not contain any duties comparable with political duties.
- The European legal order does not recognize either direct or indirect taxes or compulsory military service.
- The constitutional style wording leads to misunderstandings.

Loss and acquisition of Citizenship of the Union

Rules on the loss and acquisition of Member States' nationalities and of the Citizenship of the EU are governed by national laws.

However,

When a situation falls *rationae materiae* under the ambit of EU law the Member States must when exercising their powers in the sphere of nationality, have due regard to European Union law (Case 369/90 *Micheletti*)

C- 135/08 Janko Rottmann

- Austrian naturalised in Germany in 1999
- Loss of Austrian nationality because of voluntary acquisition of a foreign nationality
- Fraud during naturalisation process
- Withdrawal of naturalisation with retroactive effect
- If the withdrawal became definite J. Rottmann would become stateless and also lose the Citizenship of the EU.

Request for a preliminary ruling

- Deprivation : Violation of EU law?
- Preliminary ruling procedure initiated by Bundesverwaltungsgericht
- Question referred:

It it contrary to European Union law (art. 20 TFEU) for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation and obtained by deception in as much as that withdrawal would deprive the person concerned of the status of citizen of the Union and of the benefit of the rights attaching thereto by rendering him stateless?

Is EU law involved?

- Para. 42): It is clear that the situation of a citizen of the Union who is faced with a decision withdrawing his naturalisation, adopted by the authorities of one MS, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law.
- Para. 43: Citizenship of the Union is intended to be the fundamental status of nationals of the Member States

Deprivation because of fraud could be allowed

- Para. 50: withdrawing naturalisation [...] based on the deception practised by the person concerned in connection with the procedure for acquisition of the nationality in question, [...] ***could be compatible*** with European Union law.

Principle of proportionality

- Para. 55: In such a case, it is, however, for the national court to ascertain whether the withdrawal decision at issue in the main proceedings observes ***the principle of proportionality*** so far as concerns the consequences it entails for the situation of the person concerned ***in the light of European Union law, in addition***, where appropriate, to examination of the proportionality of the decision ***in the light of national law***.

What is necessary to take into account

The consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union.

In this respect it is necessary to establish, in particular, whether that loss is justified in relation

- A. to the gravity of the offence committed by that person,
- B. to the lapse of time between the naturalisation decision and the withdrawal decision and
- C. to whether it is possible for that person to recover his original nationality

Recovery of original nationality?

- Deprivation may also be possible if original nationality is not recovered (Para. 57), BUT
- Para. 58: It is, nevertheless, ***for the national court to determine whether, before such a decision withdrawing naturalisation takes effect***, having regard to all the relevant circumstances, observance of the principle of proportionality requires the person concerned to be afforded a reasonable period of time in order to try to recover the nationality of his Member State of origin.

Directive 2004/38/EC

European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

The directive regulates:

- the conditions in which Union citizens and their families exercise their right to move and reside freely within the Member States;
- the right of permanent residence;
- restrictions on the aforementioned rights on grounds of public policy, public security or public health.

Directive 2004/38/EC

Right to move and right of residence for up to three months

- All Union citizens have the right to enter another Member State. The only requirement is an identity card or valid passport.
- Family members (who do not have the nationality of a Member State) enjoy the same rights as the citizen who they accompany.
- For stays of less than three months, the only requirement on Union citizens is that they possess a valid identity document or passport.
- The host Member State may require the persons concerned to register their presence in the country within a reasonable and non-discriminatory period of time

Directive 2004/38/EC

Right of residence for more than three months

- The right of residence for more than three months remains subject to certain conditions:
 - economic activity (on an employed or self-employed basis);
 - or sufficient resources and sickness insurance. In order to ensure that they will not become a burden on the social services of the host MS during their stay.
 - or be following vocational training as a student and have sufficient resources and sickness insurance;
 - or be a family member of a EU citizen who falls into one of the above categories.
- Member States may require the citizens of other EU states to register with the competent authorities within a period of not less than three months as from the date of arrival.

Directive 2004/38/EC

Right of permanent residence

- After a five-year period of uninterrupted legal residence in the host Member State.
- There are no further conditions for this right. The same rule applies to family (Third Country Nationals) and who have lived with a Union citizen for five years.
- Loss of the right: in the event of more than two successive years' absence from the host Member State.

Directive 2004/38/EC

Restrictions on the right to freedom of movement:

- Must be on the grounds of public policy, public security or public health (Art.27(1))
- Cannot be invoked to serve economic ends
- Measures taken to expel must:
 - comply with the principle of proportionality;
 - be based exclusively on the personal conduct of the individual concerned (representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society – previous criminal convictions on their own are not enough);
 - take into account personal circumstances
- Host Member States are able to request information about the person from other Member States (art. 27(3))

Free movement of persons

- Directive 2004/38 is not the only source of relevant law
- Right to reside stemming from other sources of EU law
 - Right for workers' children to reside where they study (case 389-390/87 [1989] *Echternach and Moritz*)
 - Right to reside for the parent of the worker's child who studies (C-413/99 [2002] *Baumbast*)
 - Right to reside for the spouse of the citizens of the Union in their State of origin if not recognizing it amounts to an obstacle to free movement (C-370/90 [1992] *Singh*; C-60/00 [2002] *Carpenter*)
 - Right to reside for the parent of minor children who reside in a MS under EU law (C-200/02 [2004] *Chen*)
 - Right to reside for the parents of minor children who are citizens of the Union living in their State of origin (C-34/09 [2011] *Zambrano*)
- Cases not dealt with by Directive 2004/38
 - Family reunification of citizens of the Union in their State of origin

Complaints about abuses and frauds

“certain immigrants from other Member States ... avail themselves of the opportunities that freedom of movement provides, without, however, fulfilling the requirements for exercising this right.”

- Marriages of convenience
- Welfare tourism

The Directive offers answers, but requires in-depth case-by-case scrutiny

States prefer automatic reactions

C-200/02 - Chen

- Mr. And Mrs. Chen decided to have a child in Northern Ireland, since, at certain conditions, a person who is born there may acquire the Irish citizenship.
- Therefore, Catherine Chen – daughter of Mr. and Mrs. Chen - became an Irish citizen
- Mrs. Chen moved to Wales and asked a residence permit for her daughter as EU citizen and a residence permit for herself, as parent custodian

C-200/02 - Chen

- The UK authorities refused both permits. Therefore, Mrs. Chen summoned UK in front of the Immigration Appellate Authority, that posed a **preliminary question** to the CJEU (interpretation of EU law).

- Question referred:

“whether Directive 73/148, Directive 90/364 or Article 18 EC, if appropriate, read in conjunction with Articles 8 and 14 of the ECHR, confer, in circumstances such as those of the main proceedings, upon a young minor who is a national of a Member State, and is in the care of a parent who is a national of a non-member country, the right to reside in another Member State where the minor receives child-care services”

C-200/02 - Chen

- Preliminary considerations
 - The situation of a national of a Member State who was born in the host Member State and has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation (para. 19)
 - The capacity of a national of a Member State to be the holder of EU rights on the free movement of persons cannot be made conditional upon the attainment by the person concerned of the age prescribed for the acquisition of legal capacity to exercise those rights personally (para. 20)

C-200/02 - Chen

- Article 18 EC and Directive 90/364 confer on a young minor who is a national of a Member State, is covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State, a right to reside for an indefinite period in that State.
- UK's argument rejected:
 - the appellants in the main proceedings are not entitled to rely on the Community provisions in question because Mrs Chen's move to Northern Ireland with the aim of having her child acquire the nationality of another Member State constitutes an attempt improperly to exploit the provisions of Community law (para. 34).

C-200/02 - Chen

- Mrs Chen cannot claim to be a ‘dependent’ relative of Catherine in the ascending line within the meaning of Directive 90/364 with a view to having the benefit of a right of residence in the United Kingdom (para. 44).
- However:
“a refusal to allow the parent, (...) who is the carer of a child to whom Article 18 EC and Directive 90/364 grant a right of residence, to reside with that child in the host Member State would deprive the child’s right of residence of any useful effect. It is clear that enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer” (para. 45).

EU Citizenship: “right to have rights”

- The right to **free movement** in the territory of EU Union
- The right to **vote**, for a EU citizen that is resident in another EU country, at the European Parliament elections and at the local elections
- The right to **envoy petitions** to the EU mediator
- The right to obtain **diplomatic or consular protection** from another EU country