

European Union citizenship and free movement rights

Aims and objectives

At the end of this chapter you should understand:

- Why Art 26(2) TFEU is relevant to the free movement of persons.
- Which provisions of the EU Treaties are relevant to the free movement of workers, freedom of establishment and the free movement of services.
- How the European Economic Area Agreement impacts upon the Union law provisions on the free movement of persons.
- The nature of EU citizenship within the context of Art 21(1) TFEU.
- Through a study of the relevant case law of the Court of Justice of the European Union, how EU citizenship has, and will, impact on the Union law provisions on the free movement of persons.
- How Directive 2004/38 has consolidated the Union law provisions relating to entry and residence.
- What rights, other than the free movement of persons, are derived from EU citizenship.
- The limited rights of free movement for non-EU citizens.
- The Schengen *acquis* and the UK's participation in the Schengen arrangements.

Treaty of Lisbon

See pages 28-47 for a comprehensive discussion of the ToL.

As discussed in Chapter 1, the Treaty of Lisbon (ToL) came into force on 1 December 2009.

The ToL has *retained* and *amended* both the EC Treaty and the TEU. The EC Treaty has been renamed the Treaty on the Functioning of the European Union (TFEU). The Union has replaced and succeeded the Community (Art 1 TEU). Throughout the TFEU, the word 'Community' has been replaced with the word 'Union'. The following terms are therefore no longer used: European *Community*; European *Communities*; or *Community* law. Reference is now made solely to the European Union (or Union) and European Union law (or Union law).

The articles within both the TEU and TFEU have been renumbered as part of a simplification exercise. The ToL renumbering came into effect when the ToL itself came into

force (1 December 2009). Throughout this and subsequent chapters, the current (post-ToL) provisions are used. References to the pre-ToL provisions will also be provided, where relevant, in the following format: Art 26(2) TFEU (previously Art 14(2) EC Treaty).

Introduction to the free movement of persons

The free movement of persons has been a cornerstone of the European Union since its inception. That freedom was not, initially, an entitlement for citizens of Member States to move anywhere in the Union for any purpose, but was linked to a number of specific economic activities:

- Arts 45–48 TFEU (previously Arts 39–42 EC Treaty) – workers
- Arts 49–54 TFEU (previously Arts 43–48 EC Treaty) – rights of establishment
- Arts 56–62 TFEU (previously Arts 49–55 EC Treaty) – services

Each of these Treaty provisions has been elaborated by detailed secondary legislation. The rights of individuals and undertakings in the three principal categories are examined in more detail in Chapter 12 (workers) and Chapter 13 (services and establishment).

Free movement rights must be seen in the context of three important developments of recent years. The first of these are the measures taken to create the internal market which shall, under Art 26(2) TFEU (previously Art 14(2) EC Treaty), ‘comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties’. Although Art 26(2) TFEU creates a commitment for the Union to remove border restrictions, it is not clear whether the provision has direct effect. In **R v Secretary of State for the Home Department, ex parte Flynn** [1995] 3 CMLR 397, McCullough J held that it did not match the criteria for having direct effect. It imposed no obligation on Member States, ‘let alone one which is clear and precise’. He therefore refused a claim by the applicant, an EU citizen, that he had been unlawfully detained for questioning at Dover. This decision was subsequently upheld in the Court of Appeal; although note that this was a decision of an English court and not the Court of Justice.

The principle of direct effect is considered further at pages 266–282.

See page 52 for further commentary on EFTA and the EEA.

The second development is the European Economic Area (EEA) Agreement, which came into effect on 1 January 1994. Under the EEA Agreement all the free movement rights enjoyed under the EU Treaties were extended to the remaining states of EFTA (currently Iceland, Liechtenstein and Norway, but not including Switzerland). European Union citizens and their families, and citizens of the participating EFTA states and their families, enjoy the full free movement rights of the Treaty and of the implementing legislation in all the territories of the EU and the participating EFTA states.

The third and most significant development is the creation of EU citizenship by the Treaty on European Union (Art 20 TFEU (previously Art 17 EC Treaty)).

EU citizenship

Article 20 TFEU (previously Art 17 EC Treaty) provides that:

1. **Citizenship of the Union is hereby established.** Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*:
 - (a) the right to move and reside freely within the territory of the Member States;
 - (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
 - (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
 - (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.
 These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder. [emphasis added]

The substance of Art 20 TFEU is the same as under the former Art 17 EC Treaty.

The former Art 18(1) EC Treaty has been replaced by Art 21(1) TFEU. Article 21(1) TFEU (which is practically unchanged from the former Art 18(1) EC Treaty) provides as follows:

Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, **subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.** [emphasis added]

The emphasised words of Art 21(1) TFEU (previously Art 18(1) EC Treaty) would seem to make it clear that EU citizenship does not bring any new free movement rights into being but formally attaches the existing rights, with all the qualifications and exceptions, to the new citizenship. The most that might have been said about EU citizenship and free movement is that possession of such citizenship raises a presumption of a right of entry or residence which would have to be rebutted by the host Member State if those rights were to be refused or terminated. The Treaty envisages that the existing rights form the basis for further development, because it authorises the adoption of further measures 'to give them effect' (Art 21(1)). The scope of EU citizenship was a central issue in the following case, which was decided by an English court, not the Court of Justice:

***R v Home Secretary, ex parte Vitale and Do Amaral* [1995] All ER (EC) 946**

The applicants, both EU citizens, were resident in the UK and had been in receipt of income support for a number of months. They had not found work and, in the view of the Department of Employment, they were not seeking work. They were therefore asked to leave the country. They argued that, irrespective of the truth of the allegations, they were entitled to remain simply as EU citizens. Judge J rejected this argument:

... [Article 21(1) TFEU] provides two distinct rights, the right to move freely within the territory and the right to reside freely. Neither right is free-standing nor absolute. It is expressly and unequivocally subject to the limitations and conditions contained in the Treaty. Moreover it is clear from the provisions in ... [Article 21(2) TFEU] and, more significantly ... [Article 25 TFEU], that provisions may be adopted in due course 'to strengthen or add to the rights laid down' in the part of the Treaty devoted to 'citizenship'. In effect, therefore, the existence of limitations and the potential for extending the rights of citizens are acknowledged in ... [Article 25 TFEU] as well as ... [Article 21 TFEU]. So ... [Article 21 TFEU] does not provide every citizen of the Union with an open-ended right to reside freely within every Member State.

This decision of the English Divisional Court was upheld by the Court of Appeal ([1996] All ER (EC) 461). The limited scope of the former Art 18(1) EC Treaty (now Art 21(1) TFEU) received some support from the Court of Justice in the following case:

Kremzow v Austria (Case C-299/95)

The claimant argued that, as an EU citizen, he was entitled to the protection of Union law in relation to criminal proceedings which had been brought against him. The Court of Justice held, on a reference from the national court, that the mere fact of his EU citizenship was 'not a sufficient connection with Community [i.e. Union] law to justify the application of Community [i.e. Union] provisions'.

The Court of Justice was, however, more recently prepared to hold that an EU citizen who had been *permitted* by the host state to remain there (where she had no right to remain under Union law) was entitled, as an EU citizen, to equal treatment in relation to welfare and other benefits in line with nationals of the host state. It left open the question of whether a person who is no longer exercising their free movement rights could still enjoy an independent right of residence as an EU citizen (**Sala v Freistaat Bayern** (Case C-85/96)).

One of the rights conferred by the Treaty is that contained in Art 18 TFEU, which is practically unchanged from the former Art 12 EC Treaty and provides as follows:

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

In the following case, the Court of Justice applied this non-discriminatory provision (the former Art 12 EC Treaty, now Art 18 TFEU) alongside the EU citizenship provisions, which enabled it to elevate the status of EU citizenship:

Grzelczyk v Centre Public d'aide sociale d'Ottignies-Louvain-la-Neuve (Case C-184/99)

A student of French nationality paid his own way throughout his first three years of full-time studies at a Belgian university by taking on minor jobs and obtaining credit. At the start of his fourth and final year he applied for a Belgian social security benefit known as minimum subsistence allowance (minimex). His application was refused on the ground that under the relevant Belgian legislation a non-Belgian applicant was only eligible if *inter alia* Regulation 1612/68 applied to him. This Regulation is considered further in Chapter 12; it is applicable to 'workers' not 'students'. If he had been Belgian then he would have been entitled to the benefit, notwithstanding the fact that he was not a worker within the scope of Regulation 1612/68. The Belgian tribunal had doubts as to whether the national legislation was compatible with the former Arts 12 and 17 EC Treaty (now Arts 18 and 20 TFEU). The tribunal therefore referred the case to the Court of Justice for a preliminary ruling pursuant to the former Art 234 EC Treaty (now Art 267 TFEU). The Court of Justice held that:

29. It is clear from the documents before the Court that a student of Belgian nationality, though not a worker within the meaning of Regulation No 1612/68, who found himself in exactly the same circumstances as Mr Grzelczyk would satisfy the conditions for obtaining the minimex. The fact that Mr Grzelczyk is not of Belgian nationality is the only bar to its being granted to

- him. It is not therefore in dispute that the case is one of discrimination solely on the ground of nationality.
30. Within the sphere of application of the Treaty, such discrimination is, in principle, prohibited by ... [Article 18 TFEU]. In the present case ... **[Article 18 TFEU] must be read in conjunction with the provisions of the Treaty concerning citizenship of the Union in order to determine its sphere of application.**
 31. **Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.**
 - ...
 36. The fact that a Union citizen pursues university studies in a Member State other than the State of which he is a national cannot, of itself, deprive him of the possibility of relying on the prohibition of all discrimination on grounds of nationality laid down in ... [Article 18 TFEU].
 37. As pointed out in paragraph 30 above, in the present case that prohibition must be read in conjunction with ... [Article 21(1) TFEU], which proclaims 'the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'.
 38. As regards those limitations and conditions, it is clear from Article 1 of Directive 93/96 [which has been repealed and replaced by Directive 2004/38] that Member States may require of students who are nationals of a different Member State and who wish to exercise the right of residence on their territory, first, that they satisfy the relevant national authority that they have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence, next, that they be enrolled in a recognised educational establishment for the principal purpose of following a vocational training course there and, lastly, that they be covered by sickness insurance in respect of all risks in the host Member State.
 39. Article 3 of Directive 93/96 [which has been repealed and replaced by Directive 2004/38] makes clear that the directive does not establish any right to payment of maintenance grants by the host Member State for students who benefit from the right of residence. On the other hand, there are no provisions in the directive that preclude those to whom it applies from receiving social security benefits.
 40. As regards more specifically the question of resources, Article 1 of Directive 93/96 [which has been repealed and replaced by Directive 2004/38] does not require resources of any specific amount, nor that they be evidenced by specific documents. The article refers merely to a declaration, or such alternative means as are at least equivalent, which enables the student to satisfy the national authority concerned that he has, for himself and, in relevant cases, for his spouse and dependent children, sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their stay (see paragraph 44 of the judgment in Case C-424/98 **Commission v Italy** [2000] ECR I-4001).
 - ...
 46. It follows from the foregoing that ... [Articles 18 and 20 TFEU] preclude entitlement to a non-contributory social benefit, such as the minimex, from being made conditional, in the case of nationals of Member States other than the host State where they are legally resident, on their falling within the scope of Regulation No 1612/68 when no such condition applies to nationals of the host Member State. [emphasis added]

In the above case, the Court of Justice (at paras 29–30) stated that because it was clear that a student who was Belgian but otherwise in the same circumstances as the applicant would be entitled to minimex, the case was one of discrimination solely on the ground of nationality which, in principle, was prohibited by the former Art 12 EC Treaty (now Art 18 TFEU). The Court further stated at para 30 that the former Art 12 EC Treaty (now

Art 18 TFEU) had to be read in conjunction with the Treaty provisions on EU citizenship (former Art 17 EC Treaty, now Art 20 TFEU), to determine its sphere of application. The Court then went on to say that EU citizenship was destined to be the fundamental status of nationals of the Member States, enabling those who found themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to some exceptions as were expressly provided for (para 31).

The Court noted that Directive 93/96 requires Member States to grant a right of residence to student nationals of a Member State who satisfied certain requirements. Although Art 3 of this Directive makes clear that there is no right to payment of maintenance grants by the host Member State for students who benefit from this right of residence, it contains no provision precluding those to whom it applies from receiving social security benefits. The Court therefore held that the former Arts 12 and 17 EC Treaty (now Arts 18 and 20 TFEU) precluded Belgium from making entitlement to minimex conditional on the applicant (Mr Grzelczyk) coming within the scope of Regulation 1612/68 (i.e. being an 'EU worker') when no such condition applied to Belgian nationals. It should be noted that Directive 93/96 has been repealed and replaced by Directive 2004/38; this directive is considered in further detail below.

The **Grzelczyk** case clearly raised the profile and status of EU citizenship. Due to the fact that the applicant had a right of residence under Union law as a student, the Court held that as an EU citizen he was entitled to be treated in the same way as a national with regard to the payment of social security benefits; an application of the former non-discriminatory provision, Art 12 EC Treaty (now Art 18 TFEU). It was unclear whether this would pave the way for the Court of Justice to extend its scope to others (e.g. work-seekers). **Grzelczyk** could be distinguished from that of, for example, a work-seeker because it could be argued that a student is contributing to the economy of the host Member State whereas a work-seeker is not necessarily doing so. In any event in **Grzelczyk** the Court stated that its judgment did not prevent a Member State from (i) taking the view that a student who had recourse to social assistance was no longer fulfilling the conditions of his right of residence; or (ii) from taking measures, within the limits imposed by Union law, to either withdraw his residence permit or refuse to renew it. But in no case, the Court said, could such a measure become the automatic consequence of a student who was a national of another Member State having recourse to the host Member State's social security system (see paras 40–45). If the Court did extend this case to, for example, work-seekers, such that they were entitled to claim social security benefits under the same terms as a national, it would therefore be open to a Member State to determine that the work-seeker no longer satisfied the conditions relating to his right of residence. The right of a work-seeker to claim a social security benefit has since been considered by the Court of Justice in two cases: **Collins** (Case C-138/02) and **Ioannidis** (Case C-258/04); see below.

Directive 2004/38 (relating to the right of entry and residence) was subsequently adopted and had to be transposed into national law by 30 April 2006. Article 6(1), Directive 2004/38 provides that EU citizens shall have the right of residence in another Member State for a period of up to three months; this will therefore include work-seekers. Article 14(1), Directive 2004/38 further provides that EU citizens and their family members shall have the right of residence under Art 6, 'as long as they do not become an *unreasonable* burden on the social assistance system of the host Member State' (emphasis added). Expulsion shall not be an automatic consequence if an EU citizen or his family members have recourse to the host Member State's social assistance system (Art 14(3), Directive 2004/38).

The status of work-seekers will be considered further in Chapter 12; suffice to state here that work-seekers are afforded a reasonable period of time to seek work in the host Member State, following which, unless they can show they are actively seeking work and have a genuine chance of securing employment, their right of residence under Union law will expire. This has now been incorporated into Directive 2004/38 which provides that, other than in accordance with the provisions relating to restrictions on the right of entry and residence on grounds of public policy, security or health, an expulsion order cannot be issued against an EU citizen or his family members, if, *inter alia*, the EU citizen entered the host Member State to seek employment and he can provide evidence that he is continuing to seek work and has a genuine chance of being employed (Art 14(4), Directive 2004/38).

The principle of EU citizenship and non-discrimination developed by the Court of Justice in *Grzelczyk* has subsequently been applied by the Court in *Marie-Nathalie D’Hoop v Office national de l’emploi* (Case C-224/98) and *Garcia Avello* (Case C-148/02). European Union citizenship was also relevant in the following case:



Baumbast and R v Secretary of State for the Home Department (Case C-413/99)

The Court of Justice held as follows:

A citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of Article 18(1) EC [now Art 21(1) TFEU]. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities and, where necessary, the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community [i.e. Union] law and, in particular, the principle of proportionality.

In the above case the Court of Justice held that the former Art 18(1) EC Treaty (now Art 21(1) TFEU), which provides every EU citizen with the right to move and reside freely within the territory of the Member States, grants a right of continued residence to an EU worker within the host Member State, even after the EU worker has ceased working. This right shall be exercised ‘in accordance with the conditions and limitations defined by the Treaties and the measures adopted thereunder’ (Art 21(1) TFEU). A series of recent cases has provided further confirmation of the increasingly important concept of EU citizenship.

In the first case, the *Korkein oikeus* (Supreme Court, Finland) referred a question on the interpretation of the former Art 18 EC Treaty (now Art 21 TFEU) to the Court of Justice for a preliminary ruling:

Pusa (Case C-224/02)

Mr Pusa, a Finnish national, was in receipt of an invalidity pension in Finland. Mr Pusa owed money to Osuuspankkien Keskinäinen Vakuutusyhtiö (OKV), and OKV sought an ‘attachment’ on Mr Pusa’s invalidity pension to enable deductions to be made from his pension automatically; these deductions would be paid to OKV.

The case concerned the calculation of the amount which OKV should be authorised to debit from Mr Pusa’s pension (i.e. the amount of the ‘attachment’). The Finnish law on enforcement provides that part of remuneration is excluded from attachment, that part being calculated from the amount which remains after compulsory deduction at source of income tax in Finland. The problem in this case lay in the fact that Mr Pusa was resident in Spain and he was subject to income tax there. In accordance with the provisions of a double taxation agreement, he was

not subject to any deduction at source in Finland. The part of his pension subject to attachment was therefore calculated on the basis of the gross amount of the pension, which would not have been the case if he had continued to reside in Finland.

The Finnish Supreme Court asked the Court of Justice essentially whether such a situation is compatible in particular with the freedom of movement and residence guaranteed to EU citizens by the EU Treaties.

The Court stated (as it had in previous cases) that EU citizenship is destined to be the fundamental status of nationals of the Member States and that an EU citizen must be granted in all Member States the same treatment in law as that accorded to the nationals of those Member States who find themselves in the same situation. The Court considered, first, that if the Finnish law on enforcement must be interpreted to mean that it does not in any way allow the tax paid by the person concerned in Spain to be taken into account, that difference of treatment will certainly and inevitably result in Mr Pusa being placed at a disadvantage by virtue of exercising his right to move and reside freely in the Member States, as guaranteed under the former Art 18 EC Treaty (now Art 21 TFEU). The Court stated, second, that to preclude all consideration of the tax payable in the Member State of residence, when such tax has become payable and to that extent affects the actual means available to the debtor, cannot be justified in the light of the legitimate objectives pursued by such a law of preserving the creditor's right to recover the debt due to him and preserving the debtor's right to a minimum subsistence income.

Consequently, the Court held that 'Community [i.e. Union] law in principle precludes legislation of a Member State under which the attachable part of a pension paid at regular intervals in that State to a debtor is calculated by deducting from that pension the income tax prepayment levied in that State, while the tax which the holder of such a pension must pay on it subsequently in the Member State where he resides is not taken into account at all for the purposes of calculating the attachable portion of that pension' (para 48).

However, the Court considered that 'on the other hand, **Community [i.e. Union] law does not preclude such national legislation if it provides for tax to be taken into account, where taking the tax into account is made subject to the condition that the debtor prove that he has in fact paid or is required to pay within a given period a specified amount as income tax in the Member State where he resides**' [emphasis added]. The Court said that that is only the case 'to the extent that, first, the right of the debtor concerned to have tax taken into account is clear from that legislation; secondly, the detailed rules for taking tax into account are such as to guarantee to the interested party the right to obtain an annual adjustment of the attachable portion of his pension to the same extent as if such a tax had been deducted at source in the Member State which enacted that legislation; and, thirdly, those detailed rules do not have the effect of making it impossible or excessively difficult to exercise that right' (para 48).

The second case was quite novel, the former Art 18 EC Treaty (now Art 21 TFEU) being successfully relied upon to enable a Chinese national to reside in the UK on the basis that she was the carer of her newborn child who had acquired Irish nationality:

Zhu and Chen (Case C-200/02)

Mr and Mrs Chen were Chinese nationals and parents of a first child born in China. They wished to have a second child but came up against China's birth control policy, the 'one child policy', which imposes financial penalties on couples who give birth to more than one child. They therefore decided that Mrs Chen would give birth abroad. Their second child was born in September 2000 in Belfast, Northern Ireland; Northern Ireland is part of the UK. The choice of the place of birth was no accident; Irish law allows any person born in the island of Ireland (which for this

purpose includes Northern Ireland) to acquire Irish nationality. The child therefore acquired Irish nationality. Because, however, she did not meet the requirements laid down by the relevant UK legislation, she did not acquire UK nationality. After the birth, Mrs Chen moved to Cardiff (Wales) with her child, and applied there for a long-term residence permit for herself and her child, which was refused. Mrs Chen appealed and the appellate authority referred a question to the Court of Justice on the lawfulness of that refusal, pointing out that the mother and child provided for their needs, they did not rely on public funds, there was no realistic possibility of their becoming so reliant, and they were insured against ill health.

The circumstance that the facts of the case concerned a young child gave the Court an occasion to state a preliminary point. The Court said that **the capacity to be the holder of rights guaranteed by the EU Treaties and by secondary law on the free movement of persons does not require that the person concerned has attained the age prescribed for the acquisition of legal capacity to exercise those rights personally. Moreover, the enjoyment of those rights cannot be made conditional on the attainment of a minimum age.**

As regards the child's right of residence, the Court recalled that the former Art 18 EC Treaty (now Art 21 TFEU) has direct effect. Purely as a national of a Member State, and therefore an EU citizen, she can rely on the right of residence laid down by that provision. Regard must be had, however, to the limitations and conditions to which that right is subject, in particular Art 1(1), Directive 90/364, which allows Member States to require that the persons concerned have sickness insurance and sufficient resources (Directive 90/364 has since been replaced by Directive 2004/38, see below). The Court found that the child had sickness insurance and sufficient resources, and therefore satisfied Art 1(1), Directive 90/364. The fact that the sufficient resources of the child were provided by her mother and she had none herself was immaterial; a requirement as to the origin of the resources cannot be added to the requirement of sufficient resources.

Finally, as regards the fact that Mrs Chen went to Ireland with the sole aim of giving her child the nationality of a Member State, in order then to secure a right of residence in the UK for herself and her child, the Court recalled that it is for each Member State to define the conditions for the acquisition and loss of nationality. A Member State may not restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for the recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.

As regards the mother's right of residence, the Court observed that Directive 90/364 recognises a right of residence for 'dependent' relatives in the ascending line of the holder of the right of residence, which assumes that material support for the family member is provided by the holder of the right of residence. In the present case, said the Court, the position was exactly the opposite. Mrs Chen could not thus be regarded as a 'dependent' relative of her child in the ascending line. On the other hand, **where a child is granted a right of residence by the former Art 18 EC Treaty (now Art 21 TFEU) and Directive 90/364, the parent who is the carer of the child cannot be refused the right to reside with the child in the host Member State, as otherwise the child's right of residence would be deprived of any useful effect.**

The next case, decided by the Court of Justice in 2005, concerned a migrant student's right to a maintenance loan at a preferential rate of interest:

Bidar (Case C-209/03)

The Court of Justice examined whether the conditions for granting student support in England and Wales complied with Union law. Student support is financial assistance granted to students by the state in the form of a loan at a preferential rate of interest to cover maintenance costs. The loan is repayable after the student completes his studies, provided he is earning in excess

of a certain sum. A national of another Member State is eligible to receive such a loan if he is 'settled' in the UK and has been resident there throughout the three-year period preceding the start of the course. However, under UK law a national of another Member State cannot, in his capacity as a student, obtain the status of being settled in the UK.

Dany Bidar, a young French national, had completed the last three years of his secondary education in the UK, living as a dependent of a member of his family without ever having recourse to social assistance. He was refused financial assistance to cover his maintenance costs, which he applied for when he started a course in economics at University College London, on the grounds that he was not settled in the UK for the purposes of UK law. He brought proceedings before the English High Court, which referred three questions to the Court of Justice for a preliminary ruling.

The first of those questions sought to determine whether, as Union law currently stands, assistance such as that at issue in the present case falls outside the scope of the Treaty, in particular the former Art 12 EC Treaty (now Art 18 TFEU). It should be noted that the Court held in **Lair** (Case 39/86) and **Brown** (Case 197/86) that assistance given to students for maintenance and for training falls in principle outside the scope of the Treaty for the purposes of the former Art 12 EC Treaty (now Art 18 TFEU); see Chapter 12. In the present case, the Court held that the former Art 12 EC Treaty (now Art 18 TFEU) must be read in conjunction with the provisions on EU citizenship and noted that an EU citizen lawfully resident in the territory of the host Member State can rely on the former Art 12 EC Treaty (now Art 18 TFEU) in all situations which fall within the scope *ratione materiae* of Union law, in particular those involving the exercise of the right to move and reside within the territory of the Member States, as conferred by the former Art 18 EC Treaty (now Art 21 TFEU). In the case of students who move to another Member State to study there, there is nothing in the text of the Treaty to suggest that they lose the rights which the Treaty confers on EU citizens. The Court added that **a national of a Member State who, as in the present case, lives in another Member State where he pursues and completes his secondary education, without it being objected that he does not have sufficient resources or sickness insurance, enjoys a right of residence on the basis of the former Art 18 EC Treaty (now Art 21 TFEU) and Directive 90/364 (Directive 90/364 has since been replaced by Directive 2004/38, see below). With regard to Lair and Brown, the Court stated that since judgment had been given in those cases the TEU had introduced EU citizenship and inserted a chapter devoted to education and training into the Treaty. In the light of those factors, it had to be held that assistance such as that at issue falls within the scope of application of the Treaty for the purposes of the prohibition of discrimination laid down in the former Art 12 EC Treaty (now Art 18 TFEU).**

The Court then considered whether, where the requirements for granting assistance are linked to the fact of being settled or to residence and are likely to place at a disadvantage nationals of other Member States, the difference in treatment between them and nationals of the Member State concerned can be justified. It observed that, although the Member States must, in the organisation and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States, it is permissible for them to ensure that the granting of that type of assistance does not become an unreasonable burden. **In the case of assistance covering the maintenance costs of students, it is thus legitimate to seek to ensure a certain degree of integration by checking that the student in question has resided in the host Member State for a certain length of time.** However, a link with the employment market, as in the case of allowances for persons seeking employment which were at issue in **D'Hoop** (Case C-224/98) and **Collins** (Case C-138/02) cannot be required.

In principle, a requirement that an applicant should be settled in the host Member State may therefore be allowed. However, in so far as it precludes any possibility for a student who is a national of another Member State to obtain the status of settled person, and hence to

receive the assistance even if he has established a genuine link with the society of the host Member State, the legislation in question is incompatible with the former Art 12 EC Treaty (now Art 18 TFEU).

The above case was applied by the Court of Justice in **Förster v Hoofddirectie van de Informatie Beheer Groep** (Case C-158/07). In the **Förster** case, the Dutch body which administered educational maintenance grants adopted a policy rule which provided that a student from the European Union must have been lawfully resident in The Netherlands for an uninterrupted period of at least five years before claiming a maintenance grant. The Court of Justice held that this period was appropriate for the purpose of guaranteeing that the applicant for the maintenance grant at issue was integrated into the society of the host Member State. The Court did not consider this condition was excessive.

The following joined cases were similar to the above two cases in that they also concerned an educational maintenance grant. However, in these joined cases the maintenance grant was provided by the EU citizen's home state (Germany) to facilitate a period of study within another Member State:

Morgan v Bezirksregierung Köln and Iris Bucher v Landrat des Kreises Düren
(Joined Cases C-11/06 and C-12/06)

Having completed her secondary education in Germany, Morgan, a German national, moved to the UK where she worked for a year as an au pair before commencing her university studies (in the UK), for which she applied to the German authorities for a grant. Her application was rejected because, under German legislation, the grant was subject to the condition that the course of study should constitute a continuation of education or training pursued for at least one year in a German establishment.

Bucher, who is also a German national, lived with her parents in Bonn (Germany) until she decided to move to Düren, a German town on the Netherlands border, and pursue a course of study in the Netherlands town of Heerlen. Bucher applied to the authorities in Düren for a grant, which she was refused on the ground that she was not 'permanently' resident near a border as required by the German legislation.

The administrative court in Aachen, before which both students brought actions, asked the Court of Justice (pursuant to the former Art 234 EC Treaty (now Art 267 TFEU)) whether freedom of movement for citizens of the Union precludes the condition that studies abroad must be a continuation of education or training pursued for at least one year in Germany. In the event that the reply to that question is in the affirmative, that court stated that it would also uphold Bucher's action.

In its judgment, the Court of Justice stated that although the Member States are competent to determine the content of teaching and the organisation of their respective education systems, that competence must be exercised in compliance with Union law and, in particular, in compliance with freedom of movement for citizens of the Union.

Consequently, where a Member State provides for a system of education or training grants which enables students to receive such grants if they pursue studies in another Member State it must ensure that the detailed rules for the award of those grants do not create an unjustified restriction on freedom of movement.

On account of the personal inconvenience, additional costs and possible delays which it entails, the twofold obligation, to have attended an education or training course for at least one year in Germany and to continue only that same education or training in another Member State, is liable to discourage citizens of the Union from leaving Germany in order to

pursue studies in another Member State. It therefore constitutes a restriction on freedom of movement for citizens of the Union.

Justification for the restriction on freedom of movement

A number of arguments were submitted to the Court seeking to justify the condition of a first stage of studies in Germany.

The Court recognised that the objective of ensuring that students complete their courses in a short period of time may constitute a legitimate aim in the context of the organisation of the education system. However, the Court held that the first-stage studies condition in Germany was inappropriate for achieving that objective.

The Court held that **the requirement of continuity** between the studies in Germany and those pursued abroad is not proportionate to the objective of enabling students to determine whether they have made 'the right choice' in respect of their studies. That requirement **may prevent students from pursuing, in another Member State, education or training different from that pursued in Germany**. As regards education or training courses in respect of which there are no equivalents in Germany, the students concerned are obliged to choose between foregoing the planned education or training course and losing entitlement to an education or training grant.

The Court stated that, **in principle, a Member State is entitled**, in order to ensure that education or training grants to students wishing to study in other Member States do not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State, **to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State**. The first-stage studies condition is nonetheless too general and exclusive in that it unduly favours an element which is not necessarily representative of the degree of integration into the society of that Member State at the time the application for assistance is made.

The Court also rejected the argument that the first-stage studies condition was necessary to prevent duplication of the assistance granted by different Member States. It observed that that condition was in no way intended to prevent or take account of any duplication. It could not therefore be claimed that the requirement of a first stage of studies in Germany was appropriate or necessary, by itself, to ensure that those grants were not duplicated.

The Court concluded that **the restriction on freedom of movement could not be justified by the reasons put forward**.

The next two cases concerned a work-seeker's right to claim a social security benefit:

Collins (Case C-138/02)

In the UK, the grant of a 'jobseeker's allowance' to persons seeking employment is subject to a condition (i) of habitual residence or (ii) that the person is a worker for the purposes of Regulation 1612/68 or a person with a right to reside in the UK pursuant to Directive 68/360 (Directive 68/360 has since been repealed and replaced by Directive 2004/38).

Brian Collins was born in the United States and had dual American and Irish nationality. Having spent one semester in the UK in 1978 as part of his university studies and having worked for ten months in 1980 and 1981 on a part-time and casual basis in bars and the sales sector, he returned to the UK in 1998 for the purpose of seeking employment. He applied for a jobseeker's allowance but was refused on the grounds that he was not habitually resident in the UK and was not a worker for the purposes of Regulation 1612/68, nor was he entitled to reside in the UK pursuant to Directive 68/360.

Three questions were referred to the Court of Justice for a preliminary ruling in this connection, the first two of which concerned respectively the regulation and the directive, while the third, phrased in an open manner, asked whether there might be some provision or principle of Union law capable of assisting the applicant in his claim.

On the question of whether Mr Collins was a worker within the terms of Regulation 1612/68 (see Chapter 12), the Court took the view that, as 17 years had elapsed since he had last been engaged in an occupational activity in the UK, Mr Collins did not have a sufficiently close connection with the employment market in that Member State. The situation of Mr Collins, the Court ruled, was comparable to that of any person seeking his first employment. The Court pointed out in this regard that a distinction had to be drawn between persons looking for work in the host Member State without having previously worked there and those who have already entered the employment market in that Member State. While the former benefit from the principle of equal treatment only as regards access to employment, the latter may, on the basis of Art 7(2), Regulation 1612/68, claim the same social and tax advantages as national workers (see Chapter 12). The Court took the view that Mr Collins was not a worker in the sense in which that term covers persons who have already entered the employment market.

With regard to Directive 68/360, the Court first pointed out that the Treaty itself confers a right of residence, which may be limited in time, on nationals of Member States who are seeking employment in other Member States. The right to reside in a Member State which Directive 68/360 confers is reserved for nationals who are already employed in that Member State. Mr Collins was not in that position and he could therefore not rely on the directive.

The Court of Justice concluded by examining the UK legislation in the light of the fundamental principle of equal treatment. Nationals of one Member State who are seeking employment in another Member State come in that regard, the Court held, within the scope of application of the former Art 39 EC Treaty (now Art 45 TFEU) and are thus entitled to benefit from the right to equal treatment set out in the former Art 39(2) EC Treaty (now Art 45(2) TFEU). However, the Court held that in principle this does not extend the right of equal treatment to benefits of a financial nature such as the jobseeker's allowance; equality of treatment in regard to social and financial benefits applies only to persons who have already entered the employment market, while others specifically benefit from it only as regards access to employment. The Court considered, however, that, **in view of the establishment of EU citizenship and the interpretation in the case law of the right to equal treatment enjoyed by EU citizens, it was no longer possible to exclude from the scope of the former Art 39(2) EC Treaty (now Art 45(2) TFEU), which is an expression of equal treatment, a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.** In the present case, the residence condition imposed by the UK legislation was likely to be more easily satisfied by UK nationals. It could be justified only if it was based on objective considerations that were independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national law. It was, the Court pointed out, legitimate for the national legislature to wish to ensure that there was a genuine link between an applicant for the allowance and the employment market, in particular by establishing that the person concerned was, for a reasonable period, in fact genuinely seeking work. However, if it is to be proportionate, a period of residence required for that purpose may not exceed what is necessary in order to enable the national authorities to be satisfied that the person concerned is genuinely seeking work.

Ioannidis (Case C-258/04)

The Court of Justice was required to examine the case of a Greek national who arrived in Belgium in 1994 after completing his secondary education in Greece and having obtained

recognition of the equivalence of his certificate of secondary education. After a three-year course of study in Liège (Belgium), he obtained a graduate diploma in physiotherapy and then registered as a jobseeker. He went to France to follow a paid training course from October 2000 to June 2001 and then returned to Belgium, where he submitted an application for a 'tideover allowance', an unemployment benefit provided for under Belgian legislation for young people seeking their first job. His application was refused because he did not fulfil the relevant requirements at that time, which were that he should have (i) completed his secondary education in Belgium; or (ii) pursued education or training of the same level and equivalent thereto in another Member State and been the dependent child of a migrant worker (for the purposes of the former Art 39 EC Treaty (now Art 45 TFEU)) who was residing in Belgium.

The proceedings arising out of the action brought by Mr Ioannidis against that refusal led the Cour du travail de Liège (Higher Labour Court, Liège) to refer a question to the Court of Justice regarding the compatibility of the Belgian system with Union law.

The Court observed, first of all, that nationals of a Member State seeking employment in another Member State fall within the scope of the former Art 39 EC Treaty (now Art 45 TFEU) and therefore enjoy the right to equal treatment laid down in the former Art 39(2) EC Treaty (now Art 45(2) TFEU); see Chapter 12.

The remainder of the Court's answer drew on case law set out in recent judgments delivered by the Court, in particular those in **D'Hoop** (Case C-224/98) and **Collins** (Case C-138/02).

The Court of Justice observed that in **Collins** it held that, in view of the establishment of EU citizenship and the interpretation of the right to equal treatment enjoyed by EU citizens, it is no longer possible to exclude from the scope of the former Art 39(2) EC Treaty (now Art 45(2) TFEU) a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State. In addition, the Court had already found in **D'Hoop** that the tideover allowances provided for by the Belgian legislation are social benefits, the aim of which is to facilitate, for young people, the transition from education to the employment market. Mr Ioannidis was therefore justified in relying on the former Art 39 EC Treaty (now Art 45 TFEU) to claim that he could not be discriminated against on the basis of nationality as far as the grant of a tideover allowance was concerned. The condition that secondary education must have been completed in Belgium could be met more easily by Belgian nationals and could therefore place nationals of other Member States at a disadvantage.

As for possible justification of that difference in treatment, the Court again referred to D'Hoop, in which it held that although it is legitimate for the national legislature to wish to ensure that there is a real link between the applicant for a tideover allowance and the geographic employment market concerned, a single condition concerning the place where completion of the secondary education diploma was obtained is too general and exclusive in nature and goes beyond what is necessary to attain the objective pursued. Lastly, as regards the fact that the Belgian legislation nonetheless affords a right to a tideover allowance to an applicant if he has obtained an equivalent diploma in another Member State and if he is the dependent child of a migrant worker who is residing in Belgium, the Court considered, by converse implication, that a person who pursues higher education in a Member State and obtains a diploma there, having previously completed secondary education in another Member State, may well be in a position to establish a real link with the employment market of the first Member State, even if he is not the dependent child of a migrant worker residing in that Member State. The Court noted that, in any event, dependent children of migrant workers who are residing in Belgium derive their right to a tideover allowance from Art 7(2), Regulation 1612/68, regardless of whether there is a real link with the employment market (see Chapter 12).

At issue in the following case was whether a residence condition was compatible with Art 18 EC Treaty (Art 21 TFEU, post-ToL):

Tas-Hagen and Tas (Case C-192/05)

This case concerned legislation on the award of benefits to civilian war victims which requires the person concerned to be resident on national territory at the time at which the application is submitted.

The Court of Justice held that a benefit to compensate civilian war victims falls within the competence of the Member States, although they must exercise that competence in accordance with Union law. In the case of legislation of the kind at issue, exercise of the right of free movement and of residence which is accorded by the former Art 18 EC Treaty (now Art 21 TFEU) is such as to affect the prospects of receiving the benefit, so that the situation cannot be considered to have no link with Union law.

With regard to the permissibility of the residence condition, the Court stated that it is liable to deter exercise of the freedoms accorded by the former Art 18 EC Treaty (now Art 21 TFEU) and therefore constitutes a restriction on those freedoms. It stated that the condition may be justified in principle by the wish to limit the obligation of solidarity with war victims to those who had links with the population of the state concerned during and after the war, the condition of residence thereby demonstrating the extent to which those persons are connected to its society. However, while noting the wide margin of appreciation enjoyed by the Member States with regard to benefits that are not covered by Union law, the Court held that a residence condition cannot be a satisfactory indicator of that connection when it is liable to lead to different results for persons resident abroad whose degree of integration is in all respects comparable. **The Court therefore held that a residence criterion based solely on the date on which the application for the benefit is submitted is not a satisfactory indicator of the degree of attachment of the applicant to the society which is demonstrating its solidarity with him and therefore fails to comply with the principle of proportionality.**

The next case was decided by the Court of Justice during 2005. It provided the Court of Justice with the opportunity to clarify the limits of the material scope of the EU Treaties with regard to EU citizenship:

Schempp (Case C-403/03)

In Germany, income tax legislation provides that maintenance payments to a divorced spouse are deductible (thus reducing a person's income tax liability). That advantage is also granted where recipients (the divorced spouse in this case) have their principal or habitual residence in another Member State, provided that taxation of the recipient's maintenance payments is proved by a certificate from the tax authorities of that other Member State. Egon Schempp, a German national resident in Germany, was refused the deduction of maintenance payments made to his former spouse resident in Austria, because Austrian tax law excluded the taxation of maintenance payments.

When a question was referred to it from the Bundesfinanzhof (Federal Finance Court, Germany) for a preliminary ruling on whether the German system complied with the former Arts 12 and 18 EC Treaty (now Arts 18 and 21 TFEU), the Court considered first of all whether such a situation falls within the scope of Union law. The governments which had submitted observations contended that Mr Schempp had not made use of his right of free movement, and the only external factor was the fact that Mr Schempp was paying maintenance in another Member State. **The Court observed that EU citizenship is not intended to extend the material scope of the Treaty to internal situations which have no link with Union law.** However, the situation of a national of a Member State who has not made use of the right to free movement cannot, for that reason alone, be assimilated to a purely internal situation. Here, the exercise

by Mr Schempp's former spouse of a right conferred under Union law to move freely to, and reside in, another Member State had an effect on his right to deduct in Germany, so **there was no question of it being an internal situation with no connection with Union law.**

The Court then considered, with regard to the principle of non-discrimination, whether Mr Schempp's situation could be compared with that of a person who was paying maintenance to a former spouse resident in Germany and was entitled to deduct the maintenance payments made to her, and it found that that was not the case. It observed that the unfavourable treatment of which Mr Schempp complained derived from the difference between the German and Austrian tax systems with regard to the taxing of maintenance payments. It is settled case law that the former Art 12 EC Treaty (now Art 18 TFEU) is not concerned with any disparities in treatment which may result from differences existing between the various Member States, so long as they affect all persons subject to them in accordance with objective criteria and without regard to their nationality.

As regards the application of the former Art 18 EC Treaty (now Art 21 TFEU), the Court found that the German legislation did not in any way obstruct Mr Schempp's right to move to and reside in other Member States. The transfer of his former spouse's residence to Austria did entail tax consequences for him. However, the Court observed that the Treaty offers no guarantee to an EU citizen that transferring his activities to a Member State other than that in which he previously resided will be neutral as regards taxation. Given the disparities in the tax legislation of the Member States, such a transfer may be to the citizen's advantage in terms of indirect taxation or not, according to the circumstances. That principle applies *a fortiori* to a situation where the person concerned has not himself made use of his right of free movement, but claims to be the victim of a difference in treatment following the transfer of his former spouse's residence to another Member State.

Likewise, in the following case the Court of Justice held that there was no breach of the former Art 18 EC Treaty (now Art 21 TFEU):

De Cuyper (Case C-406/04)

The Court of Justice examined the compatibility of Belgian legislation on unemployment with the freedom of movement and residence conferred on EU citizens by the former Art 18 EC Treaty (now Art 21 TFEU).

Under Belgian legislation, unemployed persons over 50 years of age, although no longer obliged to remain available for work, are subject to a residence requirement. The Court of Justice reiterated the point that the right of residence of EU citizens is not unconditional, but is conferred subject to the limitations and conditions laid down by the Treaty and by the measures adopted to give it effect.

The Court found that the Belgian legislation places certain Belgian nationals at a disadvantage simply because they have exercised their freedom of movement and residence, and is thus a restriction on the freedoms conferred by Art 18 EC Treaty (now Art 21 TFEU). It accepted, however, that the restriction was justified by objective considerations of public interest independent of the nationality of the persons concerned. The Court stated that a residence condition reflects the need to monitor the employment and family situation of unemployed persons by allowing inspectors to check whether the situation of a recipient of the unemployment allowance has undergone changes which may have an effect on the benefit granted. The Court also noted that the specific nature of monitoring with regard to unemployment justifies the introduction of arrangements that are more restrictive than for other benefits and that more flexible measures, such as the production of documents or certificates, would mean that the monitoring would no longer be unexpected and would consequently be less effective.

The above cases demonstrate that, when determining the scope of an EU citizen's right of free movement, the former Art 18(1) EC Treaty (now Art 21(1) TFEU) right of EU citizens to move and reside freely within the territory of the Member States and the former anti-discriminatory Art 12 EC Treaty (now Art 18 TFEU) provision must be taken into consideration; in some situations these two provisions will be of fundamental importance to the outcome of the case.

Free movement rights

In the early days of the Union, freedom of movement was seen as the means by which labour and skills shortages in one Member State could be met out of a surplus of labour and skills in another. That approach was subsequently modified, both in later implementing legislation and by decisions of the Court of Justice. The Court has interpreted the EU Treaties and the implementing provisions generously. The application of the former Art 39(3)(a) EC Treaty (now Art 45(3)(a) TFEU, post-ToL), which appears to confer a right to go to another Member State only on those able to 'accept offers of employment **actually made**' (emphasis added), to work-seekers is perhaps one of the most remarkable examples of creative interpretation (**Procureur du Roi v Royer** (Case 48/75)). Although each of the free movement rights depended until the 1990s on a specific economic activity, the Court has tended to develop a body of general principles applicable to all those exercising free movement rights. Directive 2004/38 (which replaced, *inter alia*, Directive 90/364) creates a general right of entry and residence for up to three months (see below).

Most importantly, all free movement rights are directly effective and enforceable in the courts of Member States as fundamental rights (see Chapter 9). The entry or residence of those exercising them is not dependent upon any consent or leave given by the host Member State. Provided that an individual is engaged in an activity which confers Union rights of entry or residence, or comes within the scope of the general right of residence (for up to three months) set out in Directive 2004/38, the host Member State cannot terminate that right of residence (**R v Pieck** (Case 157/79)). There are exceptions to rights of entry and residence in cases where the individual constitutes a threat to public policy, public security or public health under Arts 45(3) and 52(1) TFEU (previously Arts 39(3) and 46(1) EC Treaty) and Directive 2004/38 (which replaced, *inter alia*, Directive 64/221). These powers of Member States to derogate from individual rights of free movement have, however, been interpreted strictly by the Court (see **Adoui and Cornuaille v Belgian State** (Cases 115 and 116/81), and Chapter 15).

Since free movement rights are fundamental rights, the Court of Justice has held that they must be transparent in national legislation. Incompatible provisions of national law which, for example, exclude the employment of foreign nationals, even though they are not, in practice, applied in the case of EU citizens, must be amended to make it absolutely clear that EU citizens enjoy equal access (**Commission v France (Re French Merchant Seamen)** (Case 167/73)). It is not sufficient that Union rights should be enjoyed by virtue of administrative concessions. Those enjoying such rights must be made aware of them and, should the need arise, be able to rely upon them before a court of law (**Commission v Germany (Re Nursing Directives)** (Case 29/84)).

Decisions affecting the exercise by an individual of free movement rights should set out the reasons for them, to enable an effective legal challenge to be made. The procedures for challenging any denial of such rights, whether on the basis of public policy,

public security or public health, under Directive 2004/38 (see Chapter 15), or on any other ground, should follow the Union principles of fairness and be compatible with the European Convention on Human Rights (*UNECTEF v Heylens and Others* (Case 222/86)). The provisions of the Convention are now directly applicable to the exercise of Union rights (Art 6(3) TEU (previously Art 6(2) TEU)). Failure to deliver these rights can give rise to a claim in damages against the Member State concerned.

Non-discrimination on grounds of nationality (Art 18 TFEU (previously Art 12 EC Treaty)) is, as has been seen above, another fundamental principle of Union law that is important in the exercise of free movement rights. The detailed provisions of Regulation 1612/68 relating to equal access to employment and to other benefits enable the worker and his family to integrate into the host Member State, but there is no parallel legislation relating to the self-employed and to those providing and receiving services. Decisions of the Court of Justice relating to access to housing and the criminal process, which have been secured for workers under Regulation 1612/68 (Arts 7(2) and 9), have, however, been achieved for the self-employed and the recipients of services by a creative use of the former Art 12 EC Treaty (previously Art 18 TFEU); see *Commission v Italy* (Case 63/86) and *Cowan v Le Trésor Public* (Case 186/87). Article 18 TFEU (previously Art 12 EC Treaty) does, however, apply only to matters covered by the EU Treaties and any aspect of an individual's life which may affect his entry into or residence in another Member State as a beneficiary of Union law (unless, as discussed above, the Court applies Art 18 TFEU in conjunction with the EU citizenship provisions, to confer an independent right to be treated without discrimination in all matters).

The free movement rights will also be enhanced by measures adopted pursuant to Art 19 TFEU (previously Art 13 EC Treaty). Article 19 TFEU is the legal base for the adoption of measures to 'combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation', provided such measures do not exceed the powers of the Union as conferred upon it by the EU Treaties. In other words, measures can be adopted to combat discrimination provided they are in furtherance of the existing powers of the Union.

Pursuant to the former Art 13 EC Treaty (now Art 19 TFEU), the Council adopted Directive 2000/43 (OJ 2000 L 180/22) which implemented the principle of equal treatment between persons irrespective of racial or ethnic origin. The directive had to be implemented by 19 July 2003. The principle of equal treatment prohibits direct or indirect discrimination based on racial or ethnic origin (Art 1). It applies to EU and non-EU citizens and covers both public and private sectors in relation to employment, self-employment, education, social protection including social security and healthcare, social advantages, and access to and supply of goods and services (Art 3(1)). The prohibition of racial or ethnic discrimination does not, however, cover national provisions relating to the entry into and residence of third-country (i.e. non-EU) nationals (Art 13(2)). The directive does not, therefore, extend the free movement provisions *per se* to non-EU citizens (see below). The directive has been implemented in the UK by the following measures:

- Race Relations Act 1976 (Amendment) Regulations 2003 SI 2003/1626;
- Race Relations Order (Amendment) Regulations (Northern Ireland) 2003 SI 2003/341; and
- Equality Act 2006.

Again pursuant to the former Art 13 EC Treaty (now Art 19 TFEU), the Council adopted Directive 2000/78 (OJ 2000 L 303/16) which establishes a general framework for equal treatment in employment and occupation. The directive had to be implemented by 3 December 2003. The directive prohibits direct and indirect discrimination as regards access to employment and occupation on grounds of religion or belief, disability, age or sexual orientation. It applies to both the public and private sectors. As with Directive 2000/43, this directive applies to EU and non-EU citizens, but likewise, the prohibition does not cover national provisions relating to the admission and residence of third-country (i.e. non-EU) nationals (Art 3(2)). The directive does not, therefore, extend the free movement provisions, *per se*, to non-EU citizens (see below). The directive has been implemented in the UK by the Equality Act 2006 (as subsequently amended) and secondary legislation.

Although discrimination in relation to both employment and self-employment is generally prohibited, restrictions on the employment of EU nationals in 'the public service' are permitted by Art 45(4) TFEU (previously Art 39(4) EC Treaty). There are similar provisions relating to the self-employed, who may be refused participation in activities which 'are connected, even occasionally, with the exercise of official authority' (Art 51 TFEU (previously Art 45 EC Treaty)). There is no definition in the Treaties or the secondary legislation of either 'the public service' or 'the exercise of official authority', but both exceptions have been narrowly interpreted by the Court of Justice. The mere fact that the employer is the state is not conclusive. It is the nature of the employment which is the determining factor (**Lawrie-Blum v Land Baden-Württemberg** (Case 66/85); see Chapters 12 and 13).



To benefit from Union free movement rights, a person must be, or have been, a migrant in some sense or other. A person who has not left his own state, and does not intend to do so, cannot be a beneficiary (**Iorio** (Case 298/84)). However, this may change in relation to family reunification. Article 79(2)(a) TFEU (previously Art 63(3)(a) EC Treaty) enables measures to be adopted on immigration policy concerning the 'conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification'. Pursuant to the former Art 63(3)(a) EC Treaty (now Art 79(2)(a) TFEU), a directive has been proposed to apply to EU citizens who do not exercise their free movement rights. The aim of this directive is to avoid discriminating between EU citizens who exercise their free movement rights and those who do not. In order to achieve this, it is necessary to provide for the family reunification of EU citizens residing in countries of which they are nationals to be governed by the rules of Union law relating to free movement. If this directive is adopted, an EU citizen who has not exercised his free movement rights in another Member State will have the right to have specified family members installed with him. This right will override any less generous national provisions. In the meantime, however, he can be a worker or a self-employed person *vis-à-vis* his own state if he works in another Member State for a period and then returns home. He may then enjoy the family rights of a Union migrant against his own state, which will override the more restrictive national provisions (**Morson v Netherlands** (Case 35/82); **R v IAT and Surinder Singh** (Case C-370/90)). A person who has not left his own state may still benefit from free movement rights if, for example, he has arranged employment in another Member State, or wishes to establish a business there. Subject to the public policy, public security or public health exceptions, he cannot be prevented from leaving (Art 4(1), Directive 2004/38; see below and Chapters 12, 13 and 15).

Directive 2004/38: right of entry and residence

Although the substantive provisions of the EU Treaties and secondary legislation relating to the free movement of persons will be considered in detail in subsequent chapters, Directive 2004/38 (which relates to an EU citizen's right of entry and residence in a Member State of which they are not a national) will be considered here in detail. The rationale for considering the directive in detail at this stage is because the directive, which had to be transposed into national law by 30 April 2006, sets out the rights of entry and residence which apply across the whole range of persons exercising their right of free movement (e.g. tourists, work-seekers, workers, the self-employed, providers and recipients of services and retired persons). The directive merges into a single instrument all the legislation on the right of entry and residence for EU citizens and their family members. Regulation 1612/68 has been amended (Arts 10 and 11 have been repealed), and the following nine directives have been repealed: Directives 64/221, 68/360, 72/194, 73/148, 75/34, 75/35, 90/364, 90/365 and 93/96. Regulation 1251/70 was subsequently repealed by Regulation 635/2006. The purpose of the new directive is to simplify the law; it sets out to reduce to the bare minimum the formalities which EU citizens and their family members must complete in order to exercise their right of residence. This section provides a comprehensive review of the full range of rights of entry and residence set out within the directive.

Scope

The directive is designed to regulate:

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

Right of exit and entry (Articles 4 and 5)

All EU citizens have the right to leave or enter another Member State by virtue of having a valid identity card or valid passport (Arts 4(1) and 5(1)). Under no circumstances can an entry or exit visa be required (Arts 4(2) and 5(1)).

Article 3(1) provides that the Directive applies to all EU citizens exercising their right to move to, or reside in, a Member State other than that of which they are a national, and to 'family members' who accompany or join them. Article 2(2) defines 'family members' as the EU citizen's:

- (a) spouse;
- (b) registered partner, if the legislation of the host Member State treats registered partnerships as equivalent to marriage;
- (c) direct descendants (i.e. children, grandchildren, etc.) who are under the age of 21 or who are dependants, and those of the spouse or partner as defined above; and
- (d) dependent direct relatives in the ascending line (i.e. parents, grandparents, etc.), and those of the spouse or partner as defined above.

This definition of ‘family members’ has a broader scope than the former definition set out in Art 10(1), Regulation 1612/68 (see Chapter 12).

‘Family members’ who do not have the nationality of a Member State (i.e. non-EU family members) may be subject to an entry visa requirement under Regulation 539/2001; residence cards will be deemed equivalent to visas (Art 5(2)).

Where the EU citizen or their family member does not have the necessary travel documents, the host Member State must afford them every facility to obtain the requisite documents or to have them sent (Art 5(4)).

In addition to family members (as defined by Art 2(2)), Art 3(2) provides that the host Member State shall, in accordance with its national legislation, ‘facilitate’ entry and residence for the following persons:

- (a) any other family members (whether or not they are EU citizens) who are dependants or members of the household of the EU citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the EU citizen; and
- (b) the partner with whom the EU citizen has a durable relationship, which is duly attested.

The host Member State is required to undertake an extensive examination of the personal circumstances of such persons and shall justify any denial of entry or residence (Art 3(2)).

Article 5(5) provides that the host Member State may require each person travelling to, or residing in, another Member State to register their presence in the country within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person liable to a proportionate and non-discriminatory sanction.

In the following case, the Court of Justice considered whether Irish legislation was contrary to Directive 2004/38. The Irish legislation in question provided that a third-country (i.e. non-EU) national who was a family member of an EU citizen, could only reside with or join that citizen in Ireland if he was already lawfully resident in another Member State:

Metock and Others v Minister for Justice, Equality and Law Reform
(Case C-127/08)

The Irish legislation transposing Directive 2004/38 provides that a national of a third country who is a family member of a Union citizen may reside with or join that citizen in Ireland only if he is already lawfully resident in another Member State. The question of the compatibility of the Irish legislation with the directive was raised in four cases pending before the High Court of Ireland. In each of those cases a third-country national arrived in Ireland and applied for asylum. In each case the application was refused. While resident in Ireland those four persons married citizens of the Union who did not have Irish nationality but were resident in Ireland. None of the marriages was a marriage of convenience.

After the marriage, each of the non-EU spouses applied for a residence card as the spouse of a Union citizen. The applications were refused by the Minister for Justice on the ground that the spouse did not satisfy the condition of prior lawful residence in another Member State.

Actions were brought against those decisions in the High Court, which referred the cases to the Court of Justice (pursuant to the former Art 234 EC Treaty (now Art 267 TFEU)) for guidance on whether such a condition of prior lawful residence in another Member State was compatible with the directive and whether the circumstances of the marriage and the way in which the non-EU spouse of the Union citizen entered the Member State concerned have consequences for the application of the directive.

The Court of Justice stated that, as regards family members of a Union citizen, the application of the directive is not conditional on their having previously resided in a Member State. The directive applies to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members who accompany them or join them in that Member State. The definition of family members in the directive does not distinguish according to whether or not they have already resided lawfully in another Member State.

The Court stated that its judgment in **Akrich** (Case C-109/01), in which it ruled that, in order to benefit from the rights of entry into and residence in a Member State, the non-EU spouse of a Union citizen must be lawfully resident in a Member State when he moves to another Member State in the company of a Union citizen, must be reconsidered. The benefit of such rights cannot depend on prior lawful residence of the spouse in another Member State.

The Court emphasised that, if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed, since they would be discouraged from exercising their rights of entry into and residence in that Member State.

In reply to the argument of the Minister for Justice and of several Member States that to interpret the directive in the fashion adopted by the Court would have serious consequences by bringing about a great increase in the number of persons able to benefit from a right of residence in the Union, the Court stated that only the family members of a Union citizen who has exercised his right of freedom of movement can benefit from the rights of entry and residence under the directive. Moreover, the Member States may refuse entry and residence on grounds of public policy, public security or public health, the refusal being based on an individual examination of the particular case. It added that the Member States could also refuse, terminate or withdraw any right conferred by the directive in the case of abuse of rights or fraud, such as marriages of convenience.

The Court held that a non-EU spouse of a Union citizen who accompanies or joins that citizen can benefit from the directive, irrespective of when and where their marriage took place and of how that spouse entered the host Member State.

The Court stated that the directive does not require that the Union citizen must already have founded a family at the time when he moved, in order for his family members who are nationals of non-member countries to be able to enjoy the rights established by the directive. The Court further stated that it made no difference whether nationals of non-member countries who are family members of a Union citizen have entered the host Member State before or after becoming family members of that citizen; the host Member State is, however, entitled to impose penalties, in compliance with the directive, for entry into and residence in its territory in breach of the national rules on immigration.

General right of residence for up to three months (Article 6)

Article 6(1) provides that EU citizens shall have the right of residence in another Member State for a period of up to three months without any conditions or formalities other than the requirement to hold a valid identity card or passport (or a valid passport in the case of non-EU family members).

Article 6(2) provides that 'family members' who do not have the nationality of a Member State (i.e. non-EU family members) enjoy the same rights as the EU citizen who they have accompanied or joined.

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 (Art 5(5), see above).

Article 14(1) provides that EU citizens and their family members shall have the right of residence under Art 6, 'as long as they do not become an *unreasonable* burden on the social assistance system of the host Member State' (emphasis added); expulsion shall not be an automatic consequence if an EU citizen or his family members have recourse to the host Member State's social assistance system (Art 14(3)). Article 14(4) further provides that (other than in accordance with the provisions relating to restrictions on the right of entry and residence on grounds of public policy, public security or public health) an expulsion order cannot be issued against an EU citizen or his family members, if:

- (i) the EU citizen is a worker or self-employed person in the host Member State; or
- (ii) the EU citizen entered the host Member State to seek employment and provided he can supply evidence that he is continuing to seek work and has a genuine chance of being employed.

Right of residence for more than three months (Article 7)

The right of residence for more than three months remains subject to certain conditions. Article 7(1) provides that EU citizens have the right to reside in another Member State, for a period exceeding three months, if they:

- (a) are engaged in an economic activity in the host Member State (on an employed or self-employed basis);
- (b) have comprehensive sickness insurance and sufficient resources for themselves and their family members to ensure they do not become a burden on the social assistance system of the host Member State during their stay. Article 8(4) provides that Member States may not specify a minimum amount of resources which they deem sufficient, but they must take account of the personal situation of the person concerned. The amount of minimum resources cannot be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or if this does not apply, higher than the minimum social security pension paid by the host Member State;
- (c) are following a course of study, including vocational training, at a public or private institution which is accredited or financed by the host Member State. The student must have comprehensive sickness insurance and assure the Member State, by a declaration or equivalent means, that they have sufficient resources for themselves and their family members to ensure that they do not become a burden on the social assistance system of the host Member State during their stay. Article 8(3) provides that Member States may not require the declaration to refer to any specific amount of resources; or
- (d) are a 'family member' of an EU citizen who falls into one of the above categories.

Article 7(2) provides that the right of residence also applies to family members who are not nationals of a Member State (i.e. non-EU family members), who are accompanying or joining an EU citizen in the host Member State, provided that such EU citizen satisfies the conditions set out in (a), (b) or (c) above.

In the case of students, there is a limitation on the family members who may accompany or join them. Article 7(4) provides that only the spouse/registered partner and dependent children shall have the right of residence as family members of the student.

Dependent direct relatives in the ascending lines, and those of his spouse/registered partner, shall have their entry and residence facilitated (in accordance with Art 3(2), see above).

Residence permits are abolished for EU citizens. However, Arts 8(1) and 8(2) provide that Member States may require EU citizens to register with the competent authorities within a period of not more than three months as from the date of arrival. A registration certificate will be issued immediately (Art 8(2)). For the registration certificate to be issued, Art 8(3) provides that Member States may only require the following documentation:

- (a) in the case of an EU citizen to whom Art 7(1)(a) applies (i.e. a worker or self-employed person), a valid identity card or passport, and confirmation of engagement from the employer or a certificate of employment, or proof of their self-employed status;
- (b) in the case of an EU citizen to whom Art 7(1)(b) applies (i.e. a citizen having sufficient resources and comprehensive sickness insurance), a valid identity card or passport, proof of comprehensive sickness insurance, and proof that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or
- (c) in the case of an EU citizen to whom Art 7(1)(c) applies (i.e. a student), a valid identity card or passport, proof of enrolment at an accredited institution, proof of comprehensive sickness insurance, and a declaration (or equivalent means) that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence.

Article 8(5) provides that registration certificates will be issued to family members who are nationals of a Member State (i.e. EU family members); this is subject to the production of specified documentation. This provision also applies to other EU family members whose entry and residence to the host Member State shall be facilitated in accordance with Art 3(2).

Article 9 applies to family members who are not nationals of a Member State (i.e. non-EU family members). Such family members must apply for a residence card not more than three months from their date of arrival (Art 9(2)). A residence card is valid for at least five years from its date of issue, or for the envisaged period of residence of the EU citizen if this is less than five years (Art 11(1)). Article 10(2) sets out the documentation required before a residence card will be issued. This provision also applies to other non-EU family members whose entry and residence to the host Member State shall be facilitated in accordance with Art 3(2). Article 11(2) provides that the validity of a residence card shall not be affected by:

- (i) temporary absences of up to six months a year;
- (ii) absences of a longer period for compulsory military service; or
- (iii) one absence of up to 12 months for important reasons (e.g. pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country (i.e. non-EU country)).

Article 7(3) provides that an EU citizen shall retain the status of worker or self-employed person in the host Member State in the following circumstances:

- (a) he is temporarily unable to work as the result of an illness or accident;
- (b) he is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a jobseeker with the relevant employment office in the host Member State;
- (c) he is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year *or* after having become involuntarily unemployed during the first twelve months *and* has registered as a jobseeker with the relevant employment office in the host Member State. In this case, the status of worker shall be retained for not less than six months; or
- (d) he embarks on vocational training. Unless he is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

Article 12(1) provides that if an EU citizen dies or departs from the host Member State, his EU family members shall not have their right of residence affected. In the case of a non-EU family member, their right of residence shall not be affected if the EU citizen dies provided that the non-EU family member has been residing in the host Member State as a family member for at least one year before the EU citizen's death (Art 12(2)).

Article 12(3) provides that if an EU citizen dies or departs from the host Member State, if his children reside in the host Member State and are enrolled at an educational establishment, then his children and the parent who has actual custody of the children (whether or not they are EU citizens) shall have the right to reside in the host Member State until the children have completed their studies.

Article 13 governs a family member's right of residence following divorce, annulment of marriage or termination of partnership. In the case of EU family members, divorce, annulment of marriage or termination of partnership does not affect the family member's right of residence (Art 13(1)). However, in the case of non-EU family members, retention of the right of residence is restricted; Art 13(2) provides that there shall be no loss of the right of residence where:

- (a) prior to the start of the divorce or annulment proceedings or termination of the registered partnership, the marriage or registered partnership had lasted at least three years, including one year in the host Member State;
- (b) by agreement between the spouses or the registered partners, or by court order, the spouse or partner who is a non-EU national has custody of the EU citizen's children;
- (c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or
- (d) by agreement between the spouses or registered partners, or by court order, the spouse or partner who is a non-EU national has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.

Article 14(2) provides that EU citizens and their family members shall have the right of residence under Arts 7, 12 and 13 'as long as they meet the conditions set out therein'; expulsion shall not be an automatic consequence if an EU citizen or his family members have recourse to the host Member State's social assistance system (Art 14(3)). Article 14(4) further provides that (other than in accordance with the provisions relating to restrictions on the right of entry and residence on grounds of public policy, public security or

public health) an expulsion order cannot be issued against an EU citizen or his family members if:

- (i) the EU citizen is a worker or self-employed person in the host Member State; or
- (ii) the EU citizen entered the host Member State to seek employment and provided he can provide evidence that he is continuing to seek work and has a genuine chance of being employed.

Procedural safeguards (Article 15)

Article 15(1) provides that the procedures set out in Arts 30 and 31 (see below) will apply by analogy to all decisions restricting free movement of EU citizens and their family members on grounds other than public policy, public security or public health.

Expiry of the identity card or passport on the basis of which the persons concerned entered the host Member State and were issued with a registration certificate or residence card shall not constitute a ground for expulsion from the host Member State (Art 15(2)).

Right of permanent residence (Article 16)

EU citizens acquire the right of permanent residence in the host Member State after a five-year period of continuous legal residence (Art 16(1)), provided that an expulsion decision has not been enforced against them (Art 21). This right of permanent residence is no longer subject to any conditions. The same rule applies to non-EU family members who have lived with an EU citizen in the host Member State for five years (Art 16(2)), and again provided that an expulsion decision has not been enforced against them (Art 21). Article 16(3) provides that continuity of residence shall not be affected by:

- (i) temporary absences not exceeding six months a year;
- (ii) absences of a longer period for compulsory military service; or
- (iii) one absence of up to 12 months for important reasons (e.g. pregnancy and child-birth, serious illness, study or vocational training, or a posting in another Member State or a third country).

Once granted, the right of permanent residence is lost only in the event of more than two successive years' absence from the host Member State (Arts 16(4) and 20(3)).

Article 17 recognises the right of permanent residence for EU citizens who are workers or self-employed persons and for their family members, before the five-year period of continuous residence has expired, subject to certain conditions being met. Article 17 applies to cases where the EU citizen:

- (i) has reached retirement age;
- (ii) has become permanently incapable of working; or
- (iii) lives in the host Member State but works in another Member State.

Article 17 also provides that the family members of an EU worker or self-employed person have the right of permanent residence if the EU worker or self-employed person dies before acquiring the right of permanent residence. This right, which applies to family members of whatever nationality, is subject to the following conditions:

- (a) the worker or self-employed person had, at the time of death, resided continuously on the territory of that Member State for two years;

- (b) the death resulted from an accident at work or an occupational disease; or
- (c) the surviving spouse lost the nationality of that Member State following marriage to the worker or self-employed person.

Articles 12 and 13 were considered above. Of relevance to permanent residence are the following provisions.

Article 12(1) provides that if an EU citizen dies or departs from the host Member State, his family members who are nationals of a Member State shall not have their right of residence affected. However, before acquiring the right of permanent residence, the persons concerned must meet the conditions set out in Art 7(1)(a), (b), (c) or (d); see above. In the case of a non-EU family member, their right of residence shall not be affected if the EU citizen dies provided that the non-EU family member has been residing in the host Member State as a family member for at least one year before the EU citizen's death (Art 12(2)). However, before acquiring the right of permanent residence, the persons concerned must meet the conditions set out in Art 7(1)(a), (b), or (d); *note: category (c) does not apply to this situation*. Article 18 provides that the family members to whom Art 12(2) apply, who satisfy the conditions set out in Art 12(2), shall acquire the right of permanent residence after legally residing in the host Member State for a period of five consecutive years; this is without prejudice to Art 17 (see above).

Article 13 governs a family member's right of residence following divorce, annulment of marriage or termination of partnership. In the case of EU family members, divorce, annulment of marriage or termination of partnership does not affect the family member's right of residence (Art 13(1)). However, before acquiring the right of permanent residence, the persons concerned must meet the conditions set out in Art 7(1)(a), (b), (c) or (d); see above. In the case of non-EU family members, retention of the right of residence is restricted. Article 13(2) sets out the circumstances in which there shall be no loss of the right of residence (see above).

In this situation, however, before acquiring the right of permanent residence, the persons concerned must meet the conditions set out in Art 7(1)(a), (b), or (d). Article 18 provides that the family members to whom Art 13(2) apply, who satisfy the conditions set out in Art 13(2), shall acquire the right of permanent residence after legally residing in the host Member State for a period of five consecutive years; this is without prejudice to Art 17 (see above).

EU citizens entitled to permanent residence will be issued with a document certifying such residency (Art 19(1)). Article 20(1) provides that non-EU family members who are entitled to permanent residence will be issued with a residence card, renewable automatically every ten years. The application for a permanent residence card has to be submitted before the residence card expires (Art 20(2)); the residence card must be issued no more than six months after the application is made (Art 20(1)). Failure to apply for a permanent residence card may render the person concerned liable to proportionate and non-discriminatory sanctions (Art 20(2)).

Article 21 provides that continuity of residence may be attested by any means of proof in use in the Member State.

Common provisions on the right of residence and right of permanent residence

Article 22 provides that the right of residence and right of permanent residence shall cover the whole territory of the host Member State; territorial restrictions can only

be imposed if the same restrictions apply to the host Member State's nationals. Family members, irrespective of their nationality, are entitled to engage in an economic activity on an employed or self-employed basis (Art 23).

EU citizens qualifying for the right of residence or the right of permanent residence, and the members of their family, benefit from equal treatment with host-country nationals in the areas covered by the Treaty (Art 24(1)). However, for the first three months of residence, or while the EU citizen is exercising his right to reside while seeking work under Art 14(4)(b), the host Member State is not obliged to grant entitlement to social assistance to persons other than employed or self-employed workers and the members of their family (Art 24(2)). Equally, host Member States are not required to provide maintenance aid (i.e. student grants or student loans) to persons with a right of residence who have come to the country in question to study (Art 24(2)).

Article 25(1) provides that under no circumstances can possession of a registration certificate, etc., be made a pre-condition for the exercise of a right or the completion of an administrative formality. Entitlement to rights may be attested by any other means of proof, where such documentation is not available. Article 25(2) further provides that all the documents listed in Art 25(1) shall be issued free of charge or for a charge which does not exceed that imposed on nationals for the issuing of a similar document.

If a Member State requires their own nationals to carry an identity card, then the host Member State can require non-nationals to carry their registration certificate or residence card. The host Member State may impose the same sanction as those imposed on their own nationals if a non-national fails to comply (Art 26).

Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health

EU citizens or members of their family may be refused entry to, or expelled from, the host Member State on grounds of public policy, public security or public health (Art 27(1)). Under no circumstances may an expulsion decision be taken on economic grounds (Art 27(1)). Measures taken on the grounds of public policy or public security must comply with the principle of proportionality and must be based on the personal conduct of the individual concerned; previous criminal convictions do not automatically justify such measures (Art 27(2)). The personal conduct must represent a genuine, present and sufficiently serious threat which affects one of the fundamental interests of society (Art 27(2)).

Article 27(3) provides that in order to ascertain whether the person concerned represents a danger to public policy or public security, the host Member State, if it considers it essential, may request the Member State of origin or other Member States to provide information concerning any previous police record the person concerned may have. The request is to be made by the host Member State:

- (i) when issuing the registration certificate;
- (ii) if there is no registration system, no later than three months from the date of the person's arrival in the host Member State or date the person reported his presence in the host Member State as provided for in Art 5(5); or
- (iii) when issuing the residence card.

Such enquiries must not be made as a matter of routine. The Member State consulted should provide its reply within two months.

A person who is expelled from a Member State on grounds of public policy, public security or public health shall have the right to re-enter the Member State which issued him with a passport or identity card, even if the document is no longer valid, or if the nationality of the holder is in dispute (Art 27(4)).

Article 28(1) provides that before taking an expulsion decision on grounds of public policy or public security, the host Member State must assess a number of factors such as the period for which the individual concerned has been resident, his age, state of health, family and economic situation, degree of social and cultural integration in the host Member State and the extent of his links with the country of origin. Only for serious grounds of public policy or public security can an expulsion decision be taken against an EU citizen or his family members, if the EU citizen or his family members have acquired the right of permanent residence in the host Member State (Art 28(2)). In addition, an expulsion decision may not be taken against an EU citizen or his family members who have resided in the host country for ten years or if he is a minor, unless the decision is based on imperative grounds of public security, and, in the case of a minor, provided that expulsion is necessary for the best interests of the child (Art 28(3)).

Article 29 is concerned with the restriction on the right of entry and residence on the ground of public health. The only diseases which can justify restricting the right of entry and residence are:

- (i) those with epidemic potential as defined by the relevant instruments of the World Health Organisation (WHO); and
- (ii) other infectious diseases or other contagious parasitic diseases if they are subject to protection provisions applying to nationals of the host Member State (Art 29(1)).

Article 29(2) provides that diseases occurring after a three-month period from the date of arrival shall not constitute grounds for expulsion from the host Member State. A Member State can require the person concerned to undergo a medical examination, which must be provided free of charge, if there are serious indications that a medical examination is necessary; such medical examinations must not be carried out as a matter of routine (Art 29(3)). The person concerned by a decision refusing leave to enter or reside in a Member State on the ground of public policy, public security or public health must be notified in writing of that decision, in such a way that they are able to comprehend its content and the implications for them (Art 30(1)). The grounds for the decision must be given precisely and in full, unless this is contrary to the interests of state security (Art 30(2)), and the person concerned must be informed of the appeal procedures available to them (Art 30(3)). Except in cases of urgency, the subject of such decision must be allowed at least one month in which to leave the Member State (Art 30(3)).

Article 31 sets out the procedural safeguards which apply if a decision is taken against a person's right of entry and residence on the grounds of public policy, public security or public health. Article 31 provides as follows:

1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.
2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:

- where the expulsion decision is based on a previous judicial decision; or
 - where the persons concerned have had previous access to judicial review; or
 - where the expulsion decision is based on imperative grounds of public security under Article 28(3).
3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.
4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

Persons excluded from a Member State on grounds of public policy or public security can apply for the exclusion order to be lifted after a reasonable period, and in any event after a maximum of three years, by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering their exclusion (Art 32(1)). The Member State concerned is required to reach a decision on such application within six months of its submission (Art 32(1)). The person applying for the lifting of the exclusion order does not have a right of entry into the Member State concerned while the application is being considered (Art 32(2)).

An expulsion order cannot be issued by a Member State as a penalty or legal consequence of a custodial penalty, unless the requirements of Arts 27–29 (see above) are complied with (Art 33(1)). Where an expulsion order is issued under this provision, and where it is enforced more than two years after it was issued, the Member State is required to check that the individual concerned is a current and genuine threat to public policy or public security, and the Member State shall assess whether there has been any material change in circumstances since the expulsion order was issued (Art 33(2)).

Other rights derived from EU citizenship

The creation of EU citizenship is part of a broader programme of enhancement of individual political and social rights in the European context. The EU Treaties and secondary legislation adopted pursuant to the Treaties confer other benefits on EU citizens in addition to the general right of residence. Article 20(2) TFEU (previously Art 17(2) EC Treaty) sets out some of the rights afforded to Union citizens (these rights are dealt with in detail in the EU Treaties):

Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*:

- (a) the right to move and reside freely within the territory of the Member States;
- (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
- (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

- (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

As discussed above, Directive 2004/38 has established a general, but limited, right of entry and residence (for up to three months) for all those holding the nationality of a Member State. Extended rights of residence (for over three months) are, under Directive 2004/38, primarily linked to persons engaged in an economic activity. The subsequent chapters will examine the scope of those rights, identify the beneficiaries and explore the extent to which Member States are permitted to derogate from them. European Union citizenship is the primary avenue by which those rights are acquired, but Union law also confers more limited rights on those who are not EU citizens.

Free movement rights of non-EU citizens

Nationals of third states (i.e. non-EU citizens) can enjoy a number of important free movement rights under Treaties made with it. Besides the full range of free movement rights enjoyed by Iceland, Liechtenstein and Norway under the EEA Agreement discussed above, 'family members' of EU workers, the self-employed and other beneficiaries of free movement rights who are nationals of other states have the right to install themselves with the person entitled to the free movement right. Host Member States may demand that such individuals obtain a visa, but 'every facility' should be given to enable them to obtain one (Art 5(4), Directive 2004/38). Once installed with the principal beneficiary, the spouse or other family member is entitled to access to employment and equal treatment as if he was an EU citizen (*Gül v Regierungspräsident Düsseldorf* (Case 131/85)).

More limited rights are enjoyed by the beneficiaries of Association Agreements made with the Union. Such agreements have been held by the Court of Justice to be directly effective (*Kupferberg* (Case 104/81)). The rights in these cases are normally limited to equal treatment in employment and social security after admission, but they do not entitle the beneficiaries to enter. Such rights have been recognised in this way under the EC–Turkey Agreement (*Kus v Landeshauptstadt Wiesbaden* (Case C-237/91); *Eroglu v Baden-Württemberg* (Case C-355/93)), and under the EC–Morocco Cooperation Agreement (*Bahia Kziber v ONEM* (Case C-18/90); *Yousfi v Belgium* (Case C-58/93)). There are other agreements with *inter alia* Tunisia and Algeria, which contain provisions that could be used by nationals of those states while working in the Union.

The following case gave the Court of Justice an opportunity to rule, for the first time, on the effects of a partnership agreement between the European Union and a non-Member State:

Simutenkov (Case C-265/03)

Igor Simutenkov was a Russian national who had a residence permit and a work permit in Spain. Employed as a professional football player under an employment contract entered into with Club Deportivo Tenerife, he held a federation licence as a non-EU player issued by the Spanish Football Federation.

According to the Federation's rules, in competitions at national level clubs may field only a limited number of players from countries which do not belong to the European Economic Area.

Mr Simutenkov requested that his licence be replaced by a licence as an EU player, basing his application on the EC-Russian Federation Partnership Agreement, which, in relation to working conditions, prohibits discrimination of a Russian national based on nationality. The Federation rejected Mr Simutenkov's application. The Spanish court dealing with the case referred a question to the Court of Justice for a preliminary ruling in order to ascertain whether the rules of the Spanish Football Federation were compatible with the agreement.

Having established that the principle of non-discrimination laid down by Art 23(1) of the EC-Russia Partnership Agreement could be relied on by an individual before the national courts, the Court of Justice considered the scope of that principle.

It noted, first, that **the agreement in question establishes, for the benefit of Russian workers lawfully employed in the territory of a Member State, a right to equal treatment in working conditions of the same scope as that which, in similar terms, nationals of Member States are recognised as having under the EU Treaties. That right precludes any limitation based on nationality.**

The Court went on to note that the limitation based on nationality did not relate to specific matches between teams representing their respective countries but applied to official matches between clubs and thus to the essence of the activity performed by professional players. Such a limitation was therefore not justified on sporting grounds.

The Court of Justice accordingly held that Art 23(1) of the EC-Russian Federation Partnership Agreement precluded the application to a professional sportsman of Russian nationality, who was lawfully employed by a club established in a Member State, of a rule drawn up by a sports federation of that state which provided that in competitions organised at national level, clubs could field only a limited number of players from countries which were not parties to the European Economic Area Agreement.

Other third-state nationals (i.e. non-EU citizens) may benefit from Union free movement rights in a different way. Undertakings established in one Member State have the right to go to another, either to provide a service or to become established there (Arts 49 and 56 TFEU (previously Arts 43 and 49 EC Treaty)). To enable the undertaking to carry out its activities in the host Member State it is entitled to take its workforce with it whatever their nationality. Such employees should be admitted without any requirement of a work permit in the host Member State and should be entitled to remain there until the business of the undertaking is complete. On this basis, the French immigration authorities have been obliged to allow non-EU workers employed by Portuguese and Belgian companies to work without any further restrictions than those already imposed in the state of origin of the undertaking (**Rush Portuguesa Lda** (Case C-113/89); **Van der Elst v OMI** (Case C-43/93)). This right is conferred on the undertaking rather than on the worker and if challenged should, in principle, have to be asserted by the undertaking in the courts of the Member State. Advocate-General Tesouro, in his opinion in **Van der Elst** (above), did, however, describe the workers in the **Rush Portuguesa** case as having a *derived* right in relation to entry and employment, although he did not argue that it could be asserted by them personally (p. 3813). Somewhat surprisingly, the UK's Immigration Appeal Tribunal has held that the right of the employing company in the UK can be the subject of an application for judicial review by the *employee* (**Pasha v Home Office** [1993] 2 CMLR 350).

Third-state nationals (i.e. non-EU citizens) given leave to enter any Member State may be issued with an EU visa and be able to travel anywhere in the EU for a period of up to three months. The visa may be issued by any Member State, but it is in a standard

form for use in all the Member States (Art 63(3) EC Treaty (Art 79(2) TFEU, post-ToL), Regulation 1683/95, OJ 1995 L 164). In addition, such nationals will benefit from Directive 2000/43 prohibiting discrimination on grounds of racial or ethnic origin, and Directive 2000/78 prohibiting direct and indirect discrimination as regards access to employment and occupation on grounds of religion or belief, disability, and age or sexual orientation (see above). A more recent development for third-country nationals is provided by the Council's adoption of Directive 2003/86 (OJ 2003 L 251/12) which provides a right to family reunification for the benefit of third-country nationals who are residing lawfully within a Member State (i.e. those who hold a residence permit valid for at least one year in a Member State, and who are genuinely able to stay long term). This directive, which was adopted pursuant to the former Art 63(3)(a) EC Treaty (now Art 79(2)(a) TFEU), had to be implemented by 3 October 2005. The Council subsequently adopted Directive 2003/109 (OJ 2004 L 16/44), also pursuant to the former Art 63(3)(a) EC Treaty, which provides a right to 'long-term resident status' for third-country nationals who are long-term residents of a Member State. This directive had to be implemented by 23 January 2006.

The Schengen *acquis* and its integration into the European Union

During the 1980s, a debate opened up about the meaning of the concept of 'free movement of persons'. Some Member States felt that this should apply to EU citizens only, which would involve keeping internal border checks in order to distinguish between EU citizens and non-EU citizens. Others argued in favour of free movement for everyone, which would mean an end to internal border checks altogether. Since the Member States found it impossible to reach an agreement, France, Germany, Belgium, Luxembourg and The Netherlands decided in 1985 to create a territory without internal borders. This became known as the 'Schengen area'. The name was taken from the name of the town in Luxembourg where the first agreements were signed. This intergovernmental cooperation expanded to include 13 countries in 1997, following the signing of the Treaty of Amsterdam, which (on 1 May 1999) incorporated into EU law (i) the decisions taken since 1985 by Schengen group members; and (ii) the associated working structures. When the Treaty of Lisbon came into force on 1 December 2009, Protocol No. 19 provided for the integration of the Schengen *acquis* into the framework of the European Union. Protocol No. 19 provides as follows:

Article 1

The . . . [27 Member States of the EU, excluding Ireland and the UK] shall be authorised to establish closer cooperation among themselves in areas covered by provisions defined by the Council which constitute the Schengen *acquis*. This cooperation shall be conducted within the institutional and legal framework of the European Union and with respect for the relevant provisions of the Treaties.

Article 2

The Schengen *acquis* shall apply to the Member States referred to in Article 1, without prejudice to Article 3 of the Act of Accession of 16 April 2003 or to Article 4 of the Act of Accession of 25 April 2005. The Council will substitute itself for the Executive Committee established by the Schengen agreements.

Article 3

The participation of Denmark in the adoption of measures constituting a development of the Schengen acquis, as well as the implementation of these measures and their application to Denmark, shall be governed by the relevant provisions of the Protocol on the position of Denmark.

Article 4

Ireland and the United Kingdom of Great Britain and Northern Ireland may at any time request to take part in some or all of the provisions of this acquis.

The Council shall decide on the request with the unanimity of its members referred to in Article 1 and of the representative of the Government of the State concerned.

Article 5

1. Proposals and initiatives to build upon the Schengen acquis shall be subject to the relevant provisions of the Treaties.

In this context, where either Ireland or the United Kingdom has not notified the Council in writing within a reasonable period that it wishes to take part, the authorisation referred to in Article 329 of the Treaty on the Functioning of the European Union shall be deemed to have been granted to the Member States referred to in Article 1 and to Ireland or the United Kingdom where either of them wishes to take part in the areas of cooperation in question.

2. Where either Ireland or the United Kingdom is deemed to have given notification pursuant to a decision under Article 4, it may nevertheless notify the Council in writing, within three months, that it does not wish to take part in such a proposal or initiative. In that case, Ireland or the United Kingdom shall not take part in its adoption. As from the latter notification, the procedure for adopting the measure building upon the Schengen acquis shall be suspended until the end of the procedure set out in paragraphs 3 or 4 or until the notification is withdrawn at any moment during that procedure.
3. For the Member State having made the notification referred to in paragraph 2, any decision taken by the Council pursuant to Article 4 shall, as from the date of entry into force of the proposed measure, cease to apply to the extent considered necessary by the Council and under the conditions to be determined in a decision of the Council acting by a qualified majority on a proposal from the Commission. That decision shall be taken in accordance with the following criteria: the Council shall seek to retain the widest possible measure of participation of the Member State concerned without seriously affecting the practical operability of the various parts of the Schengen acquis, while respecting their coherence. The Commission shall submit its proposal as soon as possible after the notification referred to in paragraph 2. The Council shall, if needed after convening two successive meetings, act within four months of the Commission proposal.
4. If, by the end of the period of four months, the Council has not adopted a decision, a Member State may, without delay, request that the matter be referred to the European Council. In that case, the European Council shall, at its next meeting, acting by a qualified majority on a proposal from the Commission, take a decision in accordance with the criteria referred to in paragraph 3.
5. If, by the end of the procedure set out in paragraphs 3 or 4, the Council or, as the case may be, the European Council has not adopted its decision, the suspension of the procedure for adopting the measure building upon the Schengen acquis shall be terminated. If the said measure is subsequently adopted any decision taken by the Council pursuant to Article 4 shall, as from the date of entry into force of that measure, cease to apply for the Member State concerned to the extent and under the conditions decided by the Commission, unless the said Member State has withdrawn its notification referred to in paragraph 2 before the adoption of the measure. The Commission shall act by the date

of this adoption. When taking its decision, the Commission shall respect the criteria referred to in paragraph 3.

Article 6

The Republic of Iceland and the Kingdom of Norway shall be associated with the implementation of the Schengen acquis and its further development. Appropriate procedures shall be agreed to that effect in an Agreement to be concluded with those States by the Council, acting by the unanimity of its Members mentioned in Article 1. Such Agreement shall include provisions on the contribution of Iceland and Norway to any financial consequences resulting from the implementation of this Protocol.

A separate Agreement shall be concluded with Iceland and Norway by the Council, acting unanimously, for the establishment of rights and obligations between Ireland and the United Kingdom of Great Britain and Northern Ireland on the one hand, and Iceland and Norway on the other, in domains of the Schengen acquis which apply to these States.

Article 7

For the purposes of the negotiations for the admission of new Member States into the European Union, the Schengen acquis and further measures taken by the institutions within its scope shall be regarded as an acquis which must be accepted in full by all States candidates for admission.

Development of the Schengen area

The first agreement between the five original group members was signed on 14 June 1985. A further Convention was drafted and signed on 19 June 1990. When this Convention came into effect in 1995, it abolished the internal borders of the signatory states and created a single external border where immigration checks for the Schengen area were carried out in accordance with a single set of rules. Common rules regarding visas, asylum rights and checks at external borders were adopted to allow the free movement of persons within the signatory states without disturbing law and order.

Accordingly, in order to reconcile freedom and security, this freedom of movement was accompanied by so-called 'compensatory' measures. This involved improving coordination between the police, customs and the judiciary and taking necessary measures to combat problems such as terrorism and organised crime. In order to make this possible, an information system known as the Schengen Information System (SIS) was set up to exchange data on people's identities and descriptions of objects which were either stolen or lost.

The Schengen area was extended to include every Member State except for the UK and Ireland (Article 5, Protocol No. 19, which is annexed to the TEU and TFEU; see above). Denmark has reserved the power to determine whether future decisions will apply to it (Article 4, Protocol No. 22, which is annexed to the TEU and TFEU; see below).

Measures adopted by Schengen group members

Among the main measures are:

- the removal of checks at common borders, replacing them with external border checks;
- a common definition of the rules for crossing external borders and uniform rules and procedures for controls there;

- separation in air terminals and ports of people travelling within the Schengen area from those arriving from countries outside the area;
- harmonisation of the rules regarding conditions of entry and visas for short stays;
- coordination between administrations on surveillance of borders (liaison officers and harmonisation of instructions and staff training);
- the definition of the role of carriers in measures to combat illegal immigration;
- requirement for all non-EU nationals moving from one country to another to lodge a declaration;
- the drawing up of rules for asylum seekers (Dublin Convention, replaced in 2003 by the Dublin II Regulation);
- the introduction of cross-border rights of surveillance and hot pursuit for police forces in the Schengen states;
- the strengthening of legal cooperation through a faster extradition system and faster distribution of information about the implementation of criminal judgments; and
- the creation of the Schengen Information System (SIS).

The Schengen *acquis* comprises these measures, together with (i) the agreement signed on 14 June 1985; (ii) the Convention implementing that agreement, signed on 19 June 1990; (iii) the decisions and declarations adopted by the Executive Committee set up by the 1990 Convention; (iv) the steps taken in order to implement the 1990 Convention by the authorities on whom the Executive Committee conferred decision-making powers; and (v) the subsequent protocols and accession agreements.

The Schengen Information System (SIS)

An information network was set up to allow all border posts, police stations and consular agents from Schengen group Member States to access data on specific individuals or on vehicles or objects which had been lost or stolen.

Member States supply the network through national networks (N-SIS) connected to a central system (C-SIS), and this is supplemented by a network known as SIRENE (Supplementary Information Request at the National Entry).

See page 24 for a list of the new Member States which joined the EU on 1 May 2004, and page 25 for a list of those joining on 1 January 2007.

The Member States that joined the European Union on 1 May 2004 and 1 January 2007 are bound by the entire Schengen *acquis*, but certain provisions will apply to them only after border controls have been abolished. They will be abolished by the Council when SIS-II (see below) is operational and when those Member States have passed a test to show that they meet all the conditions required for the application of compensatory measures enabling internal border controls to be abolished. This test is new; all Schengen States have had to pass it.

As matters stand, these new Member States apply all the provisions of the Schengen *acquis* relating to police and judicial cooperation that are not directly bound up with the removal of border controls.

The second-generation Schengen Information System (SIS-II)

At present, the Schengen Information System (SIS) operates in 13 Member States and two associated states (Norway and Iceland). However, the system was not designed, and therefore lacks the capacity, to operate in more than 15 or so countries. It is therefore necessary to develop a new second-generation Schengen Information System (SIS-II) to

enable the new and future Member States to use the system, and to take account of the latest developments in information technology.

On 6 December 2001 the Council accordingly adopted two instruments (Regulation 2424/2001 and Decision 2001/866/JHA), making the Commission responsible for developing SIS-II and providing for the related expenditure to be covered by the general budget of the European Union. In addition, it adopted a new regulation on 29 April 2004 and a new decision on 24 February 2005 to give the current system certain workable functions pending the development of SIS-II (Regulation 871/2004 (OJ 2004 L 162/29) and Decision 2005/211/JHA (OJ 2005 L 68/44).

The following legislative instruments were adopted, to replace provisions of the Schengen Convention relating to SIS:

- Regulation 1987/2006 on the establishment, operation and use of SIS-II (1st pillar) (OJ 2006 L 381/4).
- Regulation 1986/2006 on access to SIS-II by the services in the Member States responsible for issuing vehicle registration certificates (OJ 2006 L 381/1).
- Decision 2007/533/JHA on the establishment, operation and use of SIS-II (3rd pillar) (OJ 2007 L 205/63).

Once SIS-II is fully functional, its use will be expanded to an additional nine Member States: Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

The participation of Denmark

As stated above, although Denmark has signed the Schengen Agreement, it can choose whether or not to apply any new decisions. Article 4, Protocol No. 22 (which is annexed to the TEU and TFEU) provides:

1. Denmark shall decide within a period of six months after the Council has decided on a proposal or initiative to build upon the Schengen *acquis* covered by this Part, whether it will implement this measure in its national law. If it decides to do so, this measure will create an obligation under international law between Denmark and the other Member States bound by the measure.
2. If Denmark decides not to implement a measure of the Council as referred to in paragraph 1, the Member States bound by that measure and Denmark will consider appropriate measures to be taken.

The participation of Ireland and the United Kingdom

In accordance with Article 5, Protocol No. 19 (which is annexed to the TEU and TFEU), Ireland and the UK can take part in all or some of the Schengen arrangements if the Schengen group Member States and the government representative of the country in question vote unanimously in favour within the Council (see above).

In March 1999 the UK asked to take part in some aspects of Schengen, namely police and judicial cooperation in criminal matters, the fight against drugs and the Schengen Information System (SIS). A Council Decision approving the request by the United Kingdom was adopted on 29 May 2000 (OJ 2000 L 131). Ireland asked to take part in some aspects of Schengen, broadly corresponding to the aspects covered by the UK's request, in June 2000. The Council adopted a decision approving Ireland's request on

28 February 2002 (OJ 2002 L 64). The Commission had issued opinions on the two applications, stressing that the partial participation of the two Member States should not have the effect of reducing the consistency of the *acquis* as a whole.

After evaluating the conditions that must precede implementation of the provisions governing police and judicial cooperation, the Council decided on 22 December 2004 that this part of the Schengen *acquis* could be implemented by the UK (OJ 2004 L 395).

The following joined cases concerned a refusal by the Council to allow the UK to take part in the adoption of two regulations concerning the Schengen *acquis*. Although this case concerned a previous Protocol, the principles apply equally to the current Protocol No. 19:

UK v Council (Case C-77/05 and Case C-137/05)

According to the Protocol integrating the Schengen *acquis* into the framework of the European Union, Ireland and the United Kingdom may at any time request to take part in some or all of the provisions of the *acquis*. If the UK and/or Ireland do not notify their wish to take part in the adoption of a measure to build upon the Schengen *acquis*, the other Member States are free to adopt the measure without the participation of those countries. A decision of 29 May 2000 lists the provisions of the Schengen *acquis* in which the UK is to participate, and provides that the UK is deemed irrevocably to have notified its wish to take part in all proposals and initiatives based on those provisions.

On 11 February 2004 the UK informed the Council of its intention to take part in the adoption of the regulation establishing the Frontex Agency (Regulation 2007/2004).

On 19 May 2004 the UK informed the Council that it also intended to take part in the adoption of the regulation establishing standards for security features and biometrics in passports (Regulation 2252/2004).

Despite those notifications the UK was not allowed to take part in the adoption of those two regulations, on the ground that they constituted developments of provisions of the Schengen *acquis* in which the UK did not take part. Both regulations were adopted without the UK's participation.

The UK claimed that the Council's refusal to allow it to take part in the adoption of the regulations was in breach of the Schengen Protocol. The UK brought two actions before the Court of Justice. Unlike the Council, the UK considered that its right to take part in the adoption of such measures was independent of whether or not it took part in the provisions of the Schengen *acquis* on which the measure is based.

The Court considered that the provision in the Schengen Protocol on the participation of the UK and Ireland in existing measures and the provision making it possible for those Member States to take part in the adoption of new measures must be read together, not independently, even though they related to two different aspects of the Schengen *acquis*.

The Court held that it followed from the use of the words 'proposals and initiatives to build upon the Schengen *acquis*' in those provisions that the measures in question are based on the Schengen *acquis*, of which they constitute merely an implementation or further development.

Logically, such measures must be consistent with the provisions they implement or develop. The participation of a Member State in their adoption therefore presupposes that it has accepted the area of the Schengen *acquis* which is the context of the measure to be adopted or of which it is a development.

In those circumstances, the Court concluded that the possibility of the UK and Ireland taking part in the adoption of a new measure in connection with the Schengen *acquis* was applicable only to proposals and initiatives to build upon an area of the *acquis* in which those countries had already been authorised to take part.

The Court held that in the present case, the UK had not accepted the area of the Schengen *acquis* which was the context of the regulations in question, and therefore the Council was right to refuse to allow the UK to take part in the adoption of those measures.

Relations with Iceland and Norway

Iceland and Norway, together with Sweden, Finland and Denmark, belong to the Nordic passport union. This passport union abolished internal border checks between the five countries. Sweden, Finland and Denmark became members of the Schengen group when they joined the EU. Iceland and Norway have been associated with the development of the agreements since 19 December 1996. Although they do not have voting rights on the Schengen Executive Committee, they are able to express opinions and formulate proposals.

An agreement was signed between Iceland, Norway and the EU on 18 May 1999 in order to extend that association (OJ 1999 L 176). On 1 December 2000 the Council decided that, as from 25 March 2001, the Schengen *acquis* arrangements would apply to the five countries of the Nordic passport union (OJ 2000 L 309). Iceland and Norway participate in the drafting of new legal instruments building on the Schengen *acquis*. These acts are adopted by the EU Member States alone, but they apply to Iceland and Norway as well.

The association between Iceland, Norway and the EU takes the form of a joint committee outside the EU framework, which is made up of representatives from the Icelandic and Norwegian governments and members of the Council and the Commission. Procedures for notifying and accepting future measures or acts have been laid down.

The SIS arrangements were put into effect as from 1 January 2000. In order to check whether the SIS functioned and was properly applied, the decision provided for evaluation visits to be carried out in all the Nordic states. Reports on the visits submitted to the Council in March 2001 indicated that the SIS was being properly applied and that controls at external borders (in ports and airports) met the conditions laid down.

Article 6, Protocol No. 19 (which is annexed to the TEU and TFEU; see above) covers relations between Iceland and Norway *vis-a-vis* Ireland and the United Kingdom, with regard to the areas of the Schengen *acquis* which apply to Iceland and Norway.

The participation of Switzerland

The Commission began negotiations with Switzerland in 2002. They culminated in an agreement between the EU and Switzerland on the association of Switzerland with the implementation, application and development of the Schengen *acquis* (OJ 2004 L 370).

Summary

Now you have read this chapter you should be able to:

- Understand why Art 26(2) TFEU is relevant to the free movement of persons.
- Identify the provisions of the EU Treaties which are relevant to the free movement of workers, freedom of establishment and the free movement of services.
- Explain how the European Economic Area Agreement impacts upon the Union law provisions on the free movement of persons.

- Understand the nature of EU citizenship within the context of Art 21(1) TFEU.
- Through a study of the relevant case law of the Court of Justice, evaluate how EU citizenship has, and will, impact on the Union law provisions on the free movement of persons.
- Explain how Directive 2004/38 has consolidated the Union law provisions relating to entry and residence.
- Understand what additional rights, other than the free movement of persons, are derived from EU citizenship.
- Identify the limited rights of free movement for non-EU citizens.
- Explain the Schengen *acquis* and the extent of the UK's participation in the Schengen arrangements.

Further reading

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Use Case Navigator to read in full some of the key cases referenced in this chapter:

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66/85 **Lawrie-Blum** [1986] ECR 2121

