

The Expulsion of European Union Citizens from the Host Member State: Legal Grounds and Practice

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The last decade has witnessed the development of a growing phenomenon, the expulsion of European Union (EU) citizens from a host Member State. While the EU encourages its citizens to use their fundamental right of freedom of movement, citizens moving to other Member States continue to encounter legal obstacles, in some cases leading to expulsion. Recently, there has even been strong political pressure in some Member States to reconsider the benefits of the principle of free movement, which has been built progressively since the foundation of the European Community. This restrictive approach has arisen against the background of the global economic crisis, which occurred just after the enlargement of the EU to economically poorer countries of Central and Eastern Europe, leading to more nationalistic and protectionist measures, which have legal consequences for EU citizens on the move. This article analyses the legal grounds for expulsion under EU law and the safeguards that protect EU citizens residing in host Member States. Examples of expulsions from Member States in recent years are noted, and possible ways of overcoming current issues are proposed.

Keywords: expulsion; EU citizens; social tourism; free movement of persons; restrictions

Introduction

The last decade has witnessed the development of a growing phenomenon, the expulsion of European Union (EU) citizens from a host Member State. While the EU encourages its citizens to use their fundamental right of freedom of movement,¹ those moving to other Member States continue to encounter legal obstacles,² in some cases leading to their expulsion. The exercise of the fundamental right of freedom of movement and residence, and its restrictions, is mainly regulated by the so-called Citizenship Directive, Directive 2004/38/EC.³

It seems that at the present time freedom of movement in the EU, far from developing, is becoming restricted. Recently, there has even been strong political pressure in some Member States to reconsider the benefits of the principle of free movement, which has been built progressively since the foundation of the European Community. This restrictive approach has arisen against the background of the global economic crisis,⁴ which occurred just after the enlargement of the EU to economically poorer countries of Central and

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Eastern Europe,⁵ leading to more nationalistic and protectionist measures, which have legal consequences for EU citizens on the move.

Until now, foreigners from third countries have been the principal targets, but it is now EU citizens residing in host Member States, mainly those who are economically inactive,⁶ who are perceived as a burden to the host country. The economic crisis has tested the host Member State's ability to maintain a satisfactory level of public services, and thus preserve social cohesion (Iliopoulou 2011). An increasing number of Member States are tempted to expel more and more people on economic grounds. A positive exception to this general tendency to restrict freedom of movement has been the removal of the transitional period for the citizens of Romania and Bulgaria since the beginning of 2014.

The fundamental right of freedom of movement is neither full nor absolute. While workers still enjoy full freedom of movement, it remains limited for those EU citizens who are economically inactive. People moving from new Member States are subject to a transitional period as far as the labour market is concerned and do not enjoy full freedom of movement. Although the latter limit is temporary, the former is not. Some authors like Marie Gautier (2011) regret the harmful consequences of such limitations while understanding the necessity of derogations from the principle of freedom of movement. According to Gautier this principle lies at the heart of the right of residence. Similarly, Sara Lafuente Hernandez (2014) argues that privileging workers serves to diminish the European ideal with its associated concepts of European Union citizenship and freedom of movement.

Legally, the freedom of movement of persons may be restricted in cases of fraud, abuse of rights, threats to public policy, public security or public health, and unreasonable burden on the social security system of the host Member State.⁷ The latter legal ground mainly targets economically inactive mobile EU citizens. Their right to stay in the host Member State for more than three months but less than five years is subject to their possessing sufficient resources and health insurance. Host Member States are not obliged to provide social security benefits to economically inactive mobile EU citizens who do not fulfil the conditions of Article 14-1 of Directive 2004/38/EC on the retention of the right of residence. They are even allowed to terminate the stay of such citizens if all the material and procedural safeguards are fulfilled.

Expulsion is certainly the most serious limitation on freedom of movement⁸ and, for this reason, it is very well regulated by various international, European and national instruments.⁹ Legal residents in host countries which subscribe to international agreements can be expelled only when the relevant legal conditions are met. Expulsion is an exception not only to the free movement and residence of persons, but also to the principle of non-discrimination on the basis of nationality. Indeed, Member States are not allowed to expel their own citizens, but may expel citizens from other EU Member States. The expulsion of foreigners, whether EU citizens or not, remains a sovereign power of Member States. This sovereign power is limited only by respect for EU law and general principles, as well as being subject to the European Court of Justice (ECJ). This national margin for manoeuvre by Member States explains several national provisions that run counter to the letter and spirit of Directive 2004/38/EC. Indeed, failure to respect the material and procedural safeguards during expulsion is considered to be the third main problem with the adoption of Directive 2004/38/EC by Member States.¹⁰

This article begins with an analysis of the legal framework for expulsion of EU citizens, including a typology of the legal grounds for expulsion and of the safeguards associated with it. Examples of expulsion practices in some Member States over the last few years are given. Finally, ways of overcoming current issues are suggested.

Part 1: The legal framework for the expulsion of EU citizens

An EU citizen can only be expelled on the legal grounds enshrined in EU law, which are: threats to public policy, public security or public health, abuse of rights, fraud and unreasonable burden on the national social security system. These grounds for expulsion are clearly listed but insufficiently defined by the European legislature.

Typology of the legal grounds for expulsion

The legal grounds for expulsion are of three types: those linked to non-fulfilment of entry and residence conditions; the abuse of rights; and those linked to a threat to public policy, public security or public health.

Non-fulfilment of entry and residence conditions

EU citizens are free to move to and stay in the territory of other Member States as long as they respect those EU entry and residence conditions. While there are almost no requirements for a stay not exceeding three months,¹¹ a longer stay requires additional conditions to be fulfilled (comprehensive health insurance, sufficient resources, administrative requirements, period of residence), which vary according to the citizen's status (temporary or permanent resident). Restrictions, ranging from a mere fine to an expulsion order, can be imposed by Member States when these conditions are not fulfilled. Since expulsion is such an exceptional and serious measure, only a serious breach of the conditions of entry and stay, such as the person representing an unreasonable burden on the social security system of the host Member State, can lead to it.¹² The legal basis for this statement is Article 14-1 of Directive 2004/38/EC, which states that *Union citizens and their family members shall have the right of residence as long as they do not become an unreasonable burden on the social assistance system of the host Member State*, and Recital 16, which states that *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*.

As Directive 2004/38/EC does not define 'unreasonable burden,' leeway is given to Member States to develop their own definition (Minderhoud 2013: 26–33). Article 14-4 targets mainly non-economic agents, as it states that *in no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers¹³ as defined by the Court of Justice save on grounds of public policy or public security*. According to Recital 16 of Directive 2004/38/EC, recourse to the social security system should not automatically result in expulsion. In determining whether or not the beneficiary constitutes a burden, the host Member State should consider whether the individual's difficulties are temporary and take into account the duration of residence, personal circumstances and the amount of aid granted. Relevant factors are duration of employment, education, qualifications and potential for future employability, as well as the unemployment rate in the region of residence.

Abuse of rights and fraud

According to Article 35 of Directive 2004/38/EC, Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Abuse of rights is not defined in the Directive (which gives the single example of marriages of convenience)¹⁴ and only partially defined by the Commission as artificial conduct entered into with the sole purpose of obtaining the right of free movement and residence under Community law.¹⁵

The Commission also defines fraud as deliberate deception or contrivance made to obtain the right of free movement and residence, such as forgery of documents or false representation of a material fact concerning the conditions attached to the right of residence.

Threat to public policy, public security or public health

Chapter VI of Directive 2004/38/EC (Article 27 and the following articles) deals with restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health.¹⁶

Public policy and public security. Public policy and public security can serve as grounds for expulsion of EU citizens who have resided in the host Member State for less than five years. Public security is considered a more serious ground than public policy and is therefore used with more caution. Those with more than five years' residence (eligible for permanent residence) can only be expelled on serious grounds of public policy or public security. A long-term resident, who has resided in the host Member State for the previous ten years, may be expelled only on imperative grounds of public security as defined by Member States.

Public health. Of all the legal grounds for expulsion of Union citizens, public health is certainly the best defined by Directive 2004/38/EC. According to Article 29:

The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.

The Directive is, in fact, allowing WHO to determine which diseases with epidemic potential can be considered a threat to public health. As far as infectious or contagious diseases are concerned, Member States benefit from a larger margin of interpretation.¹⁷ In any case, diseases occurring more than three months after the date of arrival shall not constitute grounds for expulsion from the territory. The limitation on threat to public health is in fact more a condition for refusal of access to the territory of the host Member State than a ground for expulsion, the main objective of this ground being the fight against diseases coming from abroad and not the protection of the finances of the national public health service (Carlier 2007: 87). Nevertheless, public health has been used by Belgium as a reason to limit the number of French students in Belgian universities. In the Bressol and Chaverot case (C-73/08) the Court held that European Union law precludes, in principle, a limitation on enrolment by non-resident students in certain university courses in the public health field. However, such a limitation is compatible with EU law if it proves to be justified on grounds of the protection of public health.

Insufficient definition of the legal grounds

The legal grounds for expulsion are insufficiently or perhaps 'rather broadly' defined by primary and secondary law. For this reason, Member States are responsible for defining them. It is to be hoped that Member States' margin of interpretation of legal grounds allowing expulsion is not absolute, as it could lead to abuse of law by national governments. In the absence of a Community definition there are two main limitations to this power, the importance of which have many times been underlined by the Commission and the Court of Justice: respect for EU law and standards; and the control of the ECJ.

The lack of a Community definition

While Article 27 of Directive 2004/38/EC allows Member States to expel EU citizens on the grounds of public policy and public security, the Directive does not define these two notions and neither do European law¹⁸ or European institutions.¹⁹ One reason for this lack of a Community definition is the traditional sovereign power of Member States on such sensitive subjects as public order and public security. The Directive only makes a distinction between the ‘serious grounds of public policy’ and the ‘imperative grounds of public security.’ The 2009 Communication of the Commission nevertheless reminds that *it is crucial that Member States define clearly the protected interests of society, and make a clear distinction between public policy and public security. The latter cannot be extended to measures that should be covered by the former.* The overly broad provisions of Directive 2004/38/EC make it necessary to define these two notions to avoid inconsistency in the use of these legal grounds.²⁰ The Member States have been tasked by the European Commission and the ECJ with defining these notions,²¹ and in doing so, they are required to respect EU law and are subject to the control of the ECJ.²² EU institutions contribute by drafting non-binding documents, in the form of guidelines from the European Commission (EC) and the resolutions of the European Parliament.

Communications from the European Commission. The July 1999 Communication on special measures concerning the movement and residence of citizens of the European Union justified on grounds of public policy, national security or public health²³ is one of the first documents relating to the application and interpretation of the concepts of public policy, public security and public health. It states that:

As regards the definition of the notions of public policy, public security and public health, Member States are free to determine the scope of these concepts on the basis of their national legislation and case law, but within the framework of Community law. However, any measures taken on grounds of public policy, public security or public health must be justified by a real and sufficiently serious threat to a fundamental interest of society and must be in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with the proportionality principle.

This document is still valid today and was the basis for the Commission’s 2009 Communication,²⁴ a non-binding document aimed at guiding Member States in their implementation of Directive 2004/38/EC. It begins by stating that *Member States retain the freedom to determine the requirements of public policy and public security in accordance with their needs, which can vary from one Member State to another and from one period to another.* Then it offers a framework definition to Member States, specifying that *public security is generally interpreted to cover both internal and external security along the lines of preserving the integrity of the territory of a Member State and its institutions. Public policy is generally interpreted as preventing the disturbance of social order.*

The resolutions of the European Parliament. The European Parliament often also reacts to incorrect applications of Directive 2004/38/EC and their effect on EU citizens. In its 2008 Resolution, for example, it calls on the Commission to develop in its guidelines a uniform interpretation mechanism of the normative categories of ‘public policy,’ ‘public security’ and ‘public health.’²⁵ It also recalls that the public policy exceptions cannot be invoked to serve economic ends or to pursue general preventive aims, contrary to the recent practices of some Member States.

Definition by EU Member States

The task of defining ‘public policy’ and ‘public security’ has been given to Member States, granting them an important margin of interpretation. Some of them define these terms in their national legislation, some do not, and others merely include an unclear and vague definition.²⁶

The margin of interpretation by EU Member States. A questionnaire on the transposition of Directive 2004/38/EC of the European Parliament and of the Council²⁷ was sent by the Commission in 2009 to all Member States inquiring about their national interpretation of the legal grounds for expulsion.²⁸ The Czech Republic, which does not define these terms in its national legislation, explains that *in general, it should be stated that State security and public policy are ‘indefinite’ legal terms that must be construed according to the specific situation.*²⁹ In Romania, expulsions can take place if there is an ‘imminent danger’ to public policy and national security, while the meaning and scope of this category is not developed in Romanian law. Other states, like France, provide a very broad definition of a threat to public policy. Transposing Article 27 of Directive 2004/38/EC in Article 63 of its Law of 2011,³⁰ the French legislature added Article 65,³¹ providing an extensive definition of this notion. According to the latter, a threat to public policy can be constituted by *The fact of being liable to prosecution for certain offences such as trafficking in drugs, human trafficking, pimping, and robbery, exploitation of begging and illegal occupation of land.* All these additional legal grounds are clearly contrary to Article 27 of Directive 2004/38/EC and might very easily lead to the expulsion of EU citizens.

Likewise, national interpretations of the notion of an ‘unreasonable burden to the social assistance system of the host Member State’ vary and the conditions of a resulting expulsion (Article 14, Recital 10) are uncertain in many Member States.³² While some Member States do not specify how they control the fulfilment of the criteria of unreasonable burden (for example, Austria merely states that it takes all relevant criteria into account),³³ others, like the Czech Republic, appear to have created a detailed national scale. Failure to comply with this scale represents ‘an imperative reason of security’ that allows limitations to the right of entrance and residence of EU citizens.

Some Member States are misinterpreting the notion of abuse of rights, as is the case with the French Law on Immigration of 2011, which states that it is an abuse of rights *to renew stays less than three months in order to stay on the French territory while the conditions required for a longer stay are not fulfilled, and also to stay in France with the essential aim of benefiting from the social security system.* This definition of abuse of rights is totally incompatible with the spirit of Directive 2004/38/EC.

Control of national definitions by the European Court of Justice. The ECJ has had many opportunities to intervene on the outlines of expulsion orders issued by Member States against EU citizens. At the request of national courts, the Court has indeed interpreted the legal grounds mentioned in Directive 2004/38/EC. It has exercised what Stephane Leclerc (2009) calls its creative role of law, appearing as an extra legislator and a substitute legislator alongside the tripartite Commission–Council–Parliament. ECJ jurisprudence prior to 2004 has been incorporated into the text of Directive 2004/38/EC by the European legislature and now forms the main safeguard against expulsion. All decisions of the ECJ are in fact important elements contributing to a better definition of the notions of public policy and public security, potentially leading in the future to Union-wide definitions.

The ECJ even gives concrete examples of what can be considered as a threat. With regard to public security, the Court has held that this covers both Member States’ internal and external security,³⁴ including threats to the functioning of institutions and essential public services, the survival of the population, the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, a risk to military interests,³⁵ and sexual exploitation of children.³⁶ As far as the ‘serious grounds of public policy or security’ are

concerned, the Court has stated that ‘imperative grounds’ of public security is a considerably narrower concept than ‘serious grounds,’ and that the EU legislature clearly intended to limit it to ‘exceptional circumstances.’³⁷ The concept of ‘imperative grounds of public security’ presupposes that such a threat is of a particularly high degree of seriousness. The Court held that, in its opinion, trafficking of narcotics as part of an organised group could reach a level of intensity that might directly threaten the peace and physical security of the population as a whole or in part.³⁸ In the *P.I. c/ Oberburger* case, the Court was asked to interpret the term ‘imperative grounds of public security’ that may justify the expulsion of an EU citizen who has been a resident in the host Member State for more than ten years. The Court referred to Article 83-1 of the Treaty on the Functioning of the EU (TFEU) for the enumeration of crimes constituting a particularly serious threat to one of the fundamental interests of society. According to Article 83-1 TFEU, those areas of crime are the following: terrorism; trafficking in human beings and sexual exploitation of women and children; illicit drug trafficking; illicit arms trafficking; money laundering; corruption; counterfeiting means of payment; computer crimes; and organised crime.³⁹

As far as health policy is concerned, the Court held that the protection of public health is one of the overriding reasons of general interest which can, under Article 46-1 EC, justify restrictions of freedom of establishment. It follows from the case law that two objectives may be more precisely covered by that derogation in so far as they contribute to achieving a high level of protection of health: maintaining a balanced, high-quality medical or hospital service open to all;⁴⁰ and preventing the risk of serious harm to the financial balance of the social security system.⁴¹

Safeguards against expulsion

Since the expulsion of EU citizens is considered the most serious limitation of the freedom of movement and residence, according to Recital 23 of the Preamble of Directive 2004/38/EC, there are many safeguards designed to protect them against abusive practices by Member States. Safeguards against expulsion are found in primary and secondary EU law, in the Charter of Fundamental Rights of the European Union, and in international instruments such as the European Convention on Human Rights. The latter focuses on the protection of fundamental rights such as the respect for privacy and family life, the prohibition of discrimination, and the right to a fair trial.

In spite of the economic crisis and the questioning of the principle of freedom of movement, the ECJ, which decides cases of conflict in this matter, is continuing to strongly support this fundamental freedom. It continues to repeat the need for a very strict interpretation of the provisions of Directive 2004/38/EC, allowing the expulsion of an EU citizen, and a broad interpretation of the safeguards protecting citizens against expulsion. Safeguards against expulsion are numerous and can be divided into three main categories: general safeguards, individual safeguards and procedural safeguards. Most of them are listed in Article 27 and following articles of Directive 2004/38/EC.

General safeguards

General safeguards are related to general principles that should be respected, independently of the situation of the expelled person. They concern the prohibition of automatic and collective expulsion, respect for the principles of proportionality and of the best interest of the child, and the prohibition of expulsion for economic reasons or as a consequence of a penalty.

No automatic expulsion. Directive 2004/38/EC does not expressly include a general prohibition of automatic expulsion of EU citizens. However, Article 14-3 states that an expulsion measure shall not be the au-

automatic consequence of an EU citizen's, or his or her family member's, recourse to the social security system of the host Member State. Despite this, some Member States tend to arrange automatic expulsions, without considering the appropriate steps of a fair trial or the individual circumstances of the expelled migrants. Two Member States, Italy and Finland, even provide in their national laws for automatic expulsions of EU citizens convicted of serious criminal convictions or *having committed a crime of certain gravity*.

No collective expulsion. Collective expulsion is prohibited by Article 4 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, by Article 19 of the Charter of Fundamental Rights of the European Union, and by Article 27 of Directive 2004/38/EC, which states that justifications that rely on considerations of general prevention shall not be accepted. Despite this, the national legislation of many Member States does not contain any reference to the prohibition of general preventive aims, as is the case of Hungary and Romania. In 2011, the European Committee of Social Rights determined that the expulsion of Romanian and Bulgarian citizens from France in 2010, accompanied by a so-called voluntary scheme of Humanitarian Aid Returns consisting of financial assistance of 300 euros per adult and 100 euros per child, was a disguised form of collective expulsion. The French authorities were automatically expelling all Romanian and Bulgarian citizens of Roma origin found to be lodging in illegal settlements without taking into account their personal conduct and background. In 2012, this collective expulsion took on a different face with the establishment of collaboration between the French and Romanian governments based on a two-year pilot scheme for the repatriation to Romania of around 80 Roma families living in France.

No economic ends. Article 27-1 of Directive 2004/38/EC states that these grounds (public policy, public security and public health) shall not be invoked to serve economic ends. A Member State is not allowed to expel EU citizens to serve economic ends, such as the protection of its national economy or the protection of its labour market. Some Member States like Estonia and Hungary have not yet incorporated this provision of Directive 2004/38/EC into their national legislation. Other Member States do have such provision but are tempted not to respect this prohibition in period of economic crisis.

Respect for the principle of proportionality. Limitation on freedom of movement should be subject to the principle of proportionality as required by Recital 23 of Directive 2004/38/EC, Article 52-1 of the Charter and Article 27-2 of Directive 2004/38/EC. Such limitations may be applied only if they are necessary and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others. The principle of proportionality is met if the restrictive measure (in this case, the expulsion of an EU citizen) is appropriate and necessary to achieve the national objective pursued (for example, preservation of the national budget or of the national public order). A national restrictive measure is considered necessary if no other restrictive measure that would be less damaging to the citizen is available in pursuit of the same national objective. Such national restrictive measure is appropriate when the relevant objective can be achieved through the restrictive measure. In addition to the necessity and the appropriateness of the restrictive measure, the principle of proportionality requires Member States to provide a case-by-case evaluation of the alleged offence.

Thus, expiry of the identity card or passport on the basis of which the person concerned entered the host Member State and was issued with a registration certificate or residence card shall not constitute a proportionate ground for expulsion from the host Member State (Article 15 of Directive 2004/38/EC). In the Czech Republic, it appears that the most frequent criminal law penalty imposed on foreigners is expulsion, if this is required for the safety of persons or property or other public interest. In Italy, Article 235 of the Italian criminal code provides for the expulsion of non-nationals sentenced to ten or more years' imprisonment. In both cases, the issue of compliance with the proportionality requirement of the Directive may be raised.

Best interest of the child. Article 28-3b of Directive 2004/38/EC states that an expulsion decision may not be taken against EU citizens, if they are minors, unless the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989. Whenever an expulsion order by the host Member State concerns a child, the expulsion is allowed only if it is in accordance with the best interests of the child and of its links with its family (Recital 24).

No expulsion as a penalty or legal consequence of a custodial penalty. According to Article 33-1 of Directive 2004/38/EC, *expulsion orders may not be issued by the host Member State as a penalty or legal consequence of a custodial penalty, unless they conform to the requirements of public policy, security policy or health policy.* This article refers to expulsion on account of a criminal offence.⁴²

Individual safeguards

Individual safeguards tend to impede automatic or collective expulsions by taking into account personal conduct and the background of the expelled person.

Personal conduct. According to Article 27-2 of Directive 2004/38/EC, *measures taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.* While expelling Romanian and Bulgarian citizens in 2010, the French authorities did not take into account this safeguard. Indeed, the French expulsion orders were motivated by standardised allegations not reflecting the personal conduct of each migrant. Most of these allegations were arguing the precarious conditions of existence, the absence of a job, the insufficient resources and the lack of health insurance of the EU mobile citizens concerned.

Level of integration in the host Member State. The more integrated an EU citizen is, the more difficult his or her expulsion from the host Member State will be. The initial aim of the European Commission, during the drafting of Directive 2004/38/EC, was to exclude the expulsion of permanent residents who should be totally assimilated among the nationals of the host Member State. Nevertheless, the Council and the Member States refused to give such a privilege to permanent residents. The expulsion of a long-term resident is still possible, but the legal grounds allowing it will be stricter. Article 28-1 of Directive 2004/38/EC states that the host Member State shall take into account considerations such as: the length of the residency in the host Member State; the social and cultural integration into the host Member State; and the extent of his or her links with the country of origin. The advantage enjoyed by long-term residents is most visible where grounds of public health are concerned. Article 29-2 of Directive 2004/38/EC states that diseases arising more than three months after the citizen's date of arrival shall not constitute grounds for expulsion from the territory. Similarly, permanent residents can be expelled only on serious grounds of public security or public policy, and those with more than ten years' residence in the host Member State can be expelled only on imperative grounds of public security.

Personal circumstances: age, health, family and economic situation. Article 28 of Directive 2004/38/EC states that before making an expulsion decision on grounds of public policy or public security, the host Member State shall take into account considerations such as his or her age, state of health, family and economic situation. According to the spirit of the Directive, it is very important to individualise each case of expulsion as much as possible. The gathering of such information requires, at a minimum, a time-consuming inquiry by the host Member State. For this reason, many Member States prefer to omit this safeguard and issue standardised expulsion orders.

The character of the threat. Directive 2004/38/EC and the ECJ highlight three main characteristics of the threat: it must be sufficiently serious and genuine. According to Articles 27-2 and Article 33-2 of Directive

2004/38/EC, *the personal conduct of the individual concerned must represent a present threat*. The Directive prohibits previous criminal convictions being considered as grounds for expulsion measures unless there is a likelihood of reoffending. The seriousness of the threat is related to the affection of one of the fundamental interests of society. Even multiple convictions are not sufficient, in the absence of additional factors showing that the presence of the migrant constitutes a serious threat to public security. The ECJ has judged sufficiently serious crimes to include the use of drugs, prostitution, belonging to an organised and armed group, and the non-payment of fiscal debt, but it has denied the characteristic of a threat to public policy to crimes such as non-fulfilment of formalities of the right of entry and stay. Finally, the genuineness of the threat excludes presumed threats.

Procedural safeguards

An EU citizen who is the object of an expulsion measure is also protected by various procedural safeguards, such as notification in writing to the person concerned of the expulsion decision (Article 30-1), including specifying the legal ground of expulsion (Article 30-2), the conditions for lodging an appeal and judicial review of the expulsion decision (Articles 30-3 and 31), and the time allowed to leave the territory of the host Member State. Respect for these procedural safeguards applies to any ground for expulsion, as Article 15-1 of Directive 2004/38/EC states.

Contentious proceedings: control by the European Court of Justice

The Court has to ensure that Member States comply with their obligations under the treaties and respect EU law and standards. To do so it will first check if the legal ground invoked by the Member State adheres to the authorised limitations of freedom of movement. The ECJ will then check that the principle of proportionality and the safeguards have been respected by the Member State which has issued an expulsion order against an EU citizen. Examining the proportionality allows the Court to find the right balance between two contradictory claims (the expulsion of the citizen claimed by the host Member States *versus* the right to stay claimed by the citizen) and objectives (preservation of the national budget or of national interests by the host Member State and the exercise of the citizen's fundamental right to freedom of movement). In doing so, according to Sara Lafuente Hernandez (2014), the Court provides the necessary reconciliation between autonomy of states and the rights of citizens of the EU. Lafuente Hernandez (2014) is critical of the Court's interpretation of the principle of proportionality. According to her, this principle should not be used in such an asymmetric situation which sets the potential financial burden of the inactive migrant for the host Member State if there is recourse to social assistance on one side against the burden caused by the expulsion of an EU citizen on the other.

Part 2: The use of the power of expulsion

Many Member States have already exercised their power of expulsion. Some do it with discretion⁴³ and expel a limited number of EU citizens, while other Member States' expulsion practices are more mediated because of the huge number of expelled migrants. In the last ten years, cases of expulsion of EU citizens have become increasingly common and mainly concern two types of migrants: EU citizens of Roma origin and non-economic migrants who pose an unreasonable burden for the host Member State.

The case of EU citizens of Roma origin

It should be noted that the situation of Bulgarian and Romanian citizens of Roma origin is very specific because there are a number of different reasons for restrictive measures taken against them. First, until January 2014 they belonged to one of the less favoured categories of EU citizens as far as freedom of movement is concerned – the category of citizens from new Member States subject to a transitional period as regards access to the labour market. Second, most of them belong to the category of economically inactive EU citizens. Third, they are subject to certain restrictive national practices because of their ‘Roma ethnicity.’ A study by the European Union Agency for Fundamental Rights (FRA) on the situation of Roma EU citizens moving to and settling in other Member States, clearly proves that poverty and racism are the main factors pushing these citizens to leave their country of origin. They unfortunately encounter the same problems in the host country.

Expulsion of Romanian and Bulgarian citizens of Roma origin from France

In 2010, hundreds of citizens of Romania and Bulgaria belonging to the Roma minority received an order of expulsion from French authorities.⁴⁴ Most of them were living in France in illegal settlements or in abandoned flats, without financial means or jobs. Romanian and Bulgarian citizens still needed a work permit in France in 2010, as well as a residence permit. Most of them were unable to gather the necessary documents and, for this reason, were unable to find a job. After being expelled from illegal settlements, most of them received an expulsion order from the French prefectures. To facilitate and speed up the departure of Roma migrants, the French authorities used a mechanism normally reserved for removing illegal migrants from third countries: the technical and financial services of the Office Français de l’Immigration et de l’Intégration. The Office organised, for example, the repatriation of Romanian citizens by charter to Romania and provided the migrants, *personae non gratae*, with financial help to leave France (300 euros per adult and 100 euros per child).

This practice has been widely criticised. As already stated, you cannot put a price on freedom of movement. Following criticism from European institutions (the European Parliament and European Commission) and organisations (Council of Europe), non-governmental organisations and the French *Défenseur des Droits*, France was supposed to improve its national implementation of Directive 2004/38/EC (Law 2006-911 of 24 July 2006 on immigration and integration and Decree 2007-371 of 21 March 2007 incorporated into Title 2 of the French *Code de l’entrée et du séjour des étrangers et du droit d’asile* – CESEDA). A year later, the French legislature adopted Law 2011-672 on immigration, integration and nationality. Unfortunately, many provisions of the new law are still incompatible with the spirit of Directive 2004/38/EC.⁴⁵ The task of correctly applying the provisions of the Directive remains, in practice, in the hands of French administrative judges, who do not hesitate to cancel national orders to leave French territory when inappropriate.

French arguments for expelling Romanian and Bulgarian citizens

Unreasonable burden on the French social security system. France has expelled citizens from Romania and Bulgaria who had been in France for less than three months on the ground of being an unreasonable burden on the French social security system. Such ground is not suitable for such short-term residents who are not supposed to receive any social assistance. These migrants could not even apply for welfare assistance (housing, health insurance, *Revenu de solidarité active*) because only regular migrants (in possession of health insurance and sufficient resources) could apply for it (Lhernould 2011: 115). The French social welfare sys-

tem benefits migrants who are already in possession of a certain amount of resources, but it excludes those who have nothing. The latter is often the case for EU citizens of Roma origin. Any abuse of law concerning social assistance cannot be attributed to the short-term resident but rather to the host Member State which has decided to treat migrant Union citizens more favourably than set out by Directive 2004/38.

Non-fulfilment of the requirements for a right of residence of more than three months. Article 7 of Directive 2004/38/EC requires economically inactive persons to possess health insurance and sufficient resources.⁴⁶ In 2010, French regulations calculated sufficiency of resources according to the age of the migrant: (1) for migrants under the age of 65, sufficient resources were equivalent to the monthly amount of the French RSA – *Revenu de solidarité active* (received by economically inactive persons in France) amounting to 483 euros; (2) for migrants over 65, sufficient resources were equivalent to the monthly ASPA – *Allocation de solidarité aux personnes âgées* (received by elderly people on low incomes in France), amounting to 788 euros.

Most of the Romanian and Bulgarian citizens in France were living on financial resources that were less than the amount required by French law. Lack of financial resources was used by French prefectures as a legal ground for orders of expulsion to Romanian and Bulgarian citizens. This practice was even approved by the French Conseil d'Etat, which declared in its decision of 26 November 2008 that *it results from these provisions that the insufficiency of resources may be opposed by the préfet to take an order of expulsion against a Communitary citizen who is residing in France since more than three months while this person has not been yet taken in charge by the French social assistance system.* The ground of lacking sufficient resources that has been used by the French authorities is obviously in contradiction to Directive 2004/38/EC which allows the retention of the right of residence only if the EU citizens become an unreasonable burden on the social assistance system of the Host Member State.

Threat to public policy and to public security. The French authorities accused the Romanian and Bulgarian citizens of being a threat to public policy and to public security. According to French administrative law, a threat to public policy (*ordre public*) is a threat to good order, public security, salubrity and quietness. According to French immigration law, especially Article 65 of the French Law on Immigration of 2011 (incorporated into CESEDA under Article L-213-1), a threat to public order can be assessed in relation to the commission of a crime subject to prosecution on the basis of articles of the Criminal Code or if the foreigner has violated French labour law. Article 65 allows the French authorities to consider as a threat to public policy any suspicion of the crimes listed in this article, a formal conviction not being necessary! The illegal occupation of property and stealing in landfills was considered to be a threat to public policy by the French authorities and the French legislature, at least when this concerns migrants, even EU citizens. It is in contradiction to the established jurisprudence of the ECJ and French jurisprudence, according to which the illegal occupation of a settlement, even in circumstances constituting a risk to health policy, is not sufficient to qualify as a threat to public policy. Indeed, many administrative French appeal courts⁴⁷ have held that the illegal occupation of a settlement is not sufficient – in the absence of exceptional circumstances – to establish that the stay of a Romanian citizen in France constitutes a threat to public order.

Abuse of law. Abuse of law is another ground invoked by the French legislature to justify the expulsion of EU citizens under Article 39 of the Law on Immigration of 2011 (incorporated into the CESEDA under Article L-511-3-1). Article 39 is a very extensive interpretation of Article 35 of Directive 2004/38/EC, visibly contradicting the spirit of the Directive. According to Article 39, a suspicion by the French authorities that the EU citizen is residing in France with the secret aim of benefiting from the French welfare system justifies his or her expulsion. Merely imputed motives can be grounds for an expulsion order. This is totally unacceptable, especially considering that even effective recourse to the French social system is not sufficient to justify an expulsion order, according to Directive 2004/38/EC (Article 27). An anticipated recourse to the

French social system, in this case, cannot be a justification for expulsion. The European Court of Justice itself has weighed in many times on this subject, underlining that the threat has to be real and not hypothetical.⁴⁸

The French authorities have also used the ground of abuse of law to sanction Romanian citizens renewing stays of less than three months in France. In recent years, French administrative judges have tendency to cancel the *Ordre de quitter le territoire français* based on abuse of law because of the lack of sufficient proofs.⁴⁹ In its decision of 16 May 2012, the administrative court of Lyon refused the qualification of abuse of law rendered against a Romanian citizen because the French *préfet is not bringing any element proving that the concerned person has had renewed many times stays of less than three months,*⁵⁰ and by merely quoting that the conditions of living of the latter are insecure and that he does not have sufficient resources, the prefect does not provide enough precise and objective elements in order to establish the existence of an abuse of the welfare system. Similarly, the French Commission Nationale Consultative des Droits de l'Homme, in its opinion of March 2012,⁵¹ wonders what advantages an EU citizen would gain by renewing short stays in France and travelling between France and the home country. Such a person staying less than three months in France is not registered in France as a resident and is not allowed to receive benefits. However, there can be no abuse of law when there are no benefits for the migrant, according to the jurisprudence Emsland-Starke.

All the above grounds cited by the French authorities have been severely criticised by European institutions and non-governmental organisations. Nevertheless, the EC finally decided not to start any infringement procedure against France. Surprisingly, the Commission has not challenged the French legal grounds for expulsion of the Romanian and Bulgarian citizens which were highly debatable due to their lack of conformity with the material and procedural safeguards against expulsion provided in Directive 2004/38/EC. The EC threatened the French government with infringement procedures on the basis of other legal grounds such as ethnic discrimination and collective expulsions. The French expulsion orders have been accused of violating the European Charter of Fundamental Rights, particularly its principles of non-discrimination and respect for minorities, and its prohibition of collective expulsions. It seems that such expeditious orders of expulsion have been issued automatically against EU citizens of Roma origin, their being Roma constituting the essential motive for arrest and expulsion.⁵² It is a pity that the Commission did not express an opinion on the legality of the grounds used by the French authorities.

The expulsion of EU citizens of Roma origin is not limited to France. It has also been seen in Italy, where expulsion seems to be disproportionately practised against nationals of one particular Member State, Romania, the country of origin of most Roma. Some more cautious Member States still expel Roma migrants, but they are very careful not to show any evidence of discrimination against the Romani community by grounding their expulsion only on the basis of lack of financial resources or burden on the social security system. Since 2010, there have been other problematic cases of expulsion of citizens of Roma origin. Most of them were resolved during bilateral meetings between Member States and the EC, which led to amendments of inconsistent national measures. In other cases, the Commission has started actions for infringements. Nevertheless, non-governmental organisations such as the European Roma Right Center are still today very worried about the growing number of expulsions of EU citizens of Roma origin.

The case of non-economic migrants

Non-economic migrants are the next targets of Member States that are seeking to protect their social security system and national finances. On 23 April 2013, the German, British, Austrian and Dutch ministries of internal affairs sent a letter to the Presidency of the EU denouncing the abuse of the free movement of persons in

matters commonly referred to as ‘social tourism’ and the inefficiency of Directive 2004/38/EC. The Schengen system has been questioned because of the massive migration flows to which it has led, and social tourism is the new target of some host Member States which are ready to take repressive measures against those abusing the law, who are considered to constitute an unreasonable burden. The repressive measures proposed are the expulsion of offenders and the prohibition of their return to the host Member State, which are very serious sanctions that have been reserved until now for third-country nationals. The political reaction of the four ministries has to be taken seriously for a number of reasons. First, it reflects a big step backward in matters of the freedom of movement of EU citizens, placing them on the same level as immigrants from third countries.⁵³ Second, this opinion could be shared by more Member States in the future.

The EC’s response to the four ministers was two-fold. First, in order to evaluate the magnitude of the problem, the Commission asked for details of the number of EU citizens considered to be an unreasonable burden in these Member States. Second, it reminded the Member States of the safeguards against the abuse of law that already exist in Directive 2004/38/CE. For these reasons, the question of how to nationally manage non-economic migrants staying for more than three months in the host country without fulfilling the conditions laid down in Article 7 of Directive 2004/38/EC (sufficient resources and comprehensive sickness insurance) is of great importance. Two cases will be examined in this article: Belgium’s expulsion of EU citizens constituting an unreasonable burden on its social security system; and Germany’s expulsion of EU citizens based on social tourism.

Cases of unreasonable burden in Belgium

Over the last few years, Belgium has expelled many EU citizens on the ground that they were placing an unreasonable burden on its social security system.⁵⁴ In 2013, 2,712 EU citizens, including long-term residents, were returned to their home countries.⁵⁵ Even though Belgium is expelling more EU citizens from Romania and Bulgaria, it does not hesitate to expel also citizens from the older Member States such as Spain,⁵⁶ Italy and France.⁵⁷ All these citizens have been accused of being an unreasonable burden on the Belgian social security system. Two categories of people have been affected by the Belgian measures: students⁵⁸ and economically poor citizens (families with insufficient resources,⁵⁹ job seekers, and so on).

Many of Belgium’s administrative practices towards EU migrants have been criticised. First, the automatic refusal of stays to EU citizens who have not provided proof of sufficient resources in time is certainly a disproportionate sanction. Second, Belgium is also accused of systematically controlling the economic situation of economically inactive Union migrants. Indeed, as soon as the migrants are granted Belgian social welfare or professional reintegration status, an alert system is triggered to allow the Belgian administration in charge of foreigners to retry their right of stay after three months on the ground of unreasonable burden to the Belgian social security system.

It is also interesting to note that Belgium could not find a better place to enshrine its regulation of the right of EU citizens to benefit from the Belgian RIS (*Revenu d’Intégration Sociale*) than in its amendment of the legislation related to the entry of asylum seekers.⁶⁰ Of course, and fortunately, this kind of assimilation of EU citizens to asylum seekers, as well as their assimilation to third-country nationals by the four ministers in 2014, does not have any legal effect and remains more at a formal level.

Cases of social tourism in Germany

Many Eastern European citizens have migrated to Germany in the last few years without sufficient resources and health insurance. Germany is worried about the cost of this economic migration, deemed ‘benefit or wel-

fare tourism.’ In March 2014, just after the general lifting of restrictions to labour markets for Romanian and Bulgarian citizens, a government panel recommended that Germany screen job seekers from other Member States for ‘welfare tourism’ or those who might qualify for unemployment benefit and then proceed to their expulsion and block their return for a fixed period (EurActiv 2014). Here, Germany goes further than mere expulsion as it proposes denying re-entry to ‘fraudsters’ for a certain period. After complaints from ‘overburdened’ German cities,⁶¹ some German politicians, such as Andreas Scheuer,⁶² claimed in 2013 that *ultimately (the EU) just wants Germany to extend its social services to poor immigrants*. The German government claims that it does not discriminate against poor immigrants, but is differentiating between *sufficient and insufficient qualifications of the immigrants*. Germany’s main argument for expelling EU citizens is based on Article 14 (i.e., on the efforts of the migrant to seek employment and on his or her capacity to find a job). Unqualified migrants, such as Romanian and Bulgarian citizens, are considered to be fraudsters. As the EU Commissioner for Social Affairs, Laszlo Andor, advocates in response to the complaints of the German cities, individual assessment is essential to determine whether or not there has been an abuse of law.⁶³

The ECJ had the opportunity recently to consider a case of social tourism in Germany. In the Dano case (C-333/13), the Court held that economically inactive EU citizens who go to another Member State solely in order to obtain social assistance may be excluded from certain social benefits. The Dano case is very typical of cases of social tourism and should be read as such. Indeed, Mrs Dano, a Romanian citizen who had migrated to Germany with her son, was clearly not seeking employment in Germany. Moreover, her capacity to find a job in the future was almost non-existent as she had never worked in her country of origin or in her host country. She had not been trained in any profession either. Mrs Dano did not fulfil the criteria of Article 7 of Directive 2004/38/EC (sufficient resources and health insurance) and of Article 14-4d of Directive 2004/38/EC requiring job seekers to provide evidence that they are continuing to seek employment and that they have a genuine chance of being employed.

Conclusion

Freedom of movement has been built progressively since the foundation of the European Economic Community in 1957, starting with the freedom of movement for workers and expanding to all EU citizens in 1993. It is still under way in 2015. Many steps have been taken to facilitate EU citizens’ entry to and residence in other Member States. The status of EU citizens residing in a host Member State is becoming increasingly similar to that of nationals of the host Member State, even if total equality of treatment is still not possible in some areas, such as social assistance. EU law privileges integrated migrants⁶⁴ and economically active residents⁶⁵ who will benefit from more advantages than the temporary resident and the inactive resident. Nevertheless, the inactive resident, despite not being having total equality with national residents, still benefits from freedom of movement and residence (absolute during the first three months and then conditional thereafter). The less favoured is certainly the inactive resident lacking necessary resources, and this has been the case for most of the EU citizens who have been expelled.

At this stage of progress, when the hardest work has already been done, some Member States, such as the United Kingdom, are willing to go back to the time when freedom of movement for economically inactive citizens was not automatic. They attempt to class economically inactive EU citizens as the same as third-country migrants or asylum seekers. Discrimination against poorer migrants is very regrettable for the EU and its citizens. A solution to the problematic migration of the poorest EU migrants is needed if we are to avoid the drifting of some Member States back to the situation of 30 years ago, when free movement was reserved only for economic agents (Schumacher 2013). The restrictive approach of some Member States was criticised in 2013 by the Commission,⁶⁶ which noted, based on figures communicated by Member States and its

study *The Impact of Mobile EU Citizens on National Social Security Systems*, that: (1) on average the employment rate of mobile EU citizens (67.7 per cent) was higher than among nationals (64.6 per cent) and free movement of citizens stimulates economic growth; (2) EU law already provides safeguards regarding access to social assistance for economically inactive mobile EU citizens, designed to protect host Member States from unreasonable financial burdens, and leading to expulsion if all the criteria are met; and (3) in most Member States mobile EU citizens are net contributors to the host country's welfare system. They are more likely to be economically active than nationals and less likely to claim social benefits.

If we are not prepared to accept this retrograde step, we must take account of the political claims of Member States fearing for their national interests. States such as France (expulsion of EU citizens of Roma origin), as well as Belgium and Germany (expulsions based on unreasonable burden on the national social security system and social tourism) are fighting to protect their national finances, national administrations and social security systems, while facing the arrival of a large number of economically inactive EU citizens. Their aim is legitimate, but their practices are not as long as their solution is to use the most serious restriction on the right of residence: expulsion. One has to remember that expulsion should remain as a restriction used in very limited cases because it has direct consequences for migrants' right to free movement, family rights and private rights. Where possible, alternatives to expulsion should be used.

The abuse of expulsion powers by Member States is primarily for political and legal reasons. In times of economic crisis, Member States are tempted to exaggerate the scale of the problem and accuse foreigners, including EU citizens, of responsibility for their socio-economic difficulties. The legal reasons for the abuse of Member States' powers of expulsion are linked, first of all, to an incorrect or insufficient transposition and implementation of Directive 2004/34/EC. Either fundamental provisions of the Directive have not been incorporated into national law, generating a dangerous legal vacuum,⁶⁷ or the national legislature misuses the obligation of transposing the Directive to add new provisions contrary to its spirit.⁶⁸ Second, the absence of a comprehensive definition of the legal grounds (unreasonable burden, abuse of law and threats to public policy and public security) for expulsion in Directive 2004/38/EC is also very problematic, giving Member States the opportunity to abuse their margin of interpretation. This abuse is visible at different levels: at the level of the national legislature, which will have an extensive interpretation of the European legal grounds for expulsion, and at the level of the national administration which will put the national grounds extensively into practice. The lack of an EU-wide definition generating various national definitions is also endangering the uniform application of freedom of movement, allowing differential treatments in all the Member States.

The following policy recommendations for the European Union and Member States seek to avoid the increasing questioning of freedom of movement of persons with which we are now faced.

Rethink the concept of European integration and European citizenship in a context of crisis and enlargement. Should the European Union develop the intra-European solidarity that would allow a more social Union citizenship that does not exclude non-active citizens? Should it standardise the distribution of social assistance by Member States? Two elements should be considered in answer to these questions: the existence of a common appetite for further social integration within the EU; and the ability of the EU and of the Member States to cope with such social challenges.

Make a clear distinction between abusers and integrated migrants. As the European Commission has noted, Member States already have all the legal instruments they need to deal with abuse of law in matters of social assistance. Moreover they are not obliged, in any case, to provide social assistance to economically inactive migrants who are not permanent residents or integrated migrants. They can distinguish between abusers of law (not fulfilling the conditions of stay and not seeking employment, such as in the case of Mrs Dano) and inactive EU migrants who are genuinely seeking employment and are integrated into the host society. The level of integration into the host society of the economically inactive EU citizen is a good tool

to avoid abuse of law such as social tourism. The integration link with the host Member State has to be examined *in concreto* for an economically inactive EU citizen who stays in the host Member State between three months and five years (Carlier 2013: 245). For the permanent resident, this link will be of course presumed.

Sanction the abusers of law. The very recent jurisprudence of the ECJ is moving towards this objective. According to the Court's decision in the Dano case (C-133/13), from November 2014 (Rubio 2014), economically inactive EU citizens who go to another Member State solely in order to obtain social assistance (without the intention of integration) may be excluded from certain social benefits. Sanctions can range from the simple refusal of social assistance to expulsion in very exceptional cases when all conditions are met including respect for the safeguards.

Use expulsion of EU citizens very exceptionally. As Dimitry Kochenov has stated, deportation is potentially harmful to the status of EU citizenship and an indication of its structural weakness. It also has disruptive effects for the individual.⁶⁹ Similarly, Sara Lafuente Hernandez (2014) estimates that restrictions such as expulsion are not proportionate when targeting non-active EU citizens accused of being an unreasonable burden on the social security system of the host Member State. According to her, expulsion is too costly a sanction for the individual concerned compared with the potential financial benefit to the host Member State.

Aim to better integrate Romanian and Bulgarian citizens of Roma origin both in their country of origin and in the host Member State. The ultimate aim would be to consider EU citizens of Roma origin not as victims or abusers of law but as ordinary citizens wishing to enjoy freedom of movement.⁷⁰ First, however, these EU citizens have to become ordinary citizens enjoying the same rights as other nationals in their country of origin. If they are able to work and earn a living in their home country, they are as likely to enjoy freedom of movement as any other EU citizen. This is a very difficult challenge. The EU together with the Member States has established various integration programmes in the host country (prevention and integration in the fields of education, employment, accommodation and access to health services as proposed by French non-governmental organisations) and reintegration programmes in their country of origin.⁷¹ But as Sergio Carrera (2014: 34, 61) points out, integration and reintegration have been designed as a policy mechanism for avoiding responsibility for discrimination against the Roma and exclusion because of their differences, cultures and nomadic ways of life. It is a way of preventing them from re-exercising their freedom to move and discouraging an unwelcome form of cross-border nomadism.

Notes

¹ According to Articles 21 and 45 of the Treaty on the Functioning of the European Union (TFEU). Freedom of movement originally applied exclusively to workers and has been extended to any EU citizen (economic agent or not), since the 1993 Treaty of Maastricht. Nevertheless, this freedom of movement shared by all EU citizens still favours the economically active.

² Freedom of movement of persons is considered by EU citizens as their favourite fundamental right. Despite much progress in this field, many obstacles remain, ten years after the adoption of Directive 2004/38/EC. Those obstacles are partly the result of insufficient transposition and application of Directive 2004/38/EC by Member States and national administrations.

³ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. For more information on this document, see de Bruycker (2006).

⁴ The economic crisis has also pushed Union citizens from eastern and southern parts of Europe, suffering from unemployment and job insecurity, to migrate to better economically endowed Member States.

⁵ For more details on the relationship between enlargement and freedom of movement, see Nagy Boldizsar (2006: 127).

⁶ Directive 2004/38/EC does not grant total freedom of movement to all Union citizens. After three months of stay, only workers are entitled to an automatic right to stay. Economically inactive EU citizens are subject to the conditions of sufficient resources and health insurance and do not receive the same treatment as nationals of the host Member State, especially in respect of the granting of social assistance. Inactive EU citizens are in this regard discriminated against.

⁷ These limitations are allowed by articles of the treaties such as Articles 45 and 21 TFEU, Article 52.1 of the Charter of Fundamental Rights (which is legally binding on the EU) and Article 27 of Directive 2004/38/EC.

⁸ Besides the refusal of entry, of exit, denial of social assistance and jail.

⁹ See all the international instruments to which Member States of the EU are parties such as the Universal Declaration of Human Rights of 10 December 1948 (Article 9), the International Covenant on Civil and Political Rights of 10 May 1966 (Article 13, protocol 7) as well as European instruments such as the European Convention on Human Rights (Article 4) and the Charter of Fundamental Rights of the European Union (Article 19). For more information on the role of the European Court of Human Rights in matters of expulsion, see Guimezanes (2013).

¹⁰ This after problems related to the entry and stay of family members and to the issue of visas and cards to family members who are nationals of third-countries.

¹¹ The only requirement being the possession of an ID or a passport.

¹² The non-fulfilment of administrative requirements such as the absence of registration in the host Member State cannot lead to expulsion.

¹³ European law has its own definition of the job seeker, differing from national definitions. In matters of free movement, job seekers are treated the same as workers as long as they can prove that they are seeking employment and that they have a genuine chance of being taken on. Job seekers might be first-time job seekers or persons who are no longer workers or self-employed persons and retain the status of workers after involuntary unemployment.

¹⁴ The Commission stated that the definition of marriages of convenience can be extended by analogy to other forms of relationship contracted for the sole purpose of enjoying the right of free movement and residence, such as (registered) partnership of convenience, fake adoption or where an EU citizen claims to be the father of a third-country child to convey nationality and a right of residence to the child and its mother, knowing that he is not the father and is not willing to assume parental responsibilities. Marriage of convenience is commonly used as a reason to terminate the stay of family members of third-country nationals and is less likely to be used for EU citizens.

¹⁵ Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM (2009) 0313 final.

¹⁶ Threat to public policy, public security and health policy is already enshrined in Articles 45-3, 52 and 62 of TFEU for economically active citizens and in Article 21 TFEU for all EU citizens.

¹⁷ Some Member States might consider HIV an infectious or contagious parasitic disease constituting a legal ground for expulsion of the EU citizen. If so, the host Member State should expel the citizen during the first three months of his/her residence.

¹⁸ The European treaties merely give a ‘negative definition’ of public policy, quoting situations when public policy cannot be evoked. Public policy is mentioned eight times in the TFEU but never defined.

¹⁹ The European Commission and the European Parliament are not able to offer a standard binding definition of public policy and public security.

²⁰ For more details on notions of public policy, see Emmanuelle Néraudau-d’Unienville (2006).

²¹ In the *Rutili* case (C-36/75), the Court stated that *Member States are continuing, in principle, to be free to determine the requirements of public policy in the light of their national needs.*

²² In the *Van Duyn* case (C-41/74), the Court stated that *it should be emphasised that the concept of public policy in the context of the Community and where, in particular, it is used as a justification for derogating from the fundamental principle of freedom of movement for workers, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community* (paragraph 18).

²³ See COM (1999) 372 final, Communication from the Commission to the Council and the European Parliament of 30 July 1999 on the special measures concerning the movement and residence of citizens of the Union which are justified on grounds of public policy, public security or public health. See Europa Archives, *Limitations on the movement and residence which are justified on grounds of public policy*, Summaries of EU legislation, point 4, Implementing measures. Online: http://europa.eu/legislation_summaries/other/123010_en.htm.

²⁴ Communication of the Commission on guidance for improved transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

²⁵ See point 19 of the report of the European Parliament (2008).

²⁶ For more details on the definition of public policy and public security, see the report of the European Parliament of 2009, pp. 10–11.

²⁷ See Annex of European Parliament Resolution of 2 April 2009 on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

²⁸ Questions regarding expulsion were as follows: Does your MS restrict free movement on grounds of ‘public policy,’ ‘public security’ or ‘public health’? Please provide details on: definitions in national law and jurisprudence; authorities involved; possibility of expulsion orders being issued or other measures taken on these grounds; whether any illness constitutes a ground for expulsion (for instance HIV); methods of assessment; implementation of the requirement for personal conduct of the individual concerned to be a *genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*; of the prohibition for previous criminal convictions not to constitute grounds for restrictive measures, etc. How does your MS take into account the provisions of Article 28-1 before taking an expulsion decision on grounds of public policy and public security? How does your MS define ‘serious’ and ‘imperative’ grounds of public policy or public security to order the expulsion of permanent residents, residents of more than 10 years’ standing and minors? How many expulsion orders have been issued so far? Please provide quantitative and qualitative data available by ground for expulsion, nationality, age, etc.

²⁹ See the Act on Residence of Foreigners in the Territory of the Czech Republic, Article 9-1 and 9-2 and the 2009 report of the European Parliament, pp. 30–39.

³⁰ Article 63 of the French law mentions that expulsion is justified when the personal behaviour of the migrant represents a real, actual and sufficiently serious threat to a fundamental interest of society. This article has been incorporated into the French *Code de l’entrée et du séjour des étrangers et du droit d’asile* (CESEDA) under Article L.521-5.

³¹ Article 65 has been incorporated into the CESEDA under Article L.213-1.

³² Report on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Committee on Civil Liberties, Justice and Home Affairs of the European Parliament, A6-0186/2009, p. 7/39.

³³ The Austrian answer to the questionnaire states that: *According to administrative data and case-law, a person would become an unreasonable burden on the social assistance system if the purpose of their entering the country was in order to draw social benefits. Where there is no early indication of abuse, an individual assessment is made, whereby all relevant circumstances – especially the duration and purpose of stay (entry for employment purposes or as a student, etc.) – are taken into account.*

³⁴ See, *inter alia*, case C-273/97 *Sirdar*, paragraph 17.

³⁵ See, *inter alia*, case C-398/98 *Commission v Greece*, paragraph 29.

³⁶ See case P.I. c/*Oberburger*, C-348/09.

³⁷ See recital 24 in the preamble to Directive 2004/38/EC.

³⁸ See the *Tsakouridis* case, C-145/09, mainly para. 40 ff.

³⁹ For more details on the ground of public security, see Henri Labayle (2012) and Anne Rigaux (2013).

⁴⁰ See the case of *Bressol et Chaverot* (C-73/08), paras 67 and 68: *In that regard, it cannot be ruled out a priori that a reduction in the quality of training of future health professionals may ultimately impair the quality of care provided in the territory concerned, since the quality of the medical or paramedical service within a given area depends on the competence of the health professionals who carry out their activity there. It also cannot be ruled out that a limitation of the total number of students in the courses concerned – in particular with a view to ensuring the quality of training – may reduce, proportionately, the number of graduates prepared in the future to ensure the availability of the service in the territory concerned, which could then have an effect on the level of public health protection. On that point, it must be acknowledged that a shortage of health professionals would cause serious problems for the protection of public health and that the prevention of that risk requires that a sufficient number of graduates establish themselves in that territory in order to carry out there one of the medical or paramedical occupations covered by the decree at issue in the main proceedings.*

⁴¹ See the *Hartlauer* case (C-169/07), paras 46 and 47.

⁴² It is interesting to note that Czech law, unlike EU law or international law, distinguishes between ‘administrative expulsion’ ordered by the foreign police and ‘penal expulsion’ ordered by a criminal judge.

⁴³ In the Czech Republic, for example, in 2013, EU citizens from Slovakia, Bulgaria, Poland, Romania and Germany received expulsion orders.

⁴⁴ For more details on the expulsion of EU citizens of Roma origin from France, see Lhernould (2010: 1024–1036) and Sergio Carrera (2014).

⁴⁵ The 2013 Commentary of the French CESEDA notes that French legislation has developed many legal instruments to restrict the stay of foreigners (expulsion, deportation, obligation to leave French territory, administrative and judicial prohibition to enter French territory, transfer to another Schengen state and so on). The high number of these procedures unfortunately leads to confusion regarding which instrument should be used in a particular case and French law is very often misused by regional and local authorities (for example, abuse of the notion of urgency that allows the French authorities not to motivate their decision and to execute the expulsion order without delay).

⁴⁶ The interpretation by Member States of the notion of ‘sufficient resources’ under Article 7-1-b of Directive 2004/38/EC is often unclear, while most Member States require that evidence of sufficient resources be given.

⁴⁷ For example, the appeal court of Versailles – 15 July 2009 and the Court of appeal of Lyon – 4 November 2011.

⁴⁸ See, *inter alia*, the *Bouchereau* case (C-30/77).

⁴⁹ See, for example, the judgments of the administrative court of Lyon dated 2 May 2012 and 16 May 2012, No. 1203741, No. 1203740, No. 1201114, and those of the administrative appeal court of Douai dated 25 October 2012, No. 12DA00853.

⁵⁰ Romanian citizens being EU citizens do not need a visa to enter and leave France. For this reason, it is very difficult to prove the renewal of many stays and the dates of arrival and departure.

⁵¹ *Avis sur le respect des droits des «gens du voyage» et des Roms migrants au regard des réponses récentes de la France aux instances internationales*, point 39.

⁵² It has been proved that many French *gendarmes* had received written orders to concentrate on foreigners of Roma origin.

⁵³ This is confirmed by the language used by the ministers, not using the word ‘citizens of the Union’ to designate citizens from other Member States, but describing them as ‘immigrants,’ a term generally used to designate citizens of third countries.

⁵⁴ For more details on expulsions of EU citizens from Belgium, see Jean-Yves Carlier (2014: 172–173).

⁵⁵ The number of EU citizens expelled amounted to 2,407 in 2012, 989 in 2011 and 343 in 2010. Belgium is one of the rare Member States which are not afraid of publishing the exact number of EU citizens it has expelled. In many Member States such information is confidential and not made available in the public domain.

⁵⁶ See the Spanish *indignados* petition brought to the European Parliament in April 2014 against the Belgian migration law allowing forced expulsions of European citizens and Belgian practices of systematic control over foreigners in contravention of Directive 2004/38/EC, especially its provision regarding burden on the social assistance system leading to discriminatory treatment of European migrants, especially those from Southern and Eastern Europe where the economic crisis has hit harder.

⁵⁷ In 2013, 177 French citizens were deprived of their right of residence in Belgium.

⁵⁸ This was the case of Caroline, a French student who arrived in Belgium in 2010 and received the *Revenu d'intégration* from 2013. The fact that she benefited from Belgian social assistance while not being able to find a job (according to the Belgian authorities) led to her expulsion because of her long period of inactivity. According to Article 14-4b of Directive 2004/38/EC, job seekers are allowed to stay on the territory of a host Member State for three months. After three months, *the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged*.

⁵⁹ This was the case of a French family with four children (*Delbarre-Chauvin*), resident for three years in Belgium, who were threatened with expulsion for not having sufficient financial resources. The father lost his job while the mother works in a retirement home and has her low salary topped up by the Belgian *Revenu d'intégration sociale*. The Belgian *Office des étrangers* considers that these six persons are an unreasonable burden on the Belgian social security system.

⁶⁰ See *Loi du 19 janvier 2012 modifiant la législation en matière de l'accueil des demandeurs d'asile*, specifically Article 12.

⁶¹ These German cities complain that their health and welfare systems are *unable to cope with the number of unemployed Eastern Europeans*.

⁶² CSU Secretary General.

⁶³ *When an EU citizen is denied social welfare after the mandatory three months, there should be an individualised assessment to see where the person's habitual residence is. The location of a person's habitual*

residence is crucial in determining whether they are entitled to claim social benefits in another EU Member State. To determine it, one has to take into account family situation, housing situation, reasons for the move and the duration of residence in the affected Member State.

⁶⁴ According to Article 24 of Directive 2004/38/EC, permanent residents shall enjoy total equal treatment with the nationals of the host Member States.

⁶⁵ According to Article 7 of Directive 2004/38/EC, workers or self-employed persons have an automatic right of residence for more than three months, whereas inactive residents should have sufficient resources and comprehensive health insurance.

⁶⁶ See memo: European Commission (2013) and also DG Employment, Social Affairs and Inclusion *via* DG Justice Framework Contract (2013) and Guild et al. (2013).

⁶⁷ For example, provisions on prohibitions of collective expulsions are not incorporated into some national legislations.

⁶⁸ For example, Article 39 of the French Law on Immigration of 2001, resulting in a very extensive interpretation of Article 35 of Directive 2004/38/EC.

⁶⁹ See Kochenov and Pirker (2013: 378).

⁷⁰ See Bigo (2011: 81–82): *The issue is not the Roma people's attitude, or their integration, but is first of all that attitude of our governments as regards free movement of persons and human rights in Europe, with a debate that has the observance of their previous EU commitments at its core.*

⁷¹ See COM (2011) 173 final: Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions. An EU Framework for National Roma Integration Strategies up to 2020.

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