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Permanent residence: implementation issues under Directive 2004/38

Sandra Mantu*

1. Introduction

This contribution is based on the analysis of 28 national replies to a questionnaire addressing the implementation of the provisions on permanent residence introduced by Directive 2004/38 over the time frame 2014-2016.¹ It presents main findings and is concerned with how the EU28 are implementing the provisions on permanent residence and issues relevant for the effective exercise of EU citizenship rights in this specific area of law. This monitoring effort is part of the 2015-2018 work programme of the Jean Monnet Centre of Excellence implemented by the Centre for Migration Law (Radboud University Nijmegen). The questionnaire was sent out to 28 national experts and focused on 3 main themes: family reunification, permanent residence and social rights. The other two themes are addressed separately (available here).

The permanent residence part of the questionnaire asked the following questions:

1. What requirements are present in your national legislation concerning EU citizens who wish to establish that they have acquired a right of permanent residence based on Directive 2004/38? Are there specific documents that EU citizens must produce before the authorities?
2. Is there any relevant national case law/ administrative practices on this issue?
3. If the issues we identified in this section of the questionnaire have had no impact in your Member State over the relevant period, please let us know if any other issue has been important.

2. Transposition Issues

Based on the national replies, it can be concluded that transposition into national legislation is in line with the provisions of the Directive, including those articles detailing acquisition of permanent residence status prior to the 5-year general rule. Moreover, when transposing the Citizens’ Directive, most Member States have stuck closely to the formulations used in Articles 16 and 17. This general appraisal of the transposition of the provisions on permanent residence is reassuring, especially when considering that the transposition deadline of the Directive ended in 2006. Cypriot authorities have dealt satisfactory with transposition issues concerning Article 17 paras (2) and (4)(c) of the Directive. The Cypriot provisions deemed problematic concerned the acquisition of a right to permanent residence prior to the general rule of

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¹ National replies to the questionnaire are on file with the author.
5-years by a worker or self-employed person whose spouse or partner lost Cypriot nationality as a result of marriage to the worker/self-employed person. Similar issues arose in relation to the acquisition of permanent residence by the surviving spouse or partner of a worker or self-employed person who lost Cypriot nationality as a result of marriage to the worker or self-employed person. The European Commission issued several warning letters to the Cypriot authorities demanding the correct transposition of these provisions. In 2011, this issue was satisfactorily addressed by changing the law transposing Directive 2004//38 into national legislation.2

In Belgium subsequent changes to the legislation transposing the Directive have had a direct bearing on the permanent residence provisions. Up to 2013, the right to permanent residence was acquired after 3 years of residence in Belgium, as opposed to the general rule of 5 years under Directive 2004/38. The 3-year condition was linked with the conditions for naturalization as a Belgian citizen. In 2013, the period required for naturalization was increased to 5 years with the consequence that the law of 28 June 2013 introduced a 5-year residence requirement for acquiring permanent residence, too.3

One issue that seems to impact permanent residence stems from national provisions abolishing mandatory registration and authorisation with the immigration authorities where EU citizens are concerned. For example, this is the case in Germany where Union citizens no longer obtain a certificate for stays below 5 years. EU citizens retain the right to demand to have their permanent residence status confirmed by relevant authorities but lack of previous certification has implications for demonstrating the acquisition of the right to permanent residence (please see Section 4.2 for further details).

2. More Favourable Treatment when Acquiring Permanent Residence

A number of Member States provide more favourable treatment in relation to the acquisition of the right to permanent residence for certain categories of EU citizens and family members not listed in Articles 16 and 17 of Directive 2004/38. For example, Estonia provides for more favourable treatment in relation to the acquisition of permanent residence for EU citizens who are married to Estonian citizens and for minor children younger than 1 year of a EU citizen who has the right of permanent residence (the child acquires permanent residence). Similar provisions concerning spouses exist in Hungary: the family member of a Hungarian national can acquire permanent residence after s/he lives in the shared household with the Hungarian citizen for one year and the marriage was concluded more than two years before.

In some Member States, the more favourable treatment is linked with the EU citizen’s ancestry or his/her links with a national of the host Member State. For example, Lithuanian legislation allows the acquisition of a right of permanent residence

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2 Article 5 of Law 181(I)/2011 amending Articles 15(3) and 15(4) of Law 7(I)2007.
where the EU citizen has retained the right to citizenship of the Republic of Lithuania in accordance with the procedure established by the Law on Citizenship, where s/he is a person of Lithuanian descent or s/he entered Lithuania together with a Lithuanian citizen as his family member. Special rules apply for children born to EU citizens who have been issued with a certificate confirming their right of permanent residence. As a rule, children are issued with the same type of residence permit as the one held by both or one of his parents. Slovenian law also allows for EU citizens and their family members to acquire the right of permanent residence prior to the 5-year general where the EU national is of Slovenian descent or his/her residence is in the interest of Slovenia. Family members of a Slovenian national or those of a EU or TCN who has permanent residence in Slovenia can acquire permanent residence if they reside in Slovenia without interruption for two years on the basis of the residence registration certificate. In Romania, besides the cases regulated by Article 17 of Directive 2004/38, the following categories benefit from more favourable conditions: a) European Union citizens or members of their families which are of Romanian origin or born in Romania and those whose residence is in the interest of the Romanian state; b) the minor whose parent/s hold a right of permanent residence; and c) European Union citizens who prove they have made a minimum investment of 1,000,000 Euro or created more than 100 full-time jobs.

3. The Application Process – General Issues

A combined reading of Articles 16 and 25 of Directive 2004/38 shows that the Directive makes a distinction between the acquisition of the right to permanent residence and the document certifying that the person in question (EU citizen and/or his/her family member) holds the right. Once the conditions of Article 16 or 17 (depending on the situation) are met, the EU citizen has permanent residence. Article 25 clarifies that residence documents cannot be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof. Thus, while acquiring the right is not dependent upon an application, EU citizens may apply to have their right certified. EU citizens who would like to certify their right to permanent residence need to lodge an application to this effect in line with the provisions of Article 19 of Directive 2004/38. This seems to be the rule in most states. TCN family members will need to lodge an application in line with Article 20 of Directive 2004/38 and in their case failure to comply with the requirement to apply for a permanent residence card prior to the expiry of their residence card may render the person liable to proportionate and non-discriminatory sanctions in line with Article 20(2) of Directive 2004/38. Belgium is the only state where the authorities will consider ex officio whether the EU citizen has acquired a right of permanent residence once s/he applies for renewal of his/her residence certificate.

The Directive is silent on how the application process should be designed, this issue being left to the discretion/procedural autonomy of the Member States. There are differences between Member States in terms of how an application can be lodged: e.g., online, by submitting a paper form at a designated service point, by post.
Finland allows for both options. One can either apply via the e-service Enter Finland or by submitting a paper form at one of the service points of the Finnish Immigration Service. The applicant must make an appointment to prove his/her identity at one of the service points before the application is processed (a similar requirement applies in the Netherlands). Bulgaria requires the application to be submitted before the Migration Directorate at the Ministry of Interior or the regional directorates of the same ministries 3 days before the expiration of the permitted continuous stay in Bulgaria. The application form is available online and at the local office where it needs to be submitted. Estonia allows for applications to be submitted in person or by post or email.

In other Member States, such as Lithuania, the application and the accompanying documents must be submitted in person to the Migration Service of the territorial police office in whose service area the EU citizen resides or intends to reside. If the EU citizen cannot come personally, an authorised person can submit the application and the enclosed documents; a power of attorney is necessary in this case. Special rules apply where the applicant lacks legal capacity or is a minor.

The UK report mentions that in 2015, the UK Home Office introduced EEA forms. Since 1st February 2017 all applications have to be made on UK Home Office prescribed forms. According to the national expert, the forms request a lot of information, are intrusive and seem to have been deliberately designed to elicit information that can then be used for refusals of dubious legality. Previously, it was not compulsory to use the official forms.

4. Evidentiary Issues

4.1 General Issues

As already indicated in the previous section, the Directive contains a number of provisions regulating administrative formalities linked to the right of permanent residence (Articles 19-25). More specifically, Article 21 clarifies that continuity of residence can be attested by any means of proof in use if the host state, whereas Article 25 states that

‘[…] entitlement to rights may be attested by any other means of proof’ besides a residence certificate as referred in Article 8, a document certifying permanent residence, a certificate attesting submission of an application for a family member residence card, a residence card or a permanent residence card’.

The national replies support the view that to have his/her right of permanent residence certified, the EU citizen will need to lodge an application that should be accompanied at the very least by a copy of an ID/passport and a passport photo as well as documents showing that s/he has resided legally for 5 consecutive and uninterrupted years in the host state. Where fees are asked, proof of payment of the fee needs to be provided. Where permanent residence is acquired under Article 17 of Directive 2004/38, documents will need to show that the conditions of Article 17 are met.
The type and number of documents that need to be presented to show the legality and continuity of residence vary between the EU28. In some Member States no specific documents are indicated under the principle of free consideration of evidence and linked with Article 21 of the Directive. For example, in Austria, the authorities may ask for any evidence, which is useful to check if the conditions of the acquisition of the right of permanent residence are met. Denmark operates a similar rule whereby any suitable means of proof is accepted but the website of the state administration provides examples of documents that may be relevant for assessing the basis of residence. France, Croatia and Romania allow any means of proof/evidence. The Hungarian legislation states that the right of residence may be proved in any other authentic way where the specific documents asked for are not available. The Irish administrative guidelines states that ‘such documentary evidence as may be necessary to support the application’ should accompany the application for issuing a certificate of permanent residence. In Germany, the administrative guidelines do not specify the sort of documentation required but this is generally understood to mean that the authorities may ask the same documents that they would require from a EU citizen residing on the basis of Article 7 of Directive 2004/38 and in respect of whose residence there are doubts. The documentation that should be submitted as proof will vary depending upon the category under which the EU citizen is exercising free movement rights: for workers, a confirmation from their employer; for self-employed, a confirmation of their activity, for economically inactive proof of sufficient resources and health insurance. Luxembourg stands out since the continuity of residence can be proven by all means, but the EU citizen is not asked to prove sufficient resources and comprehensive medical insurance.

### 4.2 Evidentiary Rules in Practice

It is important to stress that due to the declaratory nature of a certificate attesting residence longer than 3 months, the value of such a certificate for documenting the acquisition of a right of permanent residence varies between the Member States. As such, in some Member States it could be argued that presenting a certificate attesting residence under Article 7 of Directive 2004/38 is the starting point of analysing whether the conditions are met and to a certain extent providing such a certificate institutes a presumption that the condition of uninterrupted residence for 5 years is met (see Bulgaria, Greece, Hungary). For example, Bulgarian authorities ask for the valid long-term residence permit or previous permanent residence permit (in case of re-application) and in cases where the EU citizen is entitled to acquire permanent residence based on Article 17 of Directive 2004/38, evidence that those circumstances are present. In Greece the length of residence is checked based on the registration certificate that the EU citizen must present to the authorities. In France, authorities can require a certificate showing registration of the EU citizen upon arrival in France. Other examples of documents that can be used to attest the right of permanent residence include employment contracts, fiscal certificates, lease contracts, rental agreements, current bills etc. The EU citizen is asked to provide documentation for each semester that he has resided in France. Romanian legislation requires the presentation of the registration certificate or residence card for TCN family members.
as well as documents certifying the continuous legal residence in Romania although no details are given as to the actual documents.

In other Member States, the declaratory nature of such a certificate is understood as not instituting a presumption of meeting the conditions of permanent residence and the EU citizen may be asked to provide additional documentation to show that he indeed meets the requirements of the right to permanent residence (Austria, France, Finland, Denmark, UK). As mentioned earlier, Germany no longer requires EU citizens to obtain certificates of residence attesting residence under Article 7 of the Directive with the consequence that a EU citizen asking for his permanent residence status to be confirmed will need to show at that moment in time that he has met the conditions of Article 7 for a continuous period of 5 years or the shorter period mentioned in Article 17 if applicable.

Another aspect upon which Member States differ is the number of documents they ask from EU citizens. Some states take a minimalistic approach towards the documentation they ask from EU citizens. In Austria, a register of social insurance and an excerpt of the register of residency are enough. In Belgium, once the right to permanent residence is established, the E card attesting residence is converted into an E+ card that testifies that the EU citizen is no longer registered in the ‘register of aliens’ but in the ‘population register’. Since June 2016, EU citizens are no longer required to lodge an application to obtain the E+ card, instead their right to permanent residence is checked ex officio by the authorities when the EU citizen asks for a renewal of his E card. The Finnish report states that the EU citizen is not asked to attach any documents to his application, as the Immigration service will check the applicant’s length of residence based on info from the Population Information System.

Czech authorities require more documents and evidence than what the Directive allows. The EU citizen needs to present his/her travel document, a confirmation that he/she has resided continuously for 5 years or meets the other criteria for acquiring the right of permanent residence plus photographs and a document confirming housing. These last two requirements are problematic. There are guidelines on the accepted photo format as well as a requirement that the person should not have their hair covered which is seen as discriminatory towards persons who wear a head covering for religious purposes, since no similar requirement applies to the issuing of IDs for Czech citizens. There are legislative proposals to amend these requirements but they are yet to be adopted. The requirement concerning proof of accommodation is in violation of the Directive and the EU Commission initiated a EU Pilot to deal with this aspect but no steps were taken in accordance with the info supplied by the Czech Ministry of Interior.

Generally speaking, documents will also vary depending upon the category under which the EU citizen has been exercising free movement rights in the host state: as a worker, self-employed, student, economically inactive etc. For example, Danish authorities list as documents that are relevant for assessing the legality of residence documentation on employment, studies and income. For workers, students and persons with sufficient resources this includes annual tax returns for five years. In case of unemployment, a copy of any dismissal report and proof of registration with the job centre. Family members should provide proof that the sponsor has satisfied one
of the conditions for a minimum of 5 years or in case he already has acquired permanent residence, a copy of his certificate of permanent residence. A registration certificate certifying the 5 years of residence is not mandatory for proving the acquisition of the right of permanent residence. The length of residence is to be documented based on the date the person registered in the National Register of Persons or, if the original application for a residence right was submitted in Denmark from the time of submission of that application. Where the applicant claims to have resided for longer than 3 months prior to submitting the application, this can be shown by submitting a lease or employment contract or similar documents. Failure to register will not be relevant for acquiring the right of permanent residence where the EU citizen can show that he has resided legally in Denmark for 5 consecutive years.

A similar situation is present in Spain where Royal Decree 240/2007 of 16 February implementing Directive 2004/38 gives detailed information of the type of documents that must be provided by the EU citizen applying for the recognition of his right of permanent residence. These documents are meant to show that the EU citizen has resided legally in Spain for a continuous period of 5 years or the shorter periods provided for in article 17 of Directive 2004/38. The documents vary depending on the category under which the EU citizen exercised free movement rights, that is worker, self-employed, student, economically inactive. Special rules apply for family members. Workers must present an employment contract registered with the Public Employment Service or consent that such data can be verified. Self-employed persons must show continuous enrolment in the Register of Economic Activities or in the Mercantile Registry or a document showing discharge or situation assimilated to discharge in the corresponding regime of Social Security or consent of verification of the said data with the social security or tax authorities. Inactive EU citizens must show documentation that they possess public or private health insurance, or, if pensioners, show that they have health care from the state from where they receive pensions and documentation showing sufficient resources. Students can show that they have public of private health care by presenting an EHIC with a validity that covers the period of residence. In addition, they must provide a declaration that they have sufficient resources and show enrolment with a public or private educational institution recognized or financed by the competent educational administration. Although the Spanish legislation speaks of ‘documentary evidence’ in certain cases this remains an abstract term, without specifying what documents per se can be used; this seems to be the case in relation to inactive EU citizens but also EU citizens who claim acquisition of the right to permanent residence based on Article 17 of Directive 2004/38.

In Hungary besides the residence card and prior residence certificate, other documents can be submitted with the application depending on the circumstances under which a right to permanent residence is claimed. These documents can include a worker’s taxation/social insurance certificate on prior remunerated employment in Hungary or another EEA state; documents showing eligibility for old/preferential age pension/ accident pension; documents evidencing a medical body’s opinion on reduced capacity in work or medical treatment needs due to labour accidents or sickness; or a protocol on the worker’s death due to a labour accident. Family ties can be evidenced by presenting relevant documents such as marriage, birth, death, adoption
or registered partnership certificates. In case of a retained right of residence for TCN spouses, a document showing that the marriage was registered in the Hungarian registration system is required; the authorities can check if the conditions concerning residence are met.

In Ireland, information must be provided concerning the EU citizen’s duration of residence and the occupation in Ireland. If the applicant is no longer in employment or self-employment, they must state the reason(s). The EU citizen should supply his/her Immigration Reference Number (if any) and a PPS number. In addition, they must provide a declaration of any criminal record, together with documentary evidence that the Union citizen has satisfied either the condition of employment or self-employment or that they are a member of the immediate family of a EU citizen who does not place an undue financial burden on the State. The Irish report mentions that the supporting documents requested for administrative purposes are extensive and exceed the requirements envisaged by Schedule 5. For a claim to be processed, an employed or self-employed applicant must provide evidence of his or her activities in Ireland and include a letter and/or signed contract from the employer, a P60 tax certificate for the last five years, two payslips from current employer and a work permit if applicable. Where the EU citizen is self-employed, they must provide copies of Agreed Tax Assessment from the Revenue Commissioner for each financial year, VAT3 receipts (if applicable), bank statements of the business for six months and copies of corresponding invoices or receipts issued. Where the EU citizen has been voluntarily unemployed for a period of time, they must supply copies of a letter from the Department of Social Protection with details of benefit claims, a letter from FÁS or Employment Services Office acknowledging registration as a jobseeker, a letter from prior employer outlining circumstances of redundancy, P60s for prior two years of employment and a P45 (if currently unemployed). Students must provide a letter from college including course description, start date and completion date is required in addition to a letter from private medical insurance provider and evidence of financial resources and corresponding bank statements. Where the EU citizen has been residing in the State with sufficient resources, they must show this by providing evidence of financial resources and corresponding bank statements and a letter from a private medical insurance provider, and a letter from Department of Social Protection with details of any benefit claims, or stating that there are no claims (as applicable). Where the applicant is retired, permanently incapacitated or suffering from an occupational illness then he or she must provide documentary evidence of cessation of employment or self-employment, outlining the circumstances and also documentary evidence of receipt of a state pension (contributory or non-contributory), or any allowance, benefit or supplement with respect to a disability, injury or illness. Finally, evidence of residence should be provided in the form of letters from the landlord or Private Residential Tenancies Board (PRTB), or title and deeds to a house where the applicant is a homeowner. Utility bills should also be submitted.

Likewise, the UK report explains that a distinction should be made between the official form – the EEA(PR) which is itself generally reasonable and proportionate and the guidance notes that accompany the form. As a general rule, there is no prescribed list of documents that must be submitted but the EU citizen must be able to evidence
that s/he has resided in the UK as a qualified person or family member for a continuous 5-year period. The current guideline notes require different documents for different scenarios. For an EEA worker the guidance notes suggest: letter from each employer confirming the dates the applicant/their sponsor worked for them, salary/wages, normal hours of work, and the reason the employment ended (if relevant); wage slips and/or bank statements showing receipt of wages (this must cover each job the applicant or their sponsor has held during the relevant qualifying period); P60s for each year in which the applicant/their sponsor was employed. If these documents cannot be submitted, the UK Home Office says alternative evidence of the relevant employment must be submitted, such as, P45s, signed contract of employment, notice of redundancy, letter accepting resignation, letter of dismissal, and/or Employment tribunal judgment relating to the employment. Bank statements do not have to be submitted as a matter of law, but many elect to submit them to minimise the possibility of problems with the Home Office. Personal expenditure can be redacted (blacked out with a marker pen) from bank statements; Home Office officials only need to see the money was genuinely received, they do not need to know what it was spent on. Family members of EU citizens will need to provide a document attesting the existence of a family relationship (e.g., marriage certificate or a birth certificate) or of a registered partnership. According to the old EEA guidance notes, the applicant needs to provide documentation that confirms that all the family members included on the application form have been resident for the full five-year period. In the case of children, this may include school or nursery letters or immunisation records.

EU citizens claiming a right of permanent residence in Italy must prove the legality and duration of their residence. The duration and continuity of residence can be ascertained by showing that the EU citizen has maintained the registration with the register of population for five years, which is also a proof of the applicant’s address. To demonstrate the legality of their residence they must declare that they have been satisfying the conditions for residence for all five years and submit documents as evidence that they have been working or have been having resources and medical insurance coverage at their disposal. They must declare that they have not been absent from Italy (or if they have been, for how long and for what reason), and that they have not applied for social security benefits.

In Lithuania, similar to other Member States, the concrete documents confirming the basis for acquisition of the right to reside permanently will depend on the ground upon which the EU citizen has been exercising free movement rights. An EU citizen who applies for the certificate attesting his right of permanent residence once he reached the legal pension age and became entitled to a state pension or social assistance pension will need to submit the application together with a valid ID or passport and an employment contract or other documents proving his/her lawful activity in the Republic of Lithuania, and documents showing that he has terminated his employment upon reaching the pension age and after having acquired the right to a state pension. Where the personal data of the applicant in the application do not coincide with the personal data listed in the Register of Foreign Nationals and/or the Register of Residents of the Republic of Lithuania, the EU citizen will need to submit
documents confirming a change in personal data (e.g., certificate of registration of civil status acts, a court judgment to restore, supplement, amend or correct an entry of a civil status acts etc.).

In **Malta**, EU citizens will need to indicate the date of first arrival in Malta and list all periods of absence during the last five-years. Those who apply based on employment status will need to confirm their employment by showing copies of work permits, engagement letters, work contracts etc. Self-employed EU citizens can evidence their status via work contracts. Student EU citizens will need to show confirmation from the University of Malta, College or Educational Establishment concerned attesting to continuous attendance as well as comprehensive medical insurance and sufficient resources. Self-sufficient EU citizens need to prove self-sufficiency and comprehensive medical insurance. In the case of minor EU citizens, documentation includes certificate/s from the head of school attended by the minor. Authorities may request further documentation in order to process the application.

In the **Netherlands**, EU citizens and their family members applying to have their right of permanent residence certified can rely on the following documents to evidence that they meet the conditions concerning the length and legality of their residence: employment contracts with an employer in the Netherlands, a copy of a health insurance policy providing coverage during the previous 5 years or evidence showing that you had a bank account registered to you on an address in the Netherlands during the previous 5 years. Concerning family members of EU citizens, the website of the IND (national immigration authority) states that as a rule family members qualify for permanent residence if the EU citizen qualifies. Where the relationship ended or the marriage was dissolved, the family member is only exceptionally entitled to permanent residence. The website states that the IND will check if this is the case.

In **Poland**, although there is no list of documents that can be used as evidence, the authorities can ask for a valid proof of registration, contracts of employment, fiscal documents, tenancy agreements, energy bills etc.

In **Sweden**, EU citizens who claim a right of permanent residence after having been employed should present as evidence income statements from the Swedish Tax Agency for the previous five years, certificates from all employers in the past five years. Self-employed EU citizens should present a tax account from the Swedish tax Agency covering the previous five years of the company. Students must present study results for the periods during which the person has studied. Self-sufficient and retired EU citizens must present documents showing how the person has supported her/himself, such as pension payments, bank statements or taxation information for foreign salaries.

### 4.3 Fees

Article 25 of Directive 2004/38 contains general provisions concerning residence documents, including the document certifying permanent residence for EU citizens and the permanent residence card for TCN family members. According to Article 25(2) such documents shall be issued free of charge or for a charge not exceeding that im-
posed on nationals for issuing similar documents. A number of national reports provide information on fees. Info on the level of fees was provided for: Finland 54 euros; Netherlands 51 euros; 65 pounds in the UK. The Bulgarian, Estonian (25 euros) and Romanian reports mention that proof of payment must be submitted with the application. No fees are applicable in Sweden.

4.4 Translation and Authentication of Documents

Besides fees, EU citizens applying to have their right of permanent residence certified may incur additional costs linked with the translation and authentication of documents. For example, the Austrian report mentions that if the required documents are not in German, the EU citizen can be asked by the authority to submit a German translation of those documents. The Estonian application form is bilingual (Estonian and English) but must be filled out in Estonian. The official info available states that documents annexed to an application issued in a foreign country must be translated into Estonian, English or Russian; the translation must be certified by a notary public. Some documents need to be certified with an apostille certificate or legalized but there are exceptions depending on whether there are bilateral or multilateral conventions signed on this topic. In Lithuania, the application shall be filled in Lithuanian. Documents issued abroad, which are submitted together with the application, must be translated into Lithuanian, and the translations must be approved in accordance with the procedure provided for by applicable acts. In certain cases, legalization or approval by a certificate (apostille) is necessary.

5. How Long Does it Take for the Certificate to be Issued?

Article 19 of Directive 2004/38 states that after the authorities have checked the duration of residence, they shall issue the EU citizen with a document certifying permanent residence as soon as possible. According to Article 20, if the applicant is a TCN family member of a EU citizen, the permanent residence card shall be issued within 6 months of the submission of the application.

Although not all national reports contain information concerning this issue, based on the info provided by some Member States, it can be concluded that there is no uniform interpretation of the notion ‘as soon as possible’. Some states went for a literal transposition of Article 19: in France, the certificate should be issued as soon as possible (dans les meilleurs delais). In Finland, the certificate should be issued immediately after the length of residence has been checked. TCN family members of EU citizens can be issued with a permanent residence card within 6 months of the submission of the application. Yet, the Irish case shows some of the problems that can be linked with such a vague notion. Although, the Irish Minister of Equality and Justice should issue the certificate ‘as soon as is practicable’ where she is satisfied that the Union citizen concerned is entitled to remain permanently in the state, in practice, due to a high volume of applications there are delays in the issuing of certificates. The processing of an application takes about 10 months, which seems excessive especially when compared with the 6-month deadline stipulated by the Directive in respect of TCN family members. In Estonia, Lithuania and Slovakia the document
should be issued within one month of submitting the application. In **Hungary**, the application shall be decided within three months, whereas in **Belgium**, the municipality should decide within 5 months of the application. **Bulgaria** seems an exception, as the certificate shall be issued on the same day.

### 6. Refusal to Issue the Document Attesting the Right of Permanent Residence

A combined reading of Articles 16 and 21 of Directive 2004/38 suggests that national authorities may refuse to issue the document certifying permanent residence where the EU citizen fails to meet the general conditions listed in Article 16 – reside legally for a continuous period of five years and where the residence has not been continuous. Continuity of residence is dealt with in Article 16/3 that lists situations in which continuity of residence is not affected by temporary absences. Furthermore, Article 21 stipulates that continuity of residence is broken down by any expulsion decision duly enforced against the person concerned. Temporary absences not affecting the acquisition of the right to permanent residence include absences not exceeding a total of six months per year; absences of a longer duration for compulsory military service; and one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training or a posting in another Member State or a third country.

Where EU citizens acquire the right of permanent residence based on Article 17 of Directive 2004/38, failure to meet the conditions listed there constitute grounds for the authorities to refuse to issue the document. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years (Article 16/4). Such an absence constitutes another ground for refusal to issue the document certifying the right of permanent residence.

The national replies contain relatively scarce information concerning this aspect. The **Hungarian** report mentions that it is difficult to check whether any of the circumstances that interrupt the continuity of the 5-year condition are present. This issue seems reflected in the low number of refused applications according to the data offered by the Office for Immigration and Nationality Affairs (OIN). In 2014 – 27 applications were refused; 2015 – 44 refusals and 2016 – 48 refusals. For applications concerning TCN family members of EU citizens, the refusal rate was equally small: 2014 – 5 cases, 2015 – 7 cases, and 2016 – 10 cases. It is interesting to note that TCN family members of Hungarian nationals have a higher refusal rate: 2014 – 63 cases, 2015 – 89 cases and 2016 – 197 cases. The marginal rate of refusals for EU citizens and their family members could be an explanation for the lack of judicial review of such decisions as.

The **Belgian** report states that failure to meet the condition of 5 years uninterrupted residence in accordance with the EU instruments constitutes a ground for refusal. Residence is deemed interrupted when: the right of residence has been withdrawn, refused on first admission or the person has been held in prison following a final criminal conviction. In **Romania** a per a contrario interpretation of the provisions
of EOG no 102 of 14 July 2005 suggests that the execution of a custodial sentence of longer than 6 months would interrupt the continuity of residence. The execution of a decision asking the EU citizen to leave France is considered to interrupt the continuity of residence leading to the acquisition of a right of permanent residence.

The Italian answer stresses differences between Directive 2004/38 and the Italian legislation transposing it. The Directive stipulates that continuity of residence is broken by any expulsion decision duly enforced against the person concerned, whereas the Italian provision refers to an expulsion decision adopted against the person concerned. Under Italian law, the adoption of any expulsion decision is a cause of cancellation from the register of population. This can be a problem, when the expulsion decision is successfully challenged, since this case is not regulated. It is not clear from the law whether a new application for registration is needed or the administration must proceed on its own motion.

In Luxembourg, failure to prove the continuity of residence is an issue for those who have stayed outside of the country for more than 6 months per year. In practice, there are about 5 decisions rejecting an application per month. The number of cases where EU citizens rely on the more favourable provisions that should lead to acquisition of a right of permanent residence prior to the general 5-year rule are limited (2 cases in 8 years).

The Dutch report explains that until April 2015, when the law was changed, the immigration authorities did not assess whether the applicant (EU citizen or family member) had sufficient resources during the previous five years. In a court case, the judge decided that the IND couldn’t invoke this test retrospectively as it would breach the principle of legal certainty under EU law. Given Article 37 of Directive 2004/38, there is no compulsory obligation to check the lawfulness of residence. This practice has changed in 2017.4

7. Information on Administrative Practices

A number of national reports highlight the fact that there are differences between the official rules and guidelines applicable in their national jurisdiction and the actual manner in which they are applied by national authorities. This suggests that administrative practices may diverge from the letter of the law, an issue that impacts the effective exercise of EU citizenship rights.

In Italy, the Legislative Decree transposing Directive 2004/38 into national law is supplemented by a circular letter issued by the Ministry of Interior 2007 no.19 detailing the administrative steps that EU citizens must take. Despite the existence of such a circular, the instructions given to the authorities in charge of ascertaining whether EU citizens have acquired the right to permanent residence is rather incomplete. Since the competent authorities are part of the municipal administration, they possibly find additional instructions to guide them in the municipal regulations. Local practices have reportedly been developed, not always in line with EU law, but at the same

4 See the decision of the Dutch Highest Administrative Court, ABRvS 15 November 2017, ECLI:NL:RVS:2017:3170.
time difficult to detect when not reported by the concerned person. The most difficult cases concern EU citizens who have worked under different short-term contracts or when the economic resources do not come from a regular source (e.g., pensions) or the applicant does not possess a sizeable bank account.

It is useful to remind that the Irish and UK reports also mention divergence between the official forms and the guidance notes that national authorities rely upon when implementing the official rules. The latter impose more onerous obligations concerning the type and amount of documents authorities may deem necessary for attesting the acquisition of a right to permanent residence (see Section 4.2 on evidentiary issues). Additionally, the UK report details two further instances of divergent administrative practices concerning permanent residence. Firstly, the UK Home Office seeks to argue that a 2-year period of economic inactivity after acquiring permanent residence is akin to a physical absence of the same period, and means permanent residence status can be lost. This has yet to be tested in the UK Courts. Secondly, the Home Office argues that an EHIC issued by another Member State cannot be used in respect of a permanent residence application, as the holder of the EHIC is required, when claiming an initial right of residence in the UK to make a declaration to the effect that their residence is temporary. Students have been able to rely on the EHIC – the argument would be that at the time they were students they were temporary. The fact that they stayed for example as a worker after their studies does not invalidate their CSI at the time they were students. EU Regulation 883/2004 does not contain the requirement to make a declaration and the UK policy is arguably unlawful and challengeable in the UK courts.

The Greek report mentions that some authorities only ask for the registration certificate; whereas others check the continuity of residence by asking the EU citizen to provide tax reports, lease contracts or proof of insurance.

The Hungarian report mentions incoherence concerning the validity of the residence card issued to an EEA national and the possibility to consider the same card invalid. The card is valid for an undefined period if the holder shows his/her valid travelling document or ID card but the immigration authority can declare the card invalid and withdraw it for a variety of reasons (the data mentioned on the card has changed with the exception of the address; the card was destroyed or the stated data cannot be proven, the card is false; the data is false etc.).

8. National Case Law on Permanent Residence

The following national replies mention that no case law was found for the relevant period concerning permanent residence: Bulgaria, Cyprus, Denmark, Lithuania, Luxembourg, Latvia, Portugal, Romania.

Case law was reported for the following Member States:

In Austria, there have been cases concerning the position of Croatian nationals who were lawfully resident in Austria prior to their country’s accession to the EU. The national courts followed the decision of the CJEU in Ziolkowski and Szeja confirming that periods of residence completed by a national prior to that state’s accession
should be taken into account towards the acquisition of a right of permanent residence where residence complied with the conditions of Article 7(1) of Directive 2004/38 and in the absence of provisions to the contrary in the Act of Accession. This is seen as a correct application of CJEU jurisprudence.

The Czech report mentions cases concerning the position of family members where the EU citizen and the family member do not reside together; in other cases the national court discussed the interpretation of the meaning of durable relationship where the EU citizen and the TCN family member were not married.5

In Germany, permanent residence has not caused a great deal of jurisprudence. Existing cases concerned the calculation of the five-year period in cases of partial absence and whether residence was ‘legal’ (that is, met the requirements of Article 7 Directive 2004/38) especially where the EU citizen had an insecure and patchy employment history. The case law does not focus on how to prove permanent residence but rather on how to interpret whether the EU citizen has resided legally and uninterruptedly in the host state for 5 years.

The Spanish report highlights a number of court decisions concerning permanent residence; the majority of the case law deals with the expulsion of EU citizens who enjoy permanent residence in Spain on grounds of public policy and public security. Only one of the court decisions mentioned in the report concerns the acquisition of the right of permanent residence as such (the EU citizen was seen as not meeting the condition of having sufficient resources to support his family and not become a charge for social assistance in Spain during his period of residence).6 In the case law concerning the expulsion of permanent resident EU citizens, Spanish courts emphasize that the personal conduct of the EU citizen besides constituting a real, present and sufficiently serious thereat affecting one of the fundamental interests of society, also reveals a lack of social and cultural integration in Spain.7 Spanish courts have annulled the expulsion of a family member of a EU citizen where the conviction took place a long time ago and the family member showed rooting and links with Spain due to his marriage and fatherhood.8 In a case similar to the Rendon Marin decision, Spanish courts allowed the expulsion of the TCN family member on grounds that the minor EU citizen was not in his charge and that the marriage with the Spanish citizen had taken place after the expulsion decision was issued.9

The French report mentions one case in which the court established that where the administrative authorities contest the length of the EU citizen’s residence in a decision asking her to leave France, the authorities must show the evidence upon which it considers that the person does not meet the conditions of residing in France.10

The Maltese report mentions that it is difficult to gather any info on this topic since appeals under the Free Movement Order are heard by the Immigration Appeals

5  Czech Supreme Administrative Court, 5 Azs 28/2015, judgment of 5 June 2015.
9  High Court of Justice of the Balearic Islands, 23.11.2016.
10 CAA Versailles, 4e ch., 6.12.2016, no. 15VE02750.
Board. However, the Immigration Appeals Board does not make its decisions public and therefore it difficult to ascertain if there were any disputes on this ground and if so, what the outcome was. From the Immigration Appeals Board, there is the faculty to submit an application for judicial review to the Court of Appeal, however to date, the Court of Appeal has not delivered any judgments relating to the right of permanent residence of EU citizens and their family members.

The Swedish report mentions a number of court cases decided by the Swedish Supreme Migration Court. In one case, it was confirmed that periods of residence completed prior to the transposition of Directive 2004/38 into national law should be taken into account when calculating the five-year residence period.\textsuperscript{11} In another case, the court decided that a TCN family member of a EU citizen must present a valid passport. An expulsion should not be made before such a person have had the possibility to give proof on his or her residence right.\textsuperscript{12} In a case involving a minor EU citizen, the court decided that the examination if a minor will meet the requirements for a residence right, should be tried independent of the parents’ situation. If the minor is granted a residence right, also the parent or a caretaker from a third-country should be granted a residence right.\textsuperscript{13}

9. Conclusions

Recital 17 of directive 2004/38 states that

‘Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union.’

In light of the role ascribed to permanent residence as a force for social cohesion, it is important to note that during the monitoring period (2014-2016) in some states, permanent residence became a problematic aspect of free movement and EU citizenship due to the fact that once acquired this legal status entitles the EU citizen to social assistance or health care without any restrictions. The principle formulated in Recital 18 of the Directive\textsuperscript{14} has proven somewhat difficult to accept during times of economic crisis as national authorities increasingly scrutinize the acquisition of permanent residence. Austrian courts have decided that since residence certificates have only declaratory force, the authorities responsible for granting social assistance may check independently if the prerequisites for the right of permanent residence

\textsuperscript{11} MIG 2012:10.
\textsuperscript{12} MIG 2007:56 and MIG 2007:53.
\textsuperscript{13} MIG 2009:22.
\textsuperscript{14} Recital 18 Directive 2004/38 states ‘in order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizen resides, the right of permanent residence, once obtained, should not be subject to any conditions’.
In Belgium, the increase in the number of applications for certifying permanent residence is linked with the fact that permanent residence facilitates access to social assistance. There is an increase in applications from Eastern European citizens, especially self-employed once working in the building sector. However, there is also an increase in refusals of permanent residence on grounds that the files are not complete coupled with orders to leave the territory. Similar concerns are present in Germany where permanent residence is starting to become an issue due to its implications for accessing income support (social assistance). Economically inactive EU citizens who have not yet acquired permanent residence are excluded from receiving income support, thus authorities will critically examine if the conditions for having acquired a right of permanent residence are met with a view to police the correct application of the provisions of income support (please see the separate report on social assistance and the Danor jurisprudence). The Italian report mentions that permanent residence has not been a very important topic since Italy did not limit the rights EU citizens can enjoy before the acquisition of the right of permanent residence. When it comes to the requirements to be satisfied in order to apply for benefits, EU nationals and Italian nationals are treated in the same way and a certain duration of residence is the rule for both categories. The main advantage linked to permanent residence is the right to be enrolled into the National Health Service without meeting any time limit.

In other Member States, permanent residence is problematic when linked with the position of certain family members of EU citizens. The Czech report mentions that most problems concern TCN family members of Czech citizens who are legally assimilated to the position of family members of EU citizens. The Polish report states that permanent residence for EU citizens is not an issue, which is partly evidenced by the absence of cases reaching the administrative courts. The position of same sex partners or spouses is problematic but the rapporteur mentions that this issue becomes apparent much earlier on, usually when such couples try to register or enter Poland. Although not mandatory, EU citizens prefer to obtain a certificate attesting their permanent residence because they find it useful when dealing with the authorities or when they need to fulfil administrative formalities.

In the UK, in the run up to Brexit, permanent residence is an issue as the number of EU citizens applying for the recognition of their right to permanent residence in the UK is growing. Moreover, changes introduced in 2015 to the provisions of the British Nationality Act concerning acquisition of British citizenship have had an impact on permanent residence. Since 12 November 2015, a person with at least 12 months of permanent residence who wishes to apply for British citizenship has to apply first for a permanent residence certificate or card. This change was introduced by the British Nationality (General) (Amendment No. 3) Regulations 2015 (SI 2015/1806). Applications for naturalization, made without a permanent residence document where one is required, are now being refused. The practical significance of the amendment is considerable, as it obliges persons who are long-term residents under EU law, and who wish to take out British citizenship, to first obtain a residence document. That

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requires completion of the EEA (PR) form, submission of a range of supporting documents as above, payment of £65 per person, and temporarily giving up a passport or identity card.

The national replies to the questionnaire show a great deal of variety in terms of the documentary evidence that EU citizens must produce in order to certify the legality and duration of their residence as conditions that must be met to acquire the right of permanent residence. This situation affects the effectiveness of rights enjoyed by EU citizens; the ease and speed with which the right to permanent residence can be proven and certified depends upon the Member State in which one applies. While it is true that the Directive gives Member States leeway in certain cases (how long should it take to issue the certificate or card etc.) a more uniform practical experience of the exercise of EU citizenship rights would be beneficial in light of the role ascribed to permanent residence as a force of social cohesion. The amount of guidance and information given by national authorities to EU citizens wishing to certify their right of residence is another aspect that could be improved. Some Member States give quite a bit of guidance in terms of spelling out the types of documentary evidence they expect the EU citizen to provide. In other states this is rather unclear. The EU Commission could take a more prominent role by coming up with best practices to create a more level playing field for EU citizens. One could also think of a uniform application form. The issues of translation and legalization of documents issued by other Member States are practical obstacles to a uniform experience of EU citizenship rights and an area where the Commission could again take a more prominent role.