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Social Assistance for Economically Inactive EU Citizens in the Member States

Paul Minderhoud

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Centre for Migration Law (CMR)
Faculty of Law
Radboud University Nijmegen
P.O. Box 9049
6500 KK Nijmegen
The Netherlands

Editors Carolus Grütters
Ashley Terlouw
Anita Böcker

Lay-out Hannie van de Put

Cover photo Erik van 't Hullenaar

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Social Assistance for Economically Inactive EU Citizens in the Member States

Paul Minderhoud*

1. Introduction

This working paper is based on the analysis of 28 national replies to a questionnaire addressing the implementation of the provisions on social assistance and economically inactive EU citizens in the context of 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 social assistance and economically inactive EU citizens and what issues are 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: social rights, family reunification and permanent residence. The other two themes are addressed in separate working papers (available [here](#)).

The focus of this contribution is on three sub-themes. First, it looks at the impact of ECJ court cases (*Brey*, *Dano*, *Alimanovic*, *Garcia Nieto and Commission v UK*) in the Member States on the entitlement to social assistance. Second, it explores the definition and application of the notion of ‘sufficient resources’ in the Member States and third, it describes what is considered ‘comprehensive medical insurance’ in the Member States.

Based on Article 6 Directive 2004/38 EU citizens have the right to enter any EU Member State without any conditions or formalities, other than the requirement to hold a valid identity card or passport, for 3 months. When it comes to residence for longer than 3 months, economically inactive EU citizens need to show that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of their host state, and that they have a comprehensive sickness insurance (Article 7(1)(b) Directive 2004/38). After the introduction of Directive 2004/38, one can argue that an inactive EU citizen applying for a social assistance benefit because s/he lacked sufficient resources, kept a right of residence under Directive 2004/38 until the moment this right was withdrawn, on the ground that s/he was supposed to have become an unreasonable burden to the social assistance system. A combined reading of Articles 14, 24 and of recital 16 of the preamble of Directive 2004/38 suggests that access to social assistance is not out of the question as long as the citizen does not become an unreasonable burden on the social assistance system of the host Member State. So far, based on the Court’s jurispru-

* Centre for Migration Law, Radboud University, Nijmegen, The Netherlands.

1 National replies to the questionnaire are on file with the author.

dence it has never been possible to argue that inactive EU citizens enjoy unconditional access to social assistance benefits in their host State. A first condition is always that the applicant has to have legal residence in the host State. In several cases the ECJ has formulated additional conditions to the extent that the applicant should 'have a genuine link with the employment market of the State concerned'² or 'need to demonstrate a certain degree of integration into the society of the host State'.³ Equally, the ECJ recognises the right of the host Member State to stop the right of residence of the person concerned, but this should not be or become 'the automatic consequence of relying on the social assistance system'.⁴ Between 2013 and 2016, five important judgments of the Court of Justice of the EU (ECJ) have been delivered on this topic in the *Brey*, *Dano*, *Alimanovic*, *Garcia-Nieto* and *Commission v UK* cases. This recent case law of the ECJ has drastically changed the landscape concerning access to social assistance benefits for inactive EU citizens. All cases deal with the entitlement of EU citizens to social benefits in their host state and explore the limits of social solidarity to which mobile EU citizens are entitled.

2. Impact of ECJ Court Cases (*Brey*, *Dano*, *Alimanovic*, *Garcia Nieto* and *Commission v UK*) in the Member States

2.1 Introduction

In order to get information on this issue we asked our experts what is, if any, the impact of *Brey*, *Dano*, *Alimanovic*, *Garcia Nieto* and *Commission v UK* in their Member State. Have there been legislative and/or administrative changes operated as a result of these cases?

Based on the answers we can make a distinction between Member States where the case law did not have any impact, Member States where there is indirect effect and Member States where there is direct impact. The paper pays special attention to Germany as three of the five ECJ judgments responded to preliminary references from that Member State.

2.2 No Impact in a Majority of Member States

In the majority of the Member States (**Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Romania, Slovenia, Slovakia, Spain** and **Sweden**) these cases of the ECJ did not have any impact at the moment of research. The reason for this varies. In some Member States such as **Italy** and **Greece** the reason was that they do not have the kind of social (assistance) benefit as was at stake in the various ECJ cases. Or such a benefit was never claimed (**Latvia**). According to the Italian expert Ms Dano would have had a right of residence under Directive 2004/38 in **Italy** because her sister provided her with economic resources sufficient under the Italian regime. In **France** the reason is that the

2 Case C-138/02 *Collins*, EU:C:2004:172, para. 67-69.

3 Case C-209/03 *Bidar*, EU:C:2005:169, para. 57.

4 Case C-184/99 *Grzelczyk*, EU:C:2001:458, para 43; Case C-456/02 *Trojani*, EU:C:2004:488, para 3.

national interpretation of the Directive is accepted as consistent with the ECJ judgments regarding the limitations which can be placed on access to non-contributory social benefits.

In other countries such as **Cyprus, Lithuania, Slovakia, Slovenia** and **Spain** the restrictions for accessing social provisions, similar to the ones challenged by the applicants in *Dano*, *Alimanovic* and *Garcia Nieto*, have already been in place even before the ECJ delivered its judgment in these cases. In **Slovakia** for instance, inactive EU citizens who want to register their residence have to hand over documents certifying sufficient financial resources for the entire period of his/her stay in order not to become person in material need, (as well as a certificate of medical insurance). In **Slovenia** non-contributory social benefits are available to all foreigners, including EU nationals, only once they have obtained a permanent residence permit, which is, with some exceptions, after 5 years of residing in Slovenia based on a residence registration certificate.

2.3 Indirect Impact in Some Member States

In **Sweden, Poland** and **Denmark** there was no direct influence of these cases on the legal practice but the issue was addressed in governmental reports and in legal literature and generated an increased focus on the issue of granting social benefits to EU citizens and the notion of 'benefit tourism'.

In **Sweden** a 2017 Official report of a governmental investigation committee analysed the above-mentioned ECJ cases. The report's overall conclusion is that the case law involves a restriction of the free movement of economically inactive EU citizens.⁵ Social benefits based on an individual needs assessment as well as some of the special non-contributory cash benefits and social assistance can be made subject to a requirement of residence. Concerning more traditional social security benefits, the committee does not come to the same conclusion. The report suggests certain legal amendments are needed in order to adapt Swedish social security law to internationalisation. The report suggests that a person should have the right to have his claim examined in order to determine if social security law is applicable, considering his personal circumstances, and if the decision is positive, a certificate should be issued giving proof of such a status. The decision could be subject to an appeal before a court. When deciding if a person should be considered having residence in Sweden, all relevant circumstances should be considered. An exception to a positive decision could be based on 'special circumstances'. There are also suggestions from the investigation committee to clarify Swedish social security law meaning that for having a right to, for instance, housing allowance and elderly income support, a person must have a residence right in Sweden. It is the intention that these suggestions become law in 2019 if approved by Parliament.

Although there are no relevant judgments issued by **Polish** courts, the ECJ judgments have been widely commented and analysed in the relevant literature. There is

5 Official report (SOU) 2017:05, Part II, p. 606.

an opinion that these judgments severely affect the scope of social protection in Poland in relation to EU citizens who intend to reside in Poland longer than 3 months. The comments focus on the access to a social pension benefit for young disabled adult persons.⁶ It is argued that the ECJ's interpretation indirectly excludes from this Polish social pension EU citizens who want to stay in Poland longer, but do not possess sufficient resources for themselves and their family members and who may become a burden on the social assistance system. In consequence, the fact that these people have their vital interests in Poland, which is the only condition for this social pension benefit, does not matter because the requirement of 'not becoming a burden on the social assistance system',⁷ overrides the other ones.⁸ According to the Polish expert such an interpretation may also affect the possibility of granting other benefits not related to the contributory system.⁹

In **Denmark** the granting of social benefits to EU citizens and the notion of 'benefit tourism' have been high on the political agenda of the last few years. To an increased extent reference is made to the term 'unreasonable burden on the host Member State's social system' and the possible loss of residence rights in guidelines issued to the administrative authorities as well as in explanatory remarks to the Bill introducing the 'integration benefit'.¹⁰ The 2015 *Briefing to the State Administration about the EU Residence Order* addresses the possibility of becoming an unreasonable burden, the loss of residence rights for that reason as well as the requirement on conducting a proportionality test. The Briefing makes no reference to *Brey*, but while referring to *Dano*, the Briefing notes that:

'[i]t follows from recent practice from the ECJ that a Member State may refuse the granting of social benefits to economically inactive Union citizens who exercise their right of free movement solely in order to obtain social assistance in another Member State.'¹¹

6 *Ustawa o rencie socjalnej, Journal of Laws* 2003, No. 135, item 1268, as amended.

7 As stipulated in the Directive 2004/38/EC as well as in the Polish Act of 14 July 2006 on the entry into, residence in and exit from the Republic of Poland of nationals of the European Union Member States and their family members (*Ustawa z dnia 14 lipca 2006 r. o wjeździe na terytorium Rzeczypospolitej Polskiej, pobycie oraz wyjeździe z tego terytorium obywateli państw członkowskich Unii Europejskiej i członków ich rodzin – Act on the EU Citizens – AEUC*) (unified text *Journal of Laws* 2014, item 1525, as amended).

8 A. Szybkie, 'Specjalne nieskładkowe świadczenia pieniężne w świetle dyrektywy 2004/38 i orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej' [Special non-contributory cash benefits in the light of Directive 2004/38 and rulings of the Court of Justice of the European Union], *Ubezpieczenia Społeczne. Teoria i praktyka* 2016, issue 2, p. 69-100.

9 Like parental benefits for women who gave birth to a child but who never worked nor paid a social security contribution (such a benefit is granted for one year) and the new child benefit (so-called 'Family 500+') granted to families with two or more children (having at least 2 children is the only requirement).

10 By Act No. 1000 of 30 August 2015, available at <https://www.retsinformation.dk/Forms/R0710.aspx?id=174123>.

11 *Orientering til Statsforvaltningen om EU-opholdsbekendtgørelsen*, EU Briefing No. 2/15 of 26 November 2015, p. 32, the Immigration Service, available at [http://www.statsforvaltningen.dk/sfdocs/EU-omr%C3%A5det/Vejledning%20\(prim%C3%A6r%20bev%C3%A6gelse\).pdf](http://www.statsforvaltningen.dk/sfdocs/EU-omr%C3%A5det/Vejledning%20(prim%C3%A6r%20bev%C3%A6gelse).pdf).

The increased focus is likely to have been caused by the cases of the ECJ, but may also be seen as a result of the tightened control on EU citizens. But no information is available on whether this resulted in changes to administrative practices regarding EU citizens. Regarding the *Commission v UK* judgment the Minister of Employment in response to questions from a Danish MP concerning the possible impact of that case in Denmark concluded that the issue at stake in *Commission v UK* is **not relevant** to practice in Denmark as it already follows

‘[t]hat an EU citizen has no right of residence in Denmark if he/she does not satisfy the conditions for residence rights under Directive 2004/38/EC. Such an EU citizen is not eligible for public benefits, but must leave the country.’¹²

2.4 Direct Impact in several Member States

In the following Members States (**Portugal, Ireland, Malta, Netherlands, Finland, Austria, UK**) the ECJ cases have had impact mostly in the national case law. Special attention will be paid to the developments in **Germany**.

In **Portugal** both Portuguese and EU nationals are only entitled to a non-contributory social benefit if they have resided legally in Portugal for at least one year.¹³ According to the government, Article 24 Directive 2004/38 prohibited any discrimination in this respect. But in 2015 the Constitutional Court rejected the argument of the government quoting both the *Brey* and *Dano* cases. It stated that the European Court of Justice accepts that

‘Member States are not, according to EU law, under an obligation to treat equally their own nationals and the nationals of other Member States (...) in what regards the conditions of entitlement to social benefits of a strictly assisting nature’.¹⁴ There is no ‘doubt that EU law allows the application of a different regime in a Member State to EU citizens and to national citizens concerning benefits of a non-contributory legal framework that secures a minimum of means of subsistence.’¹⁵

12 The Parliament’s Immigration, Integration and Housing Committee, UUI Alm. del, Final response to questions 718 and 719, the Ministry of Employment, 24 June 2016, available at <http://www.ft.dk/samling/20151/almdel/uui/spm/719/svar/1334297/1649691/index.htm> and <http://www.ft.dk/samling/20151/almdel/uui/spm/719/svar/1334297/1649690/index.htm>.

13 Article 6(1)(a) of Act 13/2003, of 21 May, as amended by the Decree-Law 133/2012, of 27 June.

14 Case 141/2015 (25 February 2015), Constitutional Court, available at www.tribunalconstitucional.pt, at 9 (translation from the Portuguese).

15 Case 141/2015 (25 February 2015), Constitutional Court, available at www.tribunalconstitucional.pt, at 10 (translation from the Portuguese). Doubts on this interpretation were, however, raised by some of the Court’s judges that considered that a preliminary reference to the Court of Justice should have been made. On this topic, see F. Pereira Coutinho, ‘Austerity on the loose in Portugal: European judicial restraint in times of crisis’, 2016 *Perspectives on Federalism* 8(3), note 70.

The Constitutional Court declared that the one year residence period applicable to Portuguese nationals breached the principle of equality (Article 13 of the Constitution). The condition is thus currently applicable solely to EU citizens.

In **Ireland** there is impact of the *Dano*, *Alimanovic* and *Garcia Nieto* cases in the 2015 Regulation transposing Directive 2004/38, where it is set down that:

‘In considering, for the purposes of these Regulations, whether a person (a) has sufficient resources not to become an unreasonable burden on, or (b) is, or would be, an unreasonable burden on, the social assistance system of the State, the Minister shall have regard to any claim made by him or her for assistance under the Social Welfare Acts and any payment or service received by him or her under the Health Acts 1947 to 2015 and the Housing Acts 1966 to 2014.’¹⁶

This provision implies that the door is open in the future for the Irish government to adopt the recent line of reasoning of the Court of Justice and would, in practice, enable a Deciding Officer to deny a claim for social assistance made by an EU citizen residing in Ireland for longer than three months, where they are economically inactive and have already made a claim for assistance under the relevant legislation. The Regulation seems to suggest that such a claim would indicate that the applicant is or would be an unreasonable burden on the social assistance system of Ireland and therefore could negate his or her right to lawful residence by failing to fulfil the ‘sufficient resources’ condition contained in both Directive 2004/38/EC, and the domestic Regulations.¹⁷

The decision in *Commission v UK* can have an impact as well on national legislation and on the administration of such benefits due to a reserved judgment handed down by Ms. Justice O’Malley, (then) of the Irish High Court.¹⁸ The case concerned an economically inactive EU citizen who was, *inter alia*, questioning the legality of the application of the right to reside test by the Department of Social Welfare, when ascertaining eligibility for certain payments. In refusing relief, the O’Malley J looked to the recent judgment of the Court of Justice in *Commission v UK* and held that there was nothing in EU law that precluded a statutory requirement of lawful residence in national legislation for both social assistance and social security benefits.¹⁹

The expert from **Malta** mentioned two court cases in which EU citizens were refused social benefits. In one case it was stressed that the inactive EU citizen was a

16 Regulation 2 of the European Communities (Free Movement of Persons) Regulations 2015; S.I. No. 548/2015 European Communities (Free Movement of Persons) Regulations 2015. These Regulations came into effect on the 1st February 2016.

17 Department of Social Protection, *HRC - Guidelines for Deciding Officers on the determination of Habitual Residence*, notwithstanding part 5(8) where it states: ‘This does not mean that any claim for social assistance should be regarded as an “unreasonable burden”.’

18 M. Carolan, ‘Judge Rejects Claim Social Welfare Benefits Criteria Breach EU Law’, *The Irish Times* 3 March 2017. See <https://www.irishtimes.com/news/social-affairs/judge-rejects-claim-social-welfare-benefits-criteria-breach-eu-law-1.2997246>.

19 *Munteanu v Minister for Social Protection*, [2017] IEHC 161. See M. Cousins, *Irish High Court upholds the right to reside test – Munteanu v Minister for Social Protection*, unpublished paper (2017), available at: http://works.bepress.com/mel_cousins/105/.

benefit tourist and that therefore she was not entitled to request payment of social benefits, as outlined in *Dano*.²⁰ In the other case the EU citizen applied for social assistance for unemployed persons for the period covering the time she was pregnant and also following birth.²¹ The authorities held the opinion that the EU citizen could work after birth but refused to do so and that therefore recourse to local social assistance was not permissible. The Court contended that the principles outlined in *Brey* did not apply in this case, as the appellant was not in possession of a residence certificate. It applied the principles found in *Dano* and held that the mere presence of the EU citizen in Malta is not sufficient for them to be granted social benefits.

Also in **The Netherlands** there have been no legislative or administrative changes yet. But given the recent case law, it seems that the immigration authorities (IND) are using this new case law in their decision-making. The Dutch legislation provides very detailed information in the form of a sliding scale to decide when a demand on public funds results in the termination of the EU citizen's lawful residence by the immigration authorities (IND).²² The longer an EU citizen is staying in The Netherlands, the longer he or she can ask for social assistance without losing his/her right of residence. With this sliding scale, the IND has implemented in a balanced manner the ambiguous nature of Directive 2004/38, balancing between the condition of sufficient resources and the possibility of access to social assistance as long as this does not become an unreasonable burden on the social assistance system of the host Member State. There is not much case law on this subject in the Netherlands yet. This might indicate that there are not many inactive EU citizens (staying less than 5 years in the Netherlands), who ask for a social assistance benefit or that the IND does not withdraw often the right of residence of these citizens.²³ But there are some developments of a restrictive nature. In an unpublished court case, the IND used in September 2015 the *Dano* reasoning regarding an inactive EU citizen, who had asked for a social assistance benefit but had never searched for work.²⁴ According to the IND, it was current policy to consider such an EU citizen immediately as an unreasonable burden to the Dutch public funds, 'even if there was only an appeal of one day'. Another case in which the *Dano* reasoning is used is a judgment by the District Court The Hague of 18 January 2016.²⁵ In this case the Court ruled that there had never been a right of residence based on article 7(1)(b) Directive 2004/38 and art 8.12 Aliens Decree, because the Bulgarian woman was unemployable because she did not speak any Dutch. According to the Court she therefore never had a right of residence.

20 Court of Appeal, (Inferior Jurisdiction), Appeal no: 42/2015, *Petya Angelova Vs Director General Social Security*, decided on Friday, 24th June, 2016.

21 Court of Appeal, (Inferior Jurisdiction), Appeal no: 43/2015 *Jutte Windekind Vs Director General Social Security*, decided on Friday, 24th June, 2016.

22 The Aliens Act Implementation Guidelines (Vc B 10/2.3).

23 The only available figures are from 2012, stating that in the first nine months 70 EU citizens were expelled because of an appeal to a social assistance benefit. It concerned Greek, Italian, Romanian and Czech citizens. See S. Bonjour et al. (eds), *Open grenzen, nieuwe uitdagingen*, Amsterdam: Amsterdam University Press 2015, p. 117-118.

24 District Court The Hague 1 September 2015, case number AWB 15/4877.

25 ECLI:NL:RBDHA:2016:3075.

In **Finland** the Supreme Administrative Court²⁶ has already ruled in several post-*Dano* judgments on the requirement of ‘sufficient funds’ and related questions. Important cases cover issues concerning sufficient funds as a condition for registering the EU citizen’s right to residence (KHO:2015:28), questions about sufficient integration (KHO:2016:202), questions concerning the right of an economically inactive EU citizen’s access to subsistence benefits in Finland (KHO:2015:173) and expulsion on grounds of being an unreasonable burden for the Finnish social assistance system (KHO:2016:75). In these cases, the Supreme Administrative Court engages in the proportionality assessment that promises to take into account the applicant’s personal circumstances, as required by the relevant Government Proposal (HE 205/2006). According to this case law, temporary recourse to social assistance cannot constitute an unreasonable burden. However, the Court has repeatedly referred to the *Dano* and *Alimanovic* judgments as an explanation for why the lawful residence in Finland is conditioned on sufficient funds in the case of economically inactive EU citizens and why economically inactive EU citizens cannot fund their residence in Finland by means of social assistance/minimum subsistence benefits. In its post-*Dano* case law, the Court has also referred to economic activity as the central indicator of sufficient integration. In light of *Dano*, the Court noted that Article 7(1)(b) of Directive 2004/38 seeks to prevent economically inactive EU citizens from using social assistance to fund their stay in the host Member State (KHO:2016:75). This would mean that whether an economically inactive EU citizen has ‘sufficient funds’ must be examined concretely without taking into account the applied social assistance.

In **Austria** two benefits are important in this context. First there is the means tested minimum pension allowance which intends to ensure a minimum means of subsistence for its recipients where the pension is insufficient; its grant is dependent on objective criteria defined by law.²⁷ As a result of the *Brey* case, which was about this Austrian minimum pension allowance, the Austrian Supreme Court (*Oberste Gerichtshof-OGH*) ruled that as long there is no legal binding decision of expulsion according to the applicable law, the applicant is entitled to receive means tested minimum pension allowances in cases where a ‘registration certificate’ has already been issued.²⁸ Nevertheless, the question whether or under which circumstances applicants, who have (at least not yet) been issued a registration certificate can receive means tested minimum pension allowance was not solved by this. Based on the *Dano* and *Alimanovic* cases the Supreme Court ruled in two judgements,²⁹ that applications for this means tested minimum pension allowance of economically inactive union citizens who moved to Austria solely in order to obtain social assistance can be rejected on grounds of EU law. The OGH stated that Directive 2004/38/EC allows the host Member State to impose restrictions on the provision of social benefits to economically non-active Union citizens in order to avoid that they would otherwise become an unreasonable burden to the Austrian social assistance scheme. According to the

26 Korkein hallinto-oikeus, KHO.

27 Case 29. 4. 2004, C- 150/02, Skalka, para 26.

28 OGH 17.12.2013, 10ObS152/13w.

29 OGH 10.5.2016, 10ObS 15/16b and OGH 19.7.2016, 10ObS 53/16s.

Brey case,³⁰ this restriction would also be applicable to the means tested minimum pension allowance. The Supreme Court further stated that according to the *Dano* case,³¹ the ECJ had granted the host Member State the opportunity to examine the fulfilment of the requirements of the Directive 2004/38/EC and to deny the application for social assistance without an expulsion being necessary. In the opinion of the Supreme Court, the necessity of an assessment of a potentially unreasonable burden which the grant of a specific benefit would place on the national system of social assistance at issue in the main proceedings as a whole, was explicitly rejected. Since a registration certificate relates only to the right of residence, its declaratory granting has no effect on the entitlement to receive social benefits.

The second Austrian benefit affected by this case law is the ‘needs based minimum benefit scheme’.³² The application of this benefit belongs to the competence of the nine Austrian provinces. In all nine provinces Union citizens are entitled to receive needs based minimum benefit if they reside lawfully in Austria according to Art 51 or 53a residence and settlement act. This has not been changed by the *Dano* and *Alimanovic* cases. But the VerwaltungsGerichtshof³³ refers to these case law in recent judgements, stressing that a Member State must have the possibility of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State’s social assistance although they do not have sufficient resources to claim a right of residence. Member States may examine the fulfilment of the requirements of the Directive 2004/38/EC and (if the prerequisites are not met) reject an application for social assistance without an expulsion being necessary.³⁴

In the **UK** in 2016 the Supreme Court handed down its judgment in the case of *Mirga and another (Appellants) v SSWP and Westminster City Council (Respondents)* [2016] UKSC. The appeals were brought by a Polish national, Roksana Mirga, and an Austrian national, Wadi Samin. The joined appeals were primarily concerned with the scope of the ‘right to reside’ test for social assistance benefits, such as income support and, in particular, whether EU law (Art 7(1) (b) of Directive 2004/38) required an individualised proportionality assessment as to the burden on the social assistance system in individual cases, following European Court of Justice (ECJ) cases such as *Brey*, *St Prix* and *Dano*. The judgment makes clear that the right to residence under Directive 2004/38 cannot to be invoked simply to enable a national of one member state to obtain social assistance in another member state. The Court says that the right of residence is not intended to be available ‘*too easily*’ to those who need social assistance from the host member state. A Union citizen can only claim equal treatment with nationals of a country, at least in relation to social assistance, if he or she can satisfy the conditions for *lawful residence* in that country. Whilst clearly sympathetic to the plight of the two appellants, the Court said this was not the case here, given that neither Ms Mirga nor Mr Samin were a worker, self-employed, student or

30 C-140/12, para 62.

31 C-333/13, para 76.

32 In German: *Bedarfsorientierte Mindestsicherung* (BMS).

33 VwGH, Supreme Administrative Court.

34 VwGH 9.8.2016, Ro 2015/10/0050.

self-sufficient. The second issue concerned proportionality. A substantial burden would be placed on the UK welfare system, where a national of another member state is not a worker, self-employed or a student, and has no, or very limited, means of support and no medical insurance. According to the UK Supreme Court it would undermine the whole thrust and purpose of Directive 2004/38 if proportionality could be invoked to entitle such a person to have the right of residence and social assistance in another member state, save perhaps in extreme circumstances. The discernable shift in the ECJ case law around the thorny issue of EU citizens' access to benefits in another Member State, evident in the *Dano* and *Alimanovic* cases, undoubtedly assisted the UK Supreme Court in its ability to declare that the aim of the 2004 Directive is to stop, 'economically inactive Union citizens using the host member state's welfare system to fund their means of subsistence'. It seems now clear that, as far as access to UK social benefits is concerned, EU citizens can only claim equal treatment with nationals of the host Member State (under art 24 (1) of Directive 2004/38) if their residence in the territory of the host Member State complies with the conditions of Directive 2004/38.

2.5 What Has Happened in Germany?

As three of the five ECJ judgments responded to preliminary references from **Germany** the reaction in Germany, which is a fascinating one, will be described here in detail. The *immediate* impact was at first sight negligent, since the ECJ confirmed the position of the German legislature as being compatible with the Citizenship Directive and primary law. At the time, Section 7(1) Social Code II excluded from income support those seeking work and anyone else, except for workers and the self-employed within the first three months of the stay. Nonetheless, things turned out differently, since there was another twist in the series of decisions by the Federal Social Court (*Bundessozialgericht*) in a follow-up judgment to the *Dano* and *Alimanovic* rulings. In this decision, the Federal Social Court accepts the position of EU law as a starting point, but moves away from it to discuss doctrinal questions of statutory interpretation under German law. In doing so, the Federal Social Court concluded, firstly, that the wording of section 7(1) Social Code II,³⁵ which literally refers to those entering to seek work, must be interpreted, in light of the drafting history and several other considerations, to cover both jobseekers and the economic inactive under EU law. After having confirmed that the statutory exemption from social benefits applies to Union citizens like Ms Dano, the Federal Social Court went on to conclude, secondly, that social benefits have to be granted nonetheless on the basis of German statutory rules

35 Social Code II (*Sozialgesetzbuch zweites Buch – SGB II*), available online at http://www.gesetze-im-internet.de/sgb_2.

under section 23 Social Code XII³⁶ after six months of factual stay in regular circumstances. It is important to understand that the judgment grounds its findings exclusively in domestic German law, not in EU law.³⁷

In a parallel decision decided on the same day, the Federal Social Court concluded in direct response to the *Alimanovic* reference that the situation described above applies and that, nonetheless, it was not able to resolve the case, since the domestic court of first instance would have to verify, in line with the indications given by the Advocate General in his opinion on the *Alimanovic* case,³⁸ whether the children had obtained an independent residence right under Article 10 Regulation (EU) No. 492/2011 on the basis of which the parents might then benefit from derived rights in line with the *Ibrahim* and *Teixeira* judgments of the ECJ.³⁹ To refer such questions, which require a factual assessment, back to courts of lower instance is standard practice, since federal courts can only decide questions of law. Legal databases give no indication what the final judgment of the lower court eventually turned out to be.

Moreover, it should be noted that the Federal Social Court reaffirmed in another judgment of the same day that statutory exemptions described above do not apply to citizens of countries of the European Convention on Social and Medical Assistance in so far as the requirements of that Convention are met.⁴⁰ This argument continues to apply at present after the legislative change described below for benefits which fall under Social Code XII.⁴¹

The abovementioned judgment superseding the restrictive outcome of the *Dano* and *Alimanovic* cases on the basis of domestic law caused a political outcry, not least among the municipalities, which, according to fiscal rules, are responsible for payments under Social Code XII on which the Federal Social Court based the claim to social benefits after six months. As a result, the deferral government promised to change the law – and that promise was supported both by the Chancellor (Christian Democrat) and the Minister for Labour (Social Democrat). Moreover, several social

36 Social Code XII (*Sozialgesetzbuch zwölftes Buch – SGB XII*), available online at http://www.gesetze-im-internet.de/sgb_12.

37 The lead case is Bundessozialgericht, judgment of 3 December 2015, B 4 AS 44/15 R, available online <http://juris.bundessozialgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bsg&Art=en&Datum=2015&nr=14136&pos=11&anz=216>.

38 See AG Wathelet, opinion of 26 March 2015, paras 117-122.

39 Bundessozialgericht, judgment of 3 December 2015, B 4 AS 43/15 R, available online <http://juris.bundessozialgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bsg&Art=en&Datum=2015&nr=14165&pos=10&anz=216>.

40 Bundessozialgericht, judgment of 3 December 2015, B 4 AS 59/13 R; it should be noted that it is mainly western and southern European countries which have, like Germany, ratified the Convention.

41 On 19 December 2011, the German government introduced a reservation to the European Convention on Social and Medical Assistance to the extent that the Convention is no longer applicable to section 7 of the Social Code II (SGB II), thus blocking the application of the convention to job seeking benefits, but not to benefits under Social Code XII. See S.A. Mantu & P.E. Minderhoud, 'Social rights and European integration theory: Situating CJEU jurisprudence in three national contexts', 2017 *E-Revista Internacional de la Protección Social*, 2(2), p. 51-68.

courts of lower instance declined to follow the guidance of the Federal Social Court⁴² – an act of judicial ‘mutiny’ which is very rare among German courts.

As a result, the Parliament passed a new law in December 2016 amending section 7 Social Code II and section 23 Social Code XII in order to clarify that Union citizens without a right to reside and those seeking work cannot claim social benefits. That law brings domestic legislation in line with the options provided by the EU legislature and the interpretation given by the ECJ in *Garcia-Nieto*, *Alimanovic* and *Dano*.⁴³ However, the citizens concerned are given a ‘bridging support’ for up to one month once in two years (in order to avoid immediate re-entry) and travel support in the form of a loan (in order to avoid the bridging support being an incentive to come for short periods and to be returned home at the cost of the government) in line with section 23(3)(2) and section 23(3a) Social Code XII as amended by the above-mentioned Act.

While the conformity of the new rules with Union law is not questioned any more as a result of the *Alimanovic* and *Dano* judgments, there continues to be a debate whether the new provision complies with the German Constitution, in particular the guarantee of human dignity, which the Federal Constitutional Court uses as a legal basis to oblige the state to provide basic income support to those in need.⁴⁴ The central legal question is whether return to the home state, with government support for an interim period and travel costs as described above, can be expected from those in need even if the state does not deport them forcibly.⁴⁵ That question will have to be settled by the German Constitutional Court at some point in the future. Some lower courts have defended that position so far,⁴⁶ although that does not pre-empt a different outcome on the part of the Constitutional Court. It should be noted, moreover, that the previous decisions by the Federal Social Court were based on statutory interpretation and did not contain an authoritative interpretation of the constitution.⁴⁷

42 See, for instance, the Social Court Berlin, judgment of 11 December 2015, S 149 AS 7191/13.

43 Amendment Act of 21 December 2016, available online at https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl116s3155.pdf#__bgbl__%2F%2F%5B%40attr_id%3D%27bgbl116s3155.pdf%27%5D__1491479277535; for the Bill setting out the motivation of the government, see the Draft Law, Parliamentary Documents (*Bundestagsdrucksache*) 18/10211 of 7 November 2016, available online at <http://dipbt.bundestag.de/doc/btd/18/102/1810211.pdf>.

44 See the lead judgment BVerfGE 125, 175 – *Hartz IV*, available online at <http://www.servat.unibe.ch/verfassungsrecht/bv125175.html>.

45 See D. Thym, ‘Migrationsfolgenrecht’, 2017 *Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer* (76), p. 169-216, at 176-185.

46 See for instance the Regional Social Court of Bavaria, Bayerisches Landsozialgericht, Decision of 13 October 2015, L 16 AS 612/15 ER, available online at <https://openjur.de/u/863637.html>; and Landsozialgericht (Regional Social Court) Nordrhein-Westfalen, Decision of 16.3.2017. L 19 AS 190/17 B ER.

47 See D. Thym, ‘Sozialhilfe für erwerbsfähige Unionsbürger: Das Bundessozialgericht auf Umwegen’, 2016 *Neue Zeitschrift für Sozialrecht*, p. 441-444.

3. Sufficient Resources: Definition and Application

3.1 Introduction

One of the crucial questions is when do inactive Union citizens have sufficient resources in order to obtain a right of residence under Directive 2004/38. The Commission has tried to provide some guidance in answering this question in its guidelines, published in 2009. According to these guidelines the notion of 'sufficient resources' must be interpreted in the light of the objective of the Directive, which is to facilitate free movement, as long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State.⁴⁸

The first step to assess the existence of sufficient resources should be whether the EU citizen (and family members who derive their right of residence from him or her) would meet the national criteria to be granted the basic social assistance benefit. EU citizens have sufficient resources, according to the Commission's guidelines, where the level of their resources is higher than the threshold under which a minimum subsistence benefit is granted in the host Member State. Where this criterion is not applicable, the minimum social security pension should be taken into account.

At the same time Article 8(4) of Directive 2004/38, which is the important provision in this context, prohibits Member States from laying down a fixed amount to be regarded as 'sufficient resources', either directly or indirectly, below which the right of residence can be automatically refused. The authorities of the Member States must take into account the personal situation of the individual concerned. The text of this provision fully reads:

'Member States may not lay down a fixed amount which they regard as "sufficient resources", but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.'

Unfortunately, this text has a rather ambivalent character. On the one hand a fixed amount is prohibited, but on the other hand a threshold at the level of a social assistance benefit is indicated. During the negotiations in 2002 and 2003 on the establishment of Directive 2004/38 the wording of this provision regarding the determination of what 'sufficient resources' should mean was highly debated by some Member States and the Commission, which has probably contributed to this ambivalence in the text.

In this context we asked the following questions:

48 COM (2009) 313 final, Communication from the Commission to the European parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Section 2.3.1. Sufficient resources.

What is the definition of sufficient resources in your MS? Is there any information on how administrative authorities apply this requirement when assessing whether an EU citizen is lawfully resident?

It appears from the answers that while in all Member States the notion of sufficient resources is recognized in the national legislation, a definition of the concept of sufficient resources is mainly absent. Based on the answers we can distinguish between Member States with a clear definition in their legislation, Member States with no clear definition but a fixed threshold and one Member State with no definition nor a fixed threshold. In a few Member States the legislation and administration provide the possibility to have an individual assessment of the presence of sufficient resources. Only in five Member States the issue of sufficient resources has been subject of court cases.

3.2 Clear Definition in Legislation

In seven Member States (**Belgium, Croatia, France, Italy, Latvia, Malta, Netherlands and Portugal**) a clear definition is given in the legislation.

In **Belgium** resources must at least correspond to the income level under which the person concerned is entitled to social assistance.⁴⁹

In **Croatia** a definition of sufficient resources has been provided in the legislation, which reads:⁵⁰

‘(2) At the time of an evaluation whether the funds for supporting oneself referred to in Paragraph 1, Points 2 and 3 of this Article are sufficient, the personal position of a national of the EEA Member State and his family members shall be taken into account. It shall not be required that such funds amount to more than funds required for the realization of rights under the social assistance system in the Republic of Croatia, in accordance with special regulations.’

The level is HRK 800, which is around € 106.

In **France** there is quite extensive legislation on the meaning of sufficient resources and some jurisprudence. According to national legislation,⁵¹ the determination of sufficient resource must be based on the individual circumstances of the person. It cannot exceed the amount available to nationals on the basis of solidarity as set out in the social security legislation.⁵² Even EU nationals who are economically inactive and hold a residence permit can be subject to a check that they continue to meet the requirement (until such time as they acquire permanent residence). The French legislation sets out minimum revenue starting at € 535,17 per month for a

49 Article 40, § 4 al. 2 of the Law of 15 December 1980

50 Art. 156 para. 2 of the Foreigners Act (Zakon o strancima, NN 130/11, 74/13), http://www.mup.hr/UserDocImages/engleska%20verzija/2014/Foreigners_Act_13.pdf.

51 CESEDA R 121-4.

52 L 815-1 Code de la securite sociale.

single person without dependents and rising from there. A 2011 circular⁵³ recommend a restrictive approach to the interpretation of resources consistent with the minima applicable to French nationals to claim the minimum social assistance. Further the amounts must be available to the individual on the day of the request (for a residence certificate). Resources from all sources are counted. Yet the decision of the administrative court in Douai (a city in France) held that the resources must be personal.⁵⁴ Such a perspective was approved by the Conseil d'Etat in 2008.⁵⁵ As regards the establishment of an 'unreasonable burden' the French authorities allow their national authorities to make a decision in the round, taking into account the notion of a 'life accident'.⁵⁶ This notion means that where a EU citizen has in the past fulfilled the conditions but as a result of a life accident no longer does so, he or she should in principle be entitled to continue to have a right of residence and access to the relevant social benefits. These life accidents include divorce, separation, health issues which become more serious, a general diminution of income and where a private insurance no longer covers a serious condition which was not foreseeable.

In **Italy** the person concerned must provide evidence that they have sufficient economic resources for them and their family members, calculated according to the criteria laid down by Art. 29(3)(b) of the Consolidated law on migration.⁵⁷ This provision states that the resources are sufficient if their amount equates the social allowance, plus a 50% for each family member to reunite. In 2016, the social allowance amounted to € 5.824,91 per year.

In **Latvia** an economically inactive EU citizen must have a monthly income equivalent to the level of income of a person who is considered a poor person,⁵⁸ which means he/she needs an income above € 128,06 within a period of the last three months.⁵⁹

In **Malta** resources are sufficient if

'they are equivalent to the level of resources indicated by the Minister responsible for social policy as being the *minimum means which determine the grant of social assistance* to Maltese nationals, and taking into account the personal circumstances of the Union citizen... and where appropriate, the personal circumstances of accompanying family

53 DSS/DACI/2011/225

54 CAA Douai, 2e ch., 3 juin 2008 n 07DA01750. See also the decision of the administrative court of appeal Nancy CAA Nancy, 2e ch., 16 novembre 2016 N 15NC02370.

55 CE n 315441, 26 novembre 2008.

56 CNAF n 2009-022 du 21 octobre 2009.

57 The Consolidated law on migration (Legislative Decree 1996 no. 286) regulates the status of third country nationals and is not applicable to EU citizens, unless an express provision on the contrary. Art. 29 of the Consolidated law on migration regulates family reunification of third country nationals.

58 The Cabinet of Ministers Regulation No. 675, 'Procedure according to which a Union citizen and his/her family members enter and reside in Latvia' (*Kārtība, kādā Savienības pilsoņi un viņu ģimenes locekļi ieceļo un uzturas Latvijas Republikā*), *Official Gazette* No. 141, 7 September 2011.

59 The Cabinet of Ministers Regulation No. 299, 'Regulation on recognition of a single person or a family as poor' (*Noteikumi par ģimenes vai atsevišķi dzīvojošas personas atzīšanu par trūcīgu*), *Official Gazette* No. 51/52, 31 March 2010.

members. If this criterion cannot be applied, such resources shall be deemed sufficient if they are equivalent to the *level of the national minimum security pension payable* by the Government of Malta at the time of application.⁶⁰

The **Dutch** immigration authorities (IND) apply a fixed amount at the level of a social assistance benefit as sufficient resources.⁶¹ There is no evidence that they accept a lower threshold.

In **Portugal** the notion of 'sufficient resources' is defined as follows:

'the resources of the citizen should not be lower than the threshold below which the Portuguese State may grant social rights and supports to Portuguese nationals, taking into account the personal situation of the citizen concerned and, as the case may be, the situation of his/her family members'.⁶²

That threshold is low: in the case of single beneficiaries it corresponds to € 183,84 per month.⁶³

3.3 No Clear Definition but a Fixed Threshold

In 10 other countries (**Austria, Bulgaria, Cyprus, Czech Republic, Estonia, Greece, Ireland, Lithuania, Poland, Romania and Slovenia**) the legislation gives no clear definition of the concept of sufficient resources but the administration uses a fixed threshold at the level of the social assistance benefit.

In **Austria** there is no specific amount of money considered as sufficient resources in the legislation. However, economically inactive Union citizens need to prove that they have sufficient resources in order not to be dependent on social assistance or the means tested minimum pension allowance.⁶⁴ Therefore, as a rule these persons need at least sufficient resources which are not below the threshold for means tested minimum pension allowance.⁶⁵

In **Bulgaria** there is no legal definition of 'sufficient resources' in the legislation. However, a leaflet,⁶⁶ prepared by the Migration Directorate at the Ministry of Interior and published on its website, states that '*sufficient financial means*' shall be '*equivalent to one minimum monthly wage*'. As of 1st January 2017 the minimum monthly wage in Bulgaria is 460 BGN (€ 235,19).

60 Article 11(5) *Free Movement of European Union Nationals and their Family Members Order*, S.L. 460.17, *ibid*.

61 Art. 8.12, section 3, Aliens Decree.

62 Article 2(f) of Act 37/2006 of 9 August (regulating the right of EU citizens and respective family members to move and reside freely within national territory and transposing the Directive 2004/38/EC).

63 Portaria 5/2017, of 3 January.

64 See Art 51, para. 1, n° 2, Residence and settlement act.

65 For 2017: € 889,84 per month for single persons, € 1.334,17 for married couples.

66 Available in English at <http://migration.mvr.bg/NR/rdonlyres/FECCB06E-F49B-465C-82D1-5CF416BA401A/0/Leaflet2.pdf>.

In **Cyprus** the provision of sufficient resources is referred in the Migration Department of the Ministry of Interior website as follows:

‘(d) Declaration or other equivalent means, as the applicants may choose, to assure that they have sufficient resources for themselves and their family in order not to become a burden on the social assistance system of Cyprus during their period of residence.’⁶⁷

The exact amounts are not specified in the website but were however provided by the Ministry upon request: € 480 for an individual person.

In the **Czech Republic** the law does not define the term sufficient resources. The EU citizen does not need to prove existence of sufficient resources, the law only requires him/her not to become a burden to the social assistance system. Of course, the logic is that if the EU citizen does not have the sufficient resources, then he/she is counted as an unjustified burden to the social assistance system (according to the Foreigners Residence Act to the system of allowances for people with disabilities or the system of assistance in material need). Consequences of it are either rejection of issue of the residence certificate or cancellation of the right of residence for more than three months.

In order for EU citizens to stay in **Estonia**, they must meet few requirements. After registration in the population register EU citizens must apply for an ID-card within a month after registration. There is no check on the necessary income and adequate health insurance.

In **Greece**, for the calculation of sufficient resources, the personal situation of the EU citizen and the level of minimum pension granted in Greece shall be taken into consideration (360 euros per month).⁶⁸ In order to verify the existence of sufficient resources, the competent authorities ask for a bank account containing € 4.000.

In **Lithuania** there is no definition of the sufficient resources under the national legislation nor is the concrete amount foreseen, but the administrative authorities apply the rule that the EU citizen should possess such amount of sufficient resources that he/she would not be a burden to the state of Lithuania. As advised by the Department of the Migration under the Ministry of Interior Affairs the amount of sufficient resources is approximately € 150 per person per month.⁶⁹

The problem in **Poland** is that there is no indication as to what amount of resources are recognized as sufficient. As a result, relevant departments of the voivodship offices interpret the term ‘sufficient resources’ differently. Some of them find resources sufficient if they exceed the amount of income per family member as defined in the Social Assistance Act.⁷⁰ In Poland, a person is eligible to receive social

67 [http://www.moi.gov.cy/moi/CRMD/crmd.nsf/All/69E690A161D174D6C2257D2C0045750B?](http://www.moi.gov.cy/moi/CRMD/crmd.nsf/All/69E690A161D174D6C2257D2C0045750B?OpenDocument)
OpenDocument.

68 Art 8 par. 3 of P.D. 106/2007.

69 Informational note of the Department of the Migration under the Ministry of Interior of the Republic of Lithuania of 11 January 2017.

70 *Ustawa o pomocy społecznej*, unified text *Journal of Laws* 2016, item 930. See also: P. Roicka, *Przeszkody w prawie do swobodnego przemieszczania się i pobytu dla obywateli UE i ich rodzin – Sprawozdanie na temat sytuacji w Polsce*, Dyrekcja Generalna ds. Polityki Wewnętrznej Unii

assistance if his/her income is not higher than 634 PLN (about € 145⁷¹) per month for individuals living in single-person households and 514 PLN (about € 117⁷²) per month per person living in a family.

EU citizens can register their residence in **Romania** if they have means of support for themselves and their family members, usually at least the minimum guaranteed income in Romania.⁷³ If a EU citizen fails to provide proof of means of subsistence at the level of MIG, considering the personal circumstances, can be taken into account other aspects such as: means of support offered by another person, property owned by him which can produce means of subsistence or other facts which prove unequivocally that the EU citizen has a secured living.

Means of subsistence are considered sufficient in **Slovenia** if the person can prove he/she receives a minimum income, which is currently € 292,56 per first adult person in the family. There is no distinction between EU citizens and third country nationals.

The practice in **Latvia** seems to be that if a EU citizen and/or their family members has/have claimed social assistance from a municipality this leads to an automatic annulment of a registration card/residence permit.⁷⁴

3.4 No Clear Definition and No Fixed Threshold

The 2015 Regulations in **Ireland** do not define a fixed sum of money in relation to the notion of 'sufficient resources'. There is no mention of 'taking into account the personal situation of the person concerned', nor do they state that the amount of sufficient resources shall not be higher than the threshold below which nationals of Ireland become eligible for social assistance, or higher than the minimum social security pension paid by Ireland, as stipulated in the Directive. The lack of any reference to these criteria in the 2015 Regulations could be considered as insufficient transposition of the Directive.

3.5 Individual Assessment

Only in six Member States (**Germany, Denmark, Spain, Finland, Sweden and the UK**) the legislation and administration provide the possibility to have an individual assessment of the presence of sufficient resources, sometimes by explicitly referring to article 8(4) Directive 2004/38.

In **Germany** the Administrative Guidelines, which are not legally binding but practice guide, contain a general description of what counts as a resource: income, property/assets, other means such as income support by family member or third par-

Europejskiej, Departament Tematyczny ds. Praw Obywatelskich i Spraw Konstytucyjnych Parlamentu Europejskiego. Dyrekcja Generalna ds. Polityki Wewnętrznej Unii Europejskiej, European Union 2016, p. 9.

71 January 2017.

72 *Ibid.*

73 The level of minimum guaranteed income is for a single person 0,283 ISR = 142 lei (€ 31.55)

74 Telephone interview with an official of Migration Unit of OCMA (27 February 2017).

ties, scholarships, support for education purposes, unemployment insurance, pensions and other contributory benefits. The guidelines emphasize that a specific amount cannot be required in line with Article 8(4) of Directive 2004/38 and that authorities may orientate themselves at the relevant threshold for income support as a maximum level, although each case has to be assessed individually.

The **Danish** guidelines appear to suggest that a requirement on a *minimum income level* is imposed, but it is somewhat modified by the subsequent paragraph:

‘This merely constitutes a *guiding minimum amount*. Thus, no absolute requirement on the Union citizen disposing of resources as a minimum corresponding to the starting benefit that previously applied can be imposed. Hence, if the Union citizen has a disposable income below the level of the starting benefit that previously applied, this cannot automatically lead to refusal. A *specific assessment* must be conducted, and the *personal situation* of the person concerned must be taken into account. If, for example, the person indicates that he/she will stay in Denmark for only a certain period of time, this must be taken into account.’⁷⁵

Also in **Spain** the guidelines express that the assessment of the sufficiency of means must be made on an individual basis, and in any case, taking into account the personal and family situation of the applicant. But in fact an *inactive citizen of the EU must have as resources more than € 5,136.60 per year of income individually*, because this is the amount limit per year to be a beneficiary of the non-contributory benefit in Spain.⁷⁶

In **Finland** the rules prescribe that each case must be assessed individually and the length of residence, personal circumstances, and the applied amount of assistance must be taken into account in this assessment. The latest Finnish case law, however, in light of the *Dano* judgment holds the opinion that whether an economically inactive EU citizen has sufficient resources must be examined concretely without taking into account the applied social assistance.

The **Swedish** National Board on Health and Welfare refers to Directive 2004/38 saying that Member States may not determine a fixed amount, but that the amount can vary depending on the circumstances.⁷⁷ However, the amount may not exceed

75 *Notat om tilstrækkelige midler i opholdsdirektivets forstand*, Memorandum of 17 March 2009, the Ministry of Refugees, Immigration and Integration, available at https://www.nyidanmark.dk/NR/rdonlyres/4F4A1092-1995-4BFF-B1EF-4C0233DEF5C6/0/Notat_tilstraekkelige_midler_EUretten.pdf.

76 Art. 3(2)(c) of Order PRE/1490/2012, of 9 July, laying down rules for the application of article 7 of Royal Decree 240/2007, of February 16, on entry, free movement and residence in Spain of citizens of the States Members of the European Union and other States party to the Agreement on the European Economic Area.

77 Socialstyrelsen (the Swedish National Board of Health and Welfare), *Rätten till social bistånd för medborgare inom EU/EES-området*, Stockholm 2014, p. 18. Basically, the regulation on ‘sufficient resources’ is found in the Aliens act (2005:716), Ch. 3a § 3.4. (Compare Directive 2004/38, Article 7(1)(b) and (c)).

the Member State's threshold for social assistance (Article 8(4) of Directive 2004/38).⁷⁸

In **Slovakia** the immigration police evaluates submitted documents on sufficient financial resources individually. After having studied the supporting documents, they decide whether the documents represent sufficient proof of financial means. If the police come to the conclusion that documents do not constitute a trustworthy proof of sufficient financial resources the EU citizen is not registered by the immigration police.⁷⁹

3.6 Court Cases regarding the Concept of Sufficient Resources

In five Member States (**Finland, Spain, Germany, the Netherlands and the UK**) the issue of sufficient resources has been subject of court cases. These cases usually dealt with the question whether the resources the EU citizen possessed could be seen as sufficient in spite of the fact that they were less than the threshold of the social assistance level. In **Finland** the Supreme Administrative Court decided on the requirement of sufficient funds as a condition for registering the right of residence of a Dutch national who stated that he had an EHIC card and that his partner's family would cover his normal living expenses and his own father would provide him with money for clothes and other expenses. As part of its reasoning, the Court referred to Article 8(4) of Directive 2004/38, according to which Member States may not lay down a fixed amount which is regarded as 'sufficient resources' but they must take into account the personal situation of the person concerned. The Court also noted that the central criterion for assessing 'sufficient funds' under the Alien Act is that the applicant does not repeatedly recourse to subsistence benefits and, thus, does not become an unreasonable burden on the Finnish social assistance system. The Court further noted that the Aliens Act does not include specific provisions on the amount and source of 'sufficient fund' or on what kind of proof the applicant must present for their existence.⁸⁰

From the several **Dutch** court cases on this issue it can be concluded that the Dutch immigration authorities apply a fixed amount at the level of a social assistance benefit as a condition of sufficient resources, not taking into account Article 8(4) Directive 2004/38, while the courts do take into account the personal situation of the EU citizen and tend to accept a lower amount of money to fulfill the condition of sufficient resources.⁸¹

78 For every year, the Government takes a decision on the minimum level for that should apply. The amount should be based on a calculation on reasonable costs for certain needs that should be covered. The amount is depending on age and family size, see <http://www.socialstyrelsen.se/ekonomisktband/riksnormen> (compare Directive 2004/38, Article 8(4)).

79 In line with Article 66 (9) of the Act on Residence of Foreigners.

80 KHO:2015:28

81 See P. Minderhoud, 'Sufficient resources and residence rights under Directive 2004/38', in: H. Verschueren (ed.), *Residence, Employment and Social Rights of Mobile Persons. On How EU Law Defines Where They Belong*, Cambridge: Intersentia 2016, p. 47-73.

In **Germany** there are occasional court judgments seeking to solve disputes, but there is no clear pattern discernible from that case law. Often references to the sufficient resources criterion presents itself as an integral part of a broader judicial dispute, which revolves around other issues, i.e. the question of resources alone rarely seems to be controversial in itself, only in combination with other factors. One element should be noted: courts maintain that there is a rebuttable presumption to the benefit of individuals that they have sufficient resources if they do not claim income support while in Germany, whereas it can be an indication that they do not have sufficient resources if they claim income support.⁸² Again, the final verdict will depend on an individual assessment: if, for instance, a citizen claims a relative amount of income support which is lower than the maximum level for two months only that is not in itself an indication that there are not sufficient resources.⁸³

4. Comprehensive Medical Insurance

4.1 Introduction

Article 7(1)(b) imposes not only a requirement that economically inactive EU migrants have sufficient resources to avoid becoming a burden on social assistance, but also that they have comprehensive sickness insurance. So far, it seems that not too much attention is paid to this condition, not at the level of the Member States, nor at European level. The first 1979 proposal of which became later Directive 2004/38 did not even require economically non-active EU citizens to have any sort of sickness insurance cover.⁸⁴ There is for instance also no mention made on the (lack of) fulfillment of this condition in either the *Brey* judgment or the *Dano* judgment. The only important information in the case law of the ECJ on this issue is provided in the *Baumbast* case,⁸⁵ in which the Court said that under the circumstances of that case the refusal to allow Mr Baumbast to exercise the right of residence which is conferred on him by Article 18(1) EC (now Article 21(1) TFEU) by virtue of the application of the provisions of Directive 90/364 (one of the predecessors of Directive 2004/38) on the ground that his sickness insurance did not cover the emergency treatment given in the host Member State would amount to a disproportionate interference with the exercise of that right.⁸⁶ Important for this decision in my opinion was that Mr. Baumbast fulfilled all other conditions, as emphasized by the Court in para 92:

‘In respect of the application of the principle of proportionality to the facts of the Baumbast case, it must be recalled, first, that it has not been denied that Mr Baumbast has sufficient resources within the meaning of Directive 90/364; second, that he worked and

82 See, by way of example, Verwaltungsgerichtshof (Regional Administrative Court) Bayern, decision of 03.02.2015, 19 CS 14.2276, para 6; Oberverwaltungsgericht (Regional Administrative Court) Saarland, decision of 05.10.2016, 2 B 248_16.

83 Verwaltungsgerichtshof Bayern, *ibid.*, para 7.

84 Proposal for a Council Directive on a Right of Residence for Nationals of Member States in the Territory of another Member State, COM(1979)215 final of 26 July 1979.

85 Case C-413/99 *Baumbast*, EU:C:2002:493.

86 Case C-413/99 *Baumbast*, para 93.

therefore lawfully resided in the host Member State for several years, initially as an employed person and subsequently as a self-employed person; third, that during that period his family also resided in the host Member State and remained there even after his activities as an employed and self-employed person in that State came to an end; fourth, that neither Mr Baumbast nor the members of his family have become burdens on the public finances of the host Member State and, fifth, that both Mr Baumbast and his family have comprehensive sickness insurance in another Member State of the Union.'

The Commission defined in the 2009 guidelines⁸⁷ a sickness insurance as any insurance cover, private or public, contracted in the host Member State or elsewhere, which would be acceptable in principle, as long as it provides comprehensive coverage and does not create a burden on the public finances of the host Member State. In protecting their public finances while assessing the comprehensiveness of sickness insurance cover, Member States must act in compliance with the limits imposed by Community law and in accordance with the principle of proportionality.⁸⁸ Pensioners fulfill the condition of comprehensive sickness insurance cover if they are entitled to health treatment on behalf of the Member State which pays their pension. The European Health Insurance Card offers such comprehensive cover when the EU citizen concerned does not move the residence in the sense of Regulation (EEC) No 1408/71 (now Regulation 883/2004) to the host Member State and has the intention to return, e.g. in case of studies or posting to another Member State.

Sickness insurance does not necessarily have to derive from the host Member State: it may be contracted in another Member State if cover is granted in the host Member State too. Differences between Member States arise from the fact that whilst some Member States have a national health service (e.g. **Denmark, Finland, Ireland, Italy, Latvia, Malta, Portugal, Spain and the UK**), others have a mandatory health insurance scheme (e.g. **Belgium, Croatia, Estonia, France, Germany, Hungary, Lithuania, Luxembourg, the Netherlands, Poland, Romania, Slovenia**).

Regarding this issue we asked what was considered as 'comprehensive medical insurance' in the Member States. From the answers it appears that in most countries there is no explicit definition of the term comprehensive medical insurance. But, definition or not, EU citizens are supposed to have a medical insurance. In countries with a national health system the coverage equals the level of health insurance provided by the system. Other Member States lay down a minimum amount of money that has to be insured. It turns out that there is not much information available on the issue of the requirement of a comprehensive medical insurance for inactive EU citizens (not being students or pensioners). Only in a few countries problems regarding this issue are reported.

87 COM (2009) 313 final, Communication from the Commission to the European parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Section 2.3.2.

88 Here the guidelines make a reference to the *Baumbast* case.

4.2 Explicit Definition?

In **Hungary** the definition of *comprehensive medical insurance* is laid down in the Government Decree 113 of 2007, 24 May (Section 22). Accordingly, it covers the right to use during the whole period of residence the same services as insured nationals that is based on the directly applicable EU legal norm, international treaty or concluded contract.

In **France** national legislation⁸⁹ has taken the definition from the directive. It provides that if the individual is covered by a health insurance system which covers all risks then the requirement is satisfied. There is no further precision in the national legislation. A 2010 circular⁹⁰ merely requires that the health insurance requirement must be fulfilled but does not explain what it entails. In practice, this can mean that the health insurance is included in Regulation 883/2004, or is a private health insurance (if it provides coverage of the same nature and level as the national system) or in some circumstances the EU national has access to the French health insurance system under the conditions which require contributions based on income. France recognises the S1 system for pensioners from other Member States to receive health care in France at the expense of their home Member State. The legislation also covers situations in which there is an unintentional loss of health care coverage for access to the French universal health care system.

The **German** legislation speaks of ‘sufficient medical assistance’ – a condition which, at times of diverse health subscription plans with different degrees of private payments for certain benefits, is pragmatic. Given the fact that the providers of medical insurance are state regulated, there are rarely disputes about whether a specific health insurance scheme would count as being sufficient.

In **Slovenia** comprehensive medical insurance would read as ‘appropriate medical insurance’. ‘Appropriate medical insurance’ should cover at least urgent health services in the territory of the Republic of Slovenia (urgent medical aid and urgent medical treatment).

4.3 Implicit Assumption Presence Health Insurance

Still, definition or not, EU citizens are supposed to have a medical insurance. In countries with a national health system the coverage equals the level of health insurance provided by the system. In **Austria** this amounts to ‘at least those risks need to be covered which are covered by the public health insurance’; in **Cyprus** to ‘insurance coverage of the normal in-patient and outpatient medical expenses as well as the confinement benefits and repatriation of the mortal remains’. Some countries lay down a minimum amount of money that has to be insured (€ 30.678 in **Bulgaria** and € 30.000 in **Belgium** and **Hungary**). Other countries (**Czech Republic**) use a list of documents which would be considered as documents confirming health insurance.

89 CESEDA L-121-1, 2.

90 Circulaire du ministère de l’immigration du 10 Septembre 2010.

For EU citizens who stay for a temporary period of 90 days or who are insured under Regulation 883/2004 the possession of a European Health Insurance Card is seen as proof of a valid health insurance.

In general inactive EU citizens (not being students or pensioners) are considered to arrange a health insurance which is equivalent to the health assistance provided by the schemes of the host Member State. In some Member States, the fulfilment of the comprehensive sickness insurance cover is not verified at all (**Estonia, Greece, Lithuania**), whereas specifically in **the Netherlands** it is not verified *ex ante* but can be verified at a later stage during the period of residence on the territory. In **Denmark** the requirement of a comprehensive health insurance is not imposed in practice. EU/EEA citizens not having residence in Denmark are as a predominant rule eligible for those primary health care services – for payment – that are available to persons having residence in Denmark under the *Health Act*.

4.4 Reported Problems in the Member States

From the questionnaire we conclude that there is little information available on the issue of the requirement of a comprehensive medical insurance for inactive EU citizens (not being students or pensioners). Only in a few countries (**Sweden, Italy, France, Spain, UK**) problems regarding this issue are reported.

Sweden has a residence based health care system, which means that to have a right to health care in Sweden, an economically inactive EU citizen needs to have his or her national registration address in Sweden. In principle, the Swedish Tax authority should not register a EU citizen on an address in Sweden, if that person is judged not to have a comprehensive health insurance. The requirement for comprehensive health insurance should be read as a right to health care.⁹¹ The health insurance shall ensure that a person does not become a financial burden to the Swedish health care system. The EU citizen who does not have access to a publicly funded health-insurance may alternatively prove that there is access to a private comprehensive health insurance. But the Swedish National Trade Board reports that none of the Swedish private healthcare insurance providers are able to provide policies that meet the conditions imposed by the Swedish Tax authority (*Skatteverket*) and also required by the Swedish Migration authority (*Migrationsverket*).⁹²

In **Italy**, since 2012 an EU citizen who is entitled to reside because of sufficient economic resources, can satisfy the requirement concerning the sickness insurance by voluntarily registering with the Italian National Health Service, an opportunity

91 MIG 2012:15.

92 National Trade Board, *Moving to Sweden – Obstacles to the Free Movement of EU Citizens*, Stockholm: National Trade Board 2014, p. 8: 'In evaluating private insurance policies, the Tax Agency requires that several conditions be met. The policy must be personal, and must not have a monetary ceiling for necessary health care. Private insurance policies may contain no disclaimers that deny coverage for certain complaints, and they must cover health care for injuries resulting from sports, risky activities and so on. The National Board of Trade contacted about twenty insurance companies to learn whether they sell insurance policies that comply with these criteria. None of them do.'

which was not available to EU nationals till then. But Italy does not allow inactive EU citizens (other than students) from affiliating with the Servizio Sanitario Nazionale. Paradoxically, this possibility is offered to non-EU citizens who are required to pay the same annual contribution that Italians pay under Article 36 of Legislative Decree 286/98.⁹³

In **France** the existence of discriminatory exclusion of inactive EU citizens from the national health service has been the subject of a number of complaints to the European Commission, as reported by the Petitions Committee of the European Parliament.⁹⁴

In **Spain** similar problems are reported concerning the refusal of healthcare coverage to EU citizens who do not work. Moreover, such citizens are not given the possibility to affiliate to the Spanish healthcare system by making monthly contributions.

In **the UK**, EEA citizens and their family members are allowed to use the NHS in the UK, but according to the Home Office, *the NHS*⁹⁵ *does not count as comprehensive sickness insurance*. In the one case that has been decided in the higher courts on this point, the Home Office won their argument.⁹⁶ For an EEA citizen or family member who needs comprehensive medical insurance, therefore, they need to show something more than merely that they can use the NHS if or when they need it. MEPs and the European Commission are looking into this question and even launching an inquiry into the treatment of EU nationals in the UK. The Commission had started infringement proceedings against the UK back in 2012 but nothing further has been heard about the case. The Commission confirmed in November 2016 that the case is ongoing, although would not say much about what, if anything, was going to happen. As to what constitutes private health care insurance the UK Home Office has published guidance on the matter – ‘*European Economic Area nationals qualified persons*’ (*‘the Guidance*’) – which provides (at p. 40):

‘You can accept an EEA national or their family member as having comprehensive sickness insurance if they hold any form of insurance that will cover the cost of the majority of medical treatment that they may receive in the UK. You must take a proportionate approach if you consider if an insurance policy is comprehensive. For example a policy may contain certain exemptions but if the policy covers the applicant’s medical treatment in the majority of circumstances you can accept it.’

Applications for a document certifying permanent residence or a permanent residence card have to show that they have had comprehensive health insurance for the whole of the five years of continuous residence. UK Home Office guidance states that it would be sufficient for applicants to show that they have held an EHIC for the full five years as long as it covers the whole of the period being relied upon and features

93 Testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero Dlgs 286/98.

94 http://www.europarl.europa.eu/meetdocs/2009_2014/documents/peti/cm/929/929916/929916en.pdf.

95 Under s. 1(3) of the National Health Service Act 2006, treatment on the NHS is free for all residents of the UK

96 *Ahmad v Secretary of State for the Home Department* [2014] EWCA Civ 988 (16 July 2014).

a 'valid from' date which covers the start of that five year period. The UK Home Office cannot request a statement of intent (like it does for students applying as a qualified person) as this is an application which looks retrospectively at whether an applicant has acquired a right of permanent residence and future intentions are irrelevant. In *Ahmad v SSHD*, it was accepted that where there was a reciprocal arrangement between the UK and another EU Member State, enabling the UK to reclaim the costs of healthcare from that EU country then this would be considered to be CSI. The EEA national would therefore need to prove the UK and their home Member State lands have such an agreement (in the absence of an EHIC) and to use forms the UK Home Office forms S1, S2 or S3, which are the forms expressly mentioned in the Home Office guidance notes on CSI. It is thought the forms can be applied for retrospectively from the health provider in the country of origin. So an individual could apply for the form and, if there was a reciprocal health care arrangement in place between the UK and the home Member State, this would cover any previous residence period in the UK.

Similar problems are reported in **Ireland**. In order to comply with the 'comprehensive sickness insurance' requirement, a letter from a private medical insurance provider is necessary. In addition to this, the right of an economically inactive non-EEA family member of a EU citizen to acquire permanent residence in the State in the event of the death of the citizen, or his/her departure from the Member State is conditional on the acquisition of comprehensive sickness insurance.⁹⁷ The inactive non-EEA family member must also show comprehensive sickness insurance in the case of a divorce, annulment or termination of a registered partnership.⁹⁸

5. Conclusion

The recent case law of the ECJ in *Brey, Dano, Alimanovic, Garcia-Nieto* and *Commission v UK* has drastically changed the landscape concerning access to social assistance benefits for inactive EU citizens. All these cases deal with the entitlement of EU citizens to social benefits in their host state and explore the limits of social solidarity to which mobile EU citizens are entitled. Regarding its impact a distinction can be made between Member States where this case law did not have any impact, Member States with indirect and Member States with direct impact. Germany enjoys a special position as three of the five ECJ judgments responded to preliminary references from that Member State.

The reason for no impact varied. In some Member States such as **Italy** and **Greece** the reason was that they do not have the kind of social (assistance) benefit as was at stake in the various ECJ cases. In other countries (**Cyprus, France, Lithuania, Slovakia, Slovenia** and **Spain**) the restrictions for accessing social provisions, similar to the ones challenged by the applicants in *Dano, Alimanovic* and *Garcia Nieto*, have already been in place even before the ECJ delivered its judgment in these cases. In **Portugal, Ireland, Malta, Netherlands, Finland, Austria** and **the UK** the ECJ cases

97 Directive 2004/38/EC, Article 12(2).

98 Directive 2004/38/EC, Article 13(2)(d).

have had impact mostly in the national case law restricting the access of inactive EU citizens. In **Germany** new legislation entered into force to clarify that every inactive EU citizen (including job seekers) has no access to social assistance benefits for the first five years. Only once in two years EU citizens without a right to a social assistance benefit can get a transitional benefit allowance of four weeks to help them leave the country. But there is still the question whether this new provision complies with German Constitution, in particular the guarantee of human dignity.

This new case law of the ECJ seems to devalue the principle that there should be a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States resident there.

It appears that while in all Member States the notion of sufficient resources is recognized in the national legislation, there is not always a concrete definition of the concept of sufficient resources. We can make a distinction between Member States with a clear definition in their legislation, Member States with no clear definition but a fixed threshold and one Member State (**Ireland**) with no definition nor a fixed threshold. In a few Member States the legislation and administration provide the possibility to have an individual assessment of the presence of sufficient resources. In five Member States the issue of sufficient resources has been subject of court cases, mostly dealing with the question whether the resources the EU citizen had could be seen as sufficient in spite of the fact that they were less than the threshold of the social assistance level. A general conclusion could be that the variety of approaches linked to the concept of 'sufficient resources' will undoubtedly give rise to confusion amongst Union citizens exercising their free movement rights.

Article 7(1)(b) imposes not only a requirement that economically inactive EU migrants have sufficient resources, but also that they have comprehensive sickness insurance. So far, the impression from the literature and from the answers to this questionnaire is that there has not been paid much attention to this second condition, not at the level of the Member States, nor at European level. Only in a few countries (**Sweden, Italy, France, Spain, UK**) problems are reported as EU citizens face obstacles when attempting to get insured. This could mean that in most Member States inactive EU citizens one way or another manage to arrange a sickness insurance.