Fitness Check Report for Belgium

A review of the state of compliance of Belgium's implementation of Directive 2004/38 on residence rights of EU citizens and their family members

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1. Introduction

The purpose of this fitness check report is to provide an overview of Belgium's rules regulating the residence rights of EU citizens and their family members, the rules concerning their access to benefits and those relating to their expulsion and removal, in order to identify the existence of obstacles to free movement encountered by EU mobile citizens and in particular those rules which have a particular impact on destitute and homeless persons.

The first three substantive sections of the report deal with residence formalities, access to benefits and the rules relating to expulsion and removal of EU citizens and their family members. Each part begins with an overview of the rules followed by a discussion of evidence of the existence of obstacles to free movement, including the identification of obstacles that operate to the particular detriment of destitute and homeless EU citizens. A final section is devoted to a discussion on strategies which may be deployed to overcome the obstacles identified in this report.

2. Methodology

The report has been compiled on the basis of a desk review of the Belgian immigration law and related regulations, as well as the associated case law of the Belgian courts. The report covers the Belgian rules that aim to implement Directive 2004/38 and associated case law. In addition, where relevant, the report also encompasses Belgian application of Regulation 492/2011 on the free movement of workers and Regulation 883/2004 on the coordination of social security. In addition to primary sources, several subject-specific secondary sources listed in the bibliography have also been consulted. The desk research has further been supplemented by interviews with officials and practitioners.

3. Implementation of Directive 2004/38 in Belgium

In Belgium, Directive 2004/38 has been transposed by Articles 40 to 47/4 of the Belgian Immigration Law of 18 December 1980[1], together with Articles 43 to 71 of an implementing Royal Decree[2], which were specifically modified to transpose the Directive into Belgian law[3]. Both instruments have since been modified on numerous

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[1] Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners, hereafter the 'Belgian Immigration Law' (*Loi du 15 décembre sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (MB 31-12-1980, p 14584)*).

[2] Royal Decree of 8 October 1981 on the entry, residence, settlement and removal of foreigners, hereafter the 'Royal Decree' (*Arrêté royal du 8 octobre sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (MB 27-10-1981, p 13740)*).

[3] The Belgian Immigration Law was modified by the Law of 25 April 2007 amending the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners (*Loi du 25 avril 2007 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (MB 10-05-2007, p 25752*) and the Royal Decree was amended Royal Decree of 7 May 2008 amending the Royal Decree of 8 October 1981 on the entry, residence, settlement and removal of foreigner (*Arrêté royal du 7 mai 2008 modifiant l'arrêté royal du 8 octobre 1981 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (MB 13-05-2008, p 25092)*). Note that a second further implementing Royal Decree of 7 May 2008 was adopted concerning registered partnerships recognised as equivalent to marriage, proof of durable relationship and registration

occasions. These rules are further supplemented by administrative circulars[4] and official guidance.[5]

In a study commissioned by the European Parliament, Belgium's transposition has been assessed by ECAS as 'satisfactory in both quantitative and qualitative terms. However, some relevant provisions have been implemented in Belgian law by making reference to the existing practices of the administration which is not an appropriate implementation of the Directive *per se*.'[6]

3.1 Registration formalities

Under Belgian law, the municipalities and the Immigration Office share responsibilities for the application of the Belgian Immigration Law in respect of EU citizens and their family members.

It should be noted here that, as a result of this partly decentralised decision-making system, the practical application of the rules on EU residence by the municipalities can vary from one region to another, even between districts in the same town. This is particularly true as regards access to information about residence formalities.[7]

3.1.1 Registration procedures

Registration is compulsory for both EU citizens[8] and their non-EU family members.[9]

The Belgian registration procedures operate as follows. EU citizens and their family members must register in the municipality where they reside within three months of their arrival in Belgium[10]. An application must be made in person and the applicant will be provided with a certificate of application[11].

The local police will then be requested to verify that the applicant lives at the specified address in what is known as an "effective residence check"[12]. A report will

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formalities for EU citizens (*Arrêté royal du 7 mai 2008 fixant certaines modalités d'exécution de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (MB 13-05-2008, p 25090)*).

[4] These are available on the website of the Belgian Immigration Office <https://dofi.ibz.be/sites/dvzoe/FR/Pages/Circulaires.aspx>.

[5] This is available on the website of the Belgian Immigration Office <https://dofi.ibz.be/sites/dvzoe/FR/Guidedesprocedures/Pages/default.aspx>.

[6] European Citizen Action Service, 'Comparative study on the application of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States' (PE 410.650, European Parliament 2009) 51.

[7] Article 34 requires that Member States should 'disseminate information concerning the rights and obligations' arising under the Directive. This provision has not been transposed into Belgian law.

[8] Belgian Immigration Law, art 42 §1.

[9] Belgian Immigration Law, art 42 §3.

[10] Royal Decree, arts 50, §1 and 52, §1.

[11] A certificate of application is issued in the standard form corresponding to the model set out in the implementing Royal Decree at Annex 19. Non-EU family members are issued with Annex 19ter.

[12] Royal Decree, arts 50, §1, para 2, and 52, §1, para 2; see further Royal decree of 16 July 1992 relating to population registers and the register of foreigners, art 7, §5 (*Arrêté royal du 16 juillet 1992 relatif aux registres de la population et au registre des étrangers (MB 15-08-1992, p 18028)*).

then be sent back to the municipality to confirm that the person lives at the address.[13] At this stage, the applicant will then be registered on the population register[14] and be assigned a unique identification number[15] that is also used as a social security number[16]. Non-EU family members will be issued a temporary residence card (the so-called "orange card")[17].

The applicant then has three months from the date of submission to provide the documents corresponding to his status[18], which are further listed in the implementing Royal Decree.[19] Where an applicant fails to provide the documentation within the three-month deadline, the application will be refused in a written decision[20]. EU citizens are permitted a further month to provide the documentation[21], failing which their application is definitively rejected[22].

Decision-making is shared between municipalities and the Immigration Office. Municipalities will handle straightforward cases involving EU citizens who can show proof of work, self-employment or enrolment on a course of study.[23] Cases which are considered more complicated, such as jobseekers, self-sufficient persons who rely on another for their means of support[24], will be handled by the Immigration Office, as well as all applications made by non-EU family members for a residence card[25].

A decision on an application for a registration certificate submitted by an EU citizen must be determined within six months of an application being submitted[26]. If the application is successful, the EU citizen will be issued a paper registration certificate by the local municipality[27], but one may choose to opt for the electronic identity card format (so-called "E card")[28]. Similar rules apply to family members who will then be issued with a residence card ("F card")[29]. A fee is payable for documents issued using electronic identity card format depending on the municipality[30].

If the decision-maker refuses the application, the EU citizen will be issued with a written decision setting out the reasons for the refusal, which is also usually

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[13] ibid.
[14] ibid.
[15] This is called *numéro d'identification au registre national / rijksregisternummer*.
[16] Databank for Social Security (*Banque Carrefour de la sécurité sociale* / Kruispuntbank van de Sociale Zekerheid), 'FAQs' (undated) <https://www.ksz-bcss.fgov.be/fr/faq#f-38>.
[17] Royal Decree, art 52, §1, para 4.
[18] Royal Decree, arts 50, §2, and 52, §2.
[19] ibid.
[20] Royal Decree, arts 51, §1, and 52, §4.
[21] Royal Decree, art 51, §1, para 2.
[22] Royal Decree, art 51, §1, para 3.
[23] Royal Decree, art 51, §3; Circular (unpublished) of 23 May 2008 on EU citizens and their family members (*Office des Étrangers*, '*Circulaire du 23 mai 2008 relative aux citoyens de l'Union et aux membres de leur famille*'), para C.1, 1°. This Circular is not currently available on the website of the Immigration Office. As far as is known, it has not been replaced and still appears to be in use.
[24] ibid, para C.1, 2°.
[25] ibid, para C.2, A).
[26] Belgian Immigration Law, art 42, §1, and Royal Decree, art 51, §2.
[27] Royal Decree, art 51, §2.
[28] Royal Decree, art 51, §4.
[29] Royal Decree, art 52.
[30] Royal Decree, arts 51, §4 and 52, §4, para 3.

accompanied by an order to leave the territory[31]. If no decision is made within the six-month deadline, the application is deemed accepted and the applicant will be issued a registration certificate by the local municipality.[32]

It should be noted that the rules on administrative formalities do not fully comply with Directive 2004/38. The Belgian rules do not provide for EU citizens to be issued a registration certificate immediately upon submitting an application contrary to what is required by the Directive.[33] Instead the Immigration Law requires a registration certificate to be issued within six months of an application being submitted[34].

The practical application of registration formalities can operate to the detriment of EU mobile citizens seeking registration. For instance, municipalities have reportedly refused to register EU citizens on short-term contracts as legal residents.[35] Other reasons for refusing EU citizens the ability to register which have been reported relate to atypical working arrangements[36].

For example, it often happens that municipal officials refrain from informing applicants that they should provide all relevant documentation relating to their personal situation and that they must inform the authorities of any subsequent change in status or personal circumstances. In this respect, the comparative study undertaken by ECAS found that the quality of information provided by the Belgian municipal authorities to the public on residence formalities[37] leaves much to be desired[38].

In other cases, applicants who bring additional documentation have been informed by municipal officials that it is not necessary for them to submit this. A recurrent example relates to jobseekers who engage in vocational training to enhance their employability and who, for one reason or another, fail to submit proof of enrolment on a training course to the municipal authorities[39]. Without such documents on the administrative file, it then makes it much easier for the Belgian Immigration Office to refuse to recognise their right of residence on the basis that they cannot demonstrate a “genuine chance of being engaged”. In the event such a refusal is appealed, the Immigration Appeals Council will simply dismiss the appeal on the basis that the burden of proving a right of residence rests on the citizen and as a result

[31] Royal Decree, art 51, §2, para 2. Any decision refusing a right of residence to an EU citizen or their family member is issued in the standard form corresponding to the model set out in the implementing Royal Decree at Annex 20.
[32] Royal Decree, art 51, §2.
[33] Article 8(2).
[34] Belgian Immigration Law, art 42 §1 provides for a six-month deadline. The Royal Decree, arts 50-51, is also incorrect in this respect. See further, Gutwirth, de Hert and Paepe, Conformity Study for Belgium (n 55) 29-30 and Correspondence Table for Belgium (n 55) 34-39.
[35] See for example, complaint filed on 4 November 2014 by INCA CGIL, ABVV-FGTB, EU Rights Clinic and Bruxelles Laïque, *‘Expulsions de citoyens européens de Belgique. Violation des articles 7 et 14 de la Directive 2004/38 sur le droit de séjour des citoyens UE et des articles 4 et 61 du Règlement n° 883/2004 sur la coordination de la sécurité sociale’*, registered under CHAP(2014) 3546.
[36] Meurens et al (n 77), 18-19.
[37] Article 34 requires that Member States should ‘disseminate information concerning the rights and obligations’ arising under the Directive. This provision has not been transposed into Belgian law.
[38] ECAS comparative study (n 6), viii.
[39] See for example, Immigration Appeals Council, judgments of 13 October 2017, 20 April 2017 and 21 December 2015 (*CCE, arrêt 193 660 du 13 octobre 2017; CCE, arrêt 185 638 du 20 avril 2017; CCE, arrêt 159 084 du 21 décembre 2015*).

the Belgian Immigration Office cannot be reproached for failing to take into account documents that do not feature on the administrative file.[40]

Other reported problems relating to registration formalities include a lack of information, delays and excessive requests for documents in support of their applications[41].

3.1.2 Recourse to an "address of reference"

Under Belgian law, it is possible for any person who has no fixed abode – due to a lack of sufficient means to support themselves – to elect the use of an "address of reference" where official correspondence may be sent to them[42]. Such an "address of reference" is limited to the home of a relative even though they do not reside at that address, or alternatively the address of social welfare centres[43] or specified non-governmental organisations[44]. Recourse to an "address of reference" is intended to enable a person to "regularise their administrative status and preserve their social rights"[45] and has been considered a form of social assistance[46].

The possibility to use of an address of reference by EU citizens will depend on whether they have previously been registered with their local municipality for residence purposes. A distinction must be made between, on the one hand, the situation of a newly arrived EU citizen who becomes homeless before having registered their residence, and on the other hand, the situation of an EU citizen who has previously registered their residence and who then becomes homeless at some point afterwards.

In respect of a newly-arrived EU migrant, such a system cannot be used by an EU citizen with no fixed abode for the purposes of registering their residence under the Belgian Immigration Law. This is because the ability to demonstrate a right of residence in excess of three months is a precondition for electing an address of reference[47].

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[40] ibid.

[41] Federal Migration Centre Myria, '2017 Migration in figures and rights' (2017) (*Centre Fédéral Migration Myria, '2017 La Migration en chiffres et droits' (2017)*) 152 <http://www.myria.be/files/MIGRA2017_FR_AS.pdf>; Meurens et al (n 77), 17-19; Single Market Scoreboard (04/205 edition), Concerns in Belgium <http://ec.europa.eu/internal_market/scoreboard/_archives/2015/04/feedback/concerns/index_en.htm#maincontentSec3>; European Parliament, Petition 0151/2013 by A.L. (Estonian), on residency registration in Belgium; European Parliament, Notice to Members 'Petition 1065/2010 by Dominik Kohlhagen (German) on the non-compliance with the provisions of Directive 2004/38/EC of the European Parliament and of the Council, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, by the Belgian authorities', 28 September 2012.

[42] Law of 19 July 1991 relating to population registers, identity cards, residence permits and other residence documentation, art 1, §2. (*Loi du 19 juillet 1991 relative aux registres de la population, aux cartes d'identité, aux cartes d'étranger et aux documents de séjour (MB 03-09-1991, p 19075)*).

[43] *Centre Public d'Action Sociale / Openbaar Centrum voor Maatschappelijk Welzij*.

[44] Law of 19 July 1991 (n 42), art 1, §2, para 3.

[45] Employment Tribunal of Mons, judgment of 23 February 2013 (*Tribunal du Travail, Mons (La Louvière), affaire 12/3061/A du 28 février 2013*).

[46] Employment Tribunal of Nivelles, judgment of 8 May 2001 (*Tribunal du Travail, Nivelles, affaire 2000/N/200 du 8 mai 2001*).

[47] Law of 19 July 1991 (n 42), art 1, §1, 1° read in conjunction with art 1, §2, para 1.

Under the Belgian Immigration Law, EU citizens and their family members who seek recognition of their right of residence in excess of three months are required to register with the local municipality. This registration process involves an "effective residence check" to be undertaken by the local police on behalf of the municipality[48]. It is only following a positive response by the local police that a person's details will be entered on the population register by municipal officials[49]. Therefore, in the absence of a place of residence, no "effective residence check" can be undertaken. This means an EU citizen will not be able to register their residence with the municipality and as a result they will be unable to obtain recognition of their right of residence in excess of three months. The recognition of such a right of residence is a precondition for electing an address of reference[50].

The situation is different in connection with an EU citizen who has previously registered their residence and who then becomes homeless at some point afterwards. In such a case, the person should be able to elect an address of reference.

However, this could have adverse consequences on their right of residence. Indeed, given that the right of residence in excess of three months is conditional upon possession of sufficient resources[51], the fact that a person has obtained an "address of reference" may be taken by the Belgian authorities as an indication of them lacking sufficient resources. This is because the Belgian rules on the population register limit the use of an "address of reference" to persons who do not or no longer have a place to live because they lack sufficient resources[52]. As a result, the award of an "address of reference" may lead the Belgian Immigration Office taking steps to verify whether the person concerned has a right of residence and may lead to a decision being taken to withdraw this person's right of residence under the Belgian Immigration Law[53].

3.2 Conditions relating to the right of residence

The Belgian Immigration Law and implementing Royal Decree generally transpose the relevant provisions accurately. However, as will be discussed further below, it is the practical application of these provisions by the Belgian authorities that is the source of most problems for EU citizens and their family members.

3.2.1 Residence for up to three months

The conditions governing the right of residence for the first three months have been correctly transposed[54]. No specific problems have been identified.

[48] Royal Decree, art 50, §1, para 2.
[49] ibid.
[50] Law of 19 July 1991 (n 42), art 1, §1, 1° read in conjunction with art 1, §2, para 1.
[51] Belgian Immigration Law, art 40, § 4, 2°.
[52] Law of 19 July 1991 (n 42), art 1, §2, para 1.
[53] Belgian Immigration Law, art 42bis, §1. See further sections 5.2 and 5.3.
[54] Belgian Immigration Law, art 40, §3.

3.2.2 Residence beyond three months for jobseekers

The Belgian rules relating to the residence of jobseekers have been identified as problematic[55].

The case law of the EU Court of Justice has confirmed that jobseekers should have an unfettered right to look for employment for a period of six months following their entry into a host Member State.[56] Instead, the Belgian Immigration Law[57] requires jobseekers wishing to reside on the national territory for more than three months to have to demonstrate they are registered as a jobseeker and have a genuine chance of being engaged.

This discrepancy leads to problems in practice. There is evidence to suggest that the Belgian authorities often refuse to recognize the right of residence of EU citizens when they are unable to find work within a period of four to five months following their arrival in Belgium - a shorter period than what is considered reasonable under EU law[58] - on the basis that the jobseeker has been unable to demonstrate a "genuine chance of being engaged"[59]. As a matter of EU law, jobseekers should only have to demonstrate that they have a genuine chance of being engaged after having been permitted to look for work for at least six months[60], whereas under Belgian law this requirement applies after three months of residence.

The Belgian rules provide that a "genuine chance of being engaged" should be assessed "taking into account the personal situation of the person concerned, including any diploma that he has obtained, any professional trainings that he has undertaken or and the duration of the period of unemployment"[61].

While an assessment is made by the Belgian Immigration Office as to whether a jobseeker has a "genuine chance of being engaged", the registration of jobseekers

[55] Serge Gutwirth, Paul de Hert and Pieter Paepe, 'Conformity Study for Belgium', 40 and 'Table of Correspondence for Belgium', 79-81 in Milieu and Edinburgh University, *Conformity studies of Member States' national implementation measures transposing Community instruments in the area of citizenship of the Union* (Report for Commission, 2008).

[56] C-292/89 *Antonissen* EU:C:1991:80; for a discussion see Sandra Mantu, *Analytical Note - Retention of EU worker status – Article 7(3)(b) of Directive 2004/38 - Prepared for the European Network on Free Movement of Workers* (Centre for Migration Law, Radboud University Nijmegen 2013) 12; Herwig Verschueren, 'Libre circulation des demandeurs d'emplois : pas de limitation dans le temps pour chercher un travail dans un autre Etat membre' (1991) *Revue du droit des étrangers*, No 64, 199-204, 202-203.

[57] Article 40, §4, para 1, 1° provides as follows:

> "*An EU citizen shall have the right to reside in the Kingdom [of Belgium] for a period exceeding three months if ...*
>
> *1° ... he enters the Kingdom to look for work, as long as he can prove that he is continuing to look for work and that he has genuine chances of being engaged*".

[58] See sources cited at footnote 56.

[59] Immigration Appeals Council, judgment of 22 December 2017 (*Conseil du Contentieux des Étrangers, arrêt 197.303 du 22 décembre 2017*) and judgments of 1 September 2017 (*CCE, arrêts 191.333 et 191.334 du 1er septembre 2017*).

[60] C-292/89 *Antonissen* EU:C:1991:80; for a discussion see Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (4th ed, Oxford University Press 2014) 276; Herwig Verschueren, 'Being Economically Active: How it Still Matters' in Herwig Verschueren (ed), *Where do I belong? EU law and adjudication on the link between individuals and Member States* (Intersentia, 2016) 205.

[61] Royal Decree, Art 50, §2, 3°, b.

and their subsequent compliance with the rules on jobseeking[62] comes under the purview of the competent regional employment office, namely Actiris in Brussels, Forem in Wallonia or VDAB in Flanders[63]. However, registration as a jobseeker with a public employment service is not sufficient to demonstrate the existence of a "genuine chance of being engaged"[64].

In practice, the Belgian Immigration Office has tended to interpret this requirement in a restrictive manner. For example, if a jobseeker has never worked in Belgium, that person will not be considered as having a "genuine chance of being engaged"[65], even if this person may have previously worked in another Member State. Another reason for refusing to accept that a jobseeker has a "genuine chance of being engaged" may be that the person concerned received a single letter of refusal after making half a dozen applications[66]. Such decisions have eventually been overturned on appeal, but it should be borne in mind that only about one in three cases are appealed[67].

Nonetheless, in other cases, the reasons given by the Belgian Immigration Office have been upheld by Immigration Appeals Council. A long period of inactivity is usually taken as demonstration that a jobseeker does not have a "genuine chance of being engaged"[68]. Taking language classes[69] or engaging in vocational training[70] is not considered as sufficient to demonstrate a "genuine chance of being engaged". In a similar fashion the fact that a jobseeker is looking for highly-skilled work following specialised postgraduate studies without being willing to take on more generic (and less remunerated) work has led the Belgian Immigration Office to conclude that the jobseeker is unable to demonstrate a "genuine chance of being engaged"[71].

The case law of the Immigration Appeals Council suggests that the Belgian Immigration Office benefits from a relatively wide margin of discretion when determining whether a jobseeker has a "genuine chance of being engaged"[72]. However, there is some evidence to suggest that the Immigration Appeals Council sometimes takes a more thorough approach to reviewing the legality of decisions of the Belgian

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[62] Royal decree of 25 November 1991 regulating unemployment *(Arrêté royal du 25 novembre 1991 portant réglementation du chômage (MB 31-12-1991, p 29888)*;

[63] Further information can be found on their respective websites are <http://www.actiris.be/>, <https://www.vdab.be/> and < https://www.leforem.be/>.

[64] Immigration Appeals Council, judgment of 12 April 2016 (*CCE, arrêt 165 606 du 12 avril 2016*).

[65] Immigration Appeals Council, judgments of 15 December 2015 (*CCE, arrêts 158.838 et 158.871 du 17.12.15*). In these cases, such a reason was considered by the Immigration Appeals Council to be contrary to the aim of Article 40 of the Belgian Immigration Law, which is to allow EU citizens to stay in Belgium in order to look for work.

[66] Immigration Appeals Council, judgment of 22 December 2017 (*CCE, arrêt 197.303 du 22 décembre 2017*). Note that in this case, such a reason was considered by the Immigration Appeals Council to constitute an insufficient reason for concluding on the absence of any "genuine chance of being engaged".

[67] For example in 2016, a total of 1,918 decisions were issued refusing or withdrawing residence rights to EU citizens whereas over the same period 498 appeals were decided.

[68] Immigration Appeals Council, judgments of 17 December 2015 and 30 September 2013 (*CCE, arrêt 158 835 du 17 décembre 2015; CCE, arrêt 111 081 du 30 septembre 2013*).

[69] Immigration Appeals Council, judgments of 26 April 2017 (*CCE, arrêt 185 928 du 26 avril 2017*).

[70] Immigration Appeals Council, judgments of 23 June 2017 and 23 December 2016 (*CCE, arrêt 188 824 du 23 juin 2017*; *CCE, arrêt 180 103 du 23 décembre 2016*).

[71] Immigration Appeals Council, judgment of 13 March 2015 (*RVV, arrest 140 965 van 13 maart 2015*).

[72] Immigration Appeals Council, judgment of 2 June 2016 (*CCE, arrêt* 168 959 du 2 juin 2016).

Immigration Office, as demonstrated by the rulings in which decisions have been annulled on the basis that the Immigration Office had failed to make a personal assessment of the jobseeker's situation[73]. Given that the Immigration Appeals Council operates as an adversarial court, the likelihood of a decision being annulled will therefore very much depend on the quality of the written pleadings submitted to the Council[74].

3.2.3 Retention of worker status

The provisions of Directive 2004/38 on the retention of the status of worker[75] are transposed into Belgian law in a more restrictive manner. The Belgian Immigration Law refers to the retention of the right to reside[76], which is narrower in scope than retention of worker status[77]. However, some take the view that this does not matter in practice[78].

It should be noted that there is no limit in time placed on the retention of worker status for EU citizens who have worked more than a year[79]. In such circumstances, the status of a worker will be retained as long as the person concerned has registered as a jobseeker with the competent regional employment office[80]. However, EU citizens who have worked less than a year will only retain the status of a worker for a period of six months[81], after which point their continued right of residence as an unemployed person will be conditional upon demonstrating that they have a "genuine chance of being engaged"[82].

There is some evidence to suggest that the Immigration Office sometimes refrains from applying this provision for the benefit of EU citizens who should otherwise be entitled to its protection[83]. This is the case, for example, in situations

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[73] See for example, Immigration Appeals Council, judgment of 20 February 2015 (*CCE, arrêt 138 933 du 20 février 2015*), in which the Immigration Office simply asserted a jobseeker has no "genuine chance of being engaged" without any examination of the jobseeker's brief period of unemployment following a period of three months of employment; Immigration Appeals Council, judgment of 30 April 2015 (*CCE, arrêt 144 628 du 30 avril 2015*), where the Immigration Office failed to explain how documents submitted (a CV, a one-month internship and proof of job applications) meant that the jobseeker had no "genuine chance of being engaged"; Immigration Appeals Council, judgment of 20 February 2014 (*CCE, arrêt 119 177 du 20 février 2014*), idem. For further examples, see also case law cited at n 65 and n 66.

[74] See for example, Immigration Appeals Council, judgment of 2 August 2017 (*CCE, arrêt 190 377 du 2 août 2015*), where the Council notes that the "claimant has not relied on or articulated any ground of appeal in this respect" and that because "the reasoning of the second decision under appeal is not contested as such, the Council considers there is no ground of appeal that would justify ordering the annulment of this decision".

[75] Article 7(3).

[76] Art 42bis, §2.

[77] Nathalie Meurens et al, *Obstacles to the right of free movement and residence for EU citizens and their family members: Country report for Belgium* (PE 559.969, European Parliament 2016) 11.

[78] Gutwirth, de Hert and Paepe, Conformity Study for Belgium (n 55), 29, and Correspondence Table for Belgium (n 55), 30.

[79] Art 42bis, §2, 2° which almost literally transposes Article 7(3)(b) of Directive 2004/38.

[80] Actiris in Brussels, Forem in Wallonia or VDAB in Flanders.

[81] Art 42bis, §2, 3° which literally transposes Article 7(3)(c) of Directive 2004/38.

[82] Art 40, §4, para 1, 1°.

[83] Meurens et al (n 77), 18.

where a worker had worked for more than a year[84] or one who embarked in vocational training following a string of fixed-term contracts totalling four months of work[85].

3.2.4 Residence beyond three months for self-sufficient citizens

In order to benefit from the right to reside in Belgium for a period exceeding three months, EU citizens who do not work must be able to demonstrate that they have sufficient resources so as not to become a burden on the Belgian social assistance system and they must hold comprehensive sickness insurance[86].

a) Proof of sufficient resources

The law provides that EU citizens can demonstrate their self-sufficiency by any means, including by being in possession of their own resources or those provided by another, as well as being in receipt of invalidity pension, pre-retirement pension, retirement pension or work injury benefits[87]. The Immigration Appeals Council has also confirmed that unemployment benefit may also be taken into consideration when assessing whether a person has sufficient resources[88] because such a benefit does not constitute social assistance[89].

The practical application of these provisions is rendered problematic by the ambiguity contained in a circular issued by the Belgian Immigration Office[90], which suggests that the level of resources indicated therein – currently €892,70 per month corresponding to the threshold below which a person may be eligible for social assistance[91] in Belgium – is a fixed amount which must be met in all cases[92], even though the Directive provides that no fixed amount can be imposed in this regard[93]. There is also case law that suggests the Belgian Immigration Office considers this a fixed amount[94].

In practice, EU citizens registering their residence in Belgium are often wrongly informed by municipal officials that they must have resources of a specific amount. For example, in one reported instance, an EU citizen was refused the possibility to register as a self-sufficient persons because she did not have at least €10,000 in her bank account[95].

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[84] Immigration Appeals Council, judgment of 13 March 2015 (*RVV, arrest 140 965 van 13 maart 2015*).
[85] Immigration Appeals Council, judgment of 1 September 2015 (*CCE, arrêt 151 491 du 1er septembre 2015*).
[86] Belgian Immigration Law, art 40, § 4, 2°.
[87] Royal Decree, art 50, §2, 4°.
[88] Immigration Appeals Council, judgment of 3 December 2015 (*CCE, arrêt 157 625 du 3 décembre 2015*).
[89] Immigration Appeals Council, judgments of 3 December 2015 and 10 September 2014 (*RVV, arrest 157 895 van 8 december 2015; RVV, arrest 129 028 van 10 september 2014*).
[90] Circular of 23 May 2008 (n 23).
[91] This refers to *aide sociale/ maatschappelijke dienstverlening*.
[92] ibid, para C.1, 1°. See further, Gutwirth, de Hert and Paepe, Conformity Study for Belgium (n 55) 32 and Correspondence Table for Belgium (n 55) 28.
[93] Article 8(4).
[94] Immigration Appeals Council, judgment of 16 April 2010 (*CCE, arrêt 41 638 du 16 avril 2010*).
[95] Meurens et al (n 77), 18-19.

b) *Proof of comprehensive sickness insurance*

Belgium operates a contribution-based healthcare system[96]. In order to access the public healthcare system, a person has to affiliate with a non-profit healthcare fund[97] and pay a subscription fee.

EU citizens who remain covered by their home country's social security system (for example students) will be able to register with a Belgian healthcare fund using a European Health Insurance Card (EHIC) issued by their home country's social security institution. The cost of any treatment obtained in Belgium will then be borne by the Member State which issued the EHIC[98].

However, EU citizens who do not remain covered by their home country's social security system will need to affiliate with a Belgian healthcare fund. Under the relevant law, EU citizens have a right to such affiliation provided that they can demonstrate that they have a right of residence in Belgium[99].

In theory, the healthcare fund should be able to proceed with the affiliation of EU citizens and their family on the basis of a certificate of application[100] issued to them when they first went to register[101].

In practice, it is only once that EU citizens and their family members have been registered on the population register[102] and provided with their unique identification number – which doubles up as a social security number – that they will be able to affiliate with a healthcare fund.

The practical application of the Belgian rules may also sometimes lead to "catch 22" situations where EU citizens cannot obtain a registration certificate from their local municipality without furnishing proof of their affiliation to a Belgian healthcare fund, but they cannot obtain their affiliation to a healthcare fund until they have been issued with a registration certificate[103].

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[96] World Health Organisation, European Observatory on Health Systems and Policies, Belgium Health System Review (2010), pp xxviii and 15 <http://www.euro.who.int/en/about-us/partners/observatory/publications/health-system-reviews-hits/full-list-of-country-hits/belgium-hit-2010>.

[97] A list of these healthcare funds can be found here on the website of the National Institute for Health and Disability Insurance: <http://www.riziv.fgov.be/fr/professionnels/autres/mutualites/Pages/contactez-mutualites.aspx>.

[98] Article 35 of Regulation 883/2004 on the coordination of social security in the EU [2004] OJ L 166/1 and Regulation 987/2009 implementing the rules on the coordination of social security [2009] OJ L 284/1.

[99] Law of 14 July 1994 on compulsory healthcare insurance, art 32, 15°(*Loi relative à l'assurance obligatoire soins de santé et indemnités coordonnée le 14 juillet 1994 (MB 27-08-1994, p 25124)*); Royal decree of 3 July 1996 on compulsory healthcare insurance, art 128quinquies (*Arrêté royal du 3 juillet 1996 portant exécution de la loi relative à l'assurance obligatoire soins de santé et indemnités, coordonnée le 14 juillet 1994 (MB 31-07-1996, p 20285)*).

[100] These are certificates of application issued as Annexes 19 and 19ter respectively.

[101] Royal decree of 3 July 1996 on compulsory healthcare insurance (n 99), art 128quinquies.

[102] See further section 3.1 on registration procedures.

[103] Interview with client held on file by the EU Rights Clinic.

3.2.5 Family members

No specific issues have been identified in connections with the definitions of family members used in the law. The provisions on direct family members are adequately transposed[104]. While the Belgian Immigration Law initially failed to transpose the provisions of the Directive relating to 'other family members'[105] in a correct and complete fashion,[106] the law has now been amended in this respect[107] with the insertion of a new chapter to cover 'other family members'.[108] This has addressed former issues of non-compliance in this respect.[109]

Nonetheless, delays beyond 6 months are being reported in connection with the issuance of residence documents to non-EU family members[110], in addition to the excessive delays in handling visa applications submitted by family members abroad[111].

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[104] Conformity Study for Belgium (n 55) 20-22.
[105] Article 3(2).
[106] Gutwirth, de Hert and Paepe, Conformity Study for Belgium (n 55), 23-25, and Correspondence Table for Belgium (n 55), 13.
[107] Law of 19 March 2014 amending the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners (*Loi du 19 mars 2014 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (MB 05-05-2014, p 36137)*).
[108] A new Chapter (*Chapitre Ibis. 1 - Autres membres de la famille d'un citoyen de l'Union*) has been inserted into the Belgian Immigration Law comprising arts 47/1-47/3 and the Royal Decree has also been amended by the insertion of art 58 relating to other family members covered by Article 3(2) of Directive 2004/38.
[109] See further Meurens et al (n 77), 10-11.
[110] ibid, 24.
[111] ibid, 23.

4. Access to social benefits for EU mobile citizens in Belgium

This section will provide a general overview of the Belgian welfare system before proceeding to an examination of the eligibility conditions that specifically apply to EU citizens and their family members.

4.1 Overview of system

In Belgium, there are several different legislative instruments governing the conditions under which persons may be eligible for social welfare benefits.

Belgian law has traditionally provided for three frameworks for the provision of social welfare, namely 1) contribution-based social security benefits, for which eligibility will depend on a claimant having worked or paid social security contributions for a certain period of time (for example, unemployment benefits), 2) non-contributory social assistance, for which eligibility is not conditional upon having previously worked or paid social security contributions and which are awarded according to a person's needs, and 3) residual social assistance, which is awarded on the basis of need where a person is not eligible for other forms of social welfare[112].

The specific conditions regarding residence which must be met by EU citizens and their family members will now be examined in respect of each category of benefits.

[112] Denis Feron, *Le droit des étrangers à l'usage des CPAS et des services sociaux* (Wolters Kluwer 2012) 1-7.

4.2 Residence conditions governing access to contributory social security benefits

Under Belgian law, there are several categories of contribution-based social security benefits[113] where eligibility essentially depends upon a claimant having worked and/or paid social security contributions for a certain period of time. These benefits are payable as consideration for the payment of social security contributions by employees and their employers to the National Office for Social Security[114] or those paid by the self-employed to their relevant social security fund[115].

Contributory social security benefits essentially cover the following branches of social security benefits: a) unemployment benefits payable to workers who have become unemployed[116], b) sickness benefits provided to workers during an illness[117], c) retirement pensions and survivor's benefits[118], d) benefits payable to workers who have become incapacitated following an occupational injury or illness[119], e) family benefits[120] and f) paid leave benefits[121]. Such benefits will fall within the scope of the EU rules on the coordination of social security[122].

In addition to meeting the eligibility conditions that apply to each category of benefit[123], Belgian law usually requires that where the claimant is not a Belgian national, that person must comply with the applicable Belgian immigration rules[124]. This essentially means that a claimant who is an EU citizen must demonstrate they have a right of residence in Belgium.

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[113] *Law of 29 June 1981 establishing the general principles of social security for employed workers (Loi du 29 juin 1981 établissant les principes généraux de la sécurité sociale des travailleurs salariés, MB 02-07-1981, p 8575);*

[114] *Office national de sécurité sociale (ONSS) / Rijksdienst voor Sociale Zekerheid (RSZ).*

[115] A listing of social security funds can be found on the website of the National Institute for Social Security of the Self-Employed (*Institut national d'assurances sociales pour travailleurs indépendants (INASTI) / Rijksinstituut voor de Sociale Verzekeringen der Zelfstandigen (RSVZ)*) <http://www.nisse.be/en/list-social-security-funds>.

[116] Unemployment benefits are called *allocations de chômage / werkloosheidsuitkering* <https://www.socialsecurity.be/citizen/fr/allocations-de-chomage>.

[117] Sickness benefits are termed *revenus de remplacement / vervangingsinkomen* <https://www.socialsecurity.be/citizen/fr/incapacite-de-travail-accident-de-travail-et-maladies-professionnelles/incapacite-de-travail-en>.

[118] Retirement pensions are called *pensions de retraite / rustpensionen*, while survivor's benefits are called *pensions de survie /overlevingspensioenen* <https://www.socialsecurity.be/citizen/fr/pension>.

[119] Incapacity benefits are termed *indemnités d'incapacité de travail / vergoedingen bij arbeidsongeschiktheid* <https://www.socialsecurity.be/citizen/fr/incapacite-de-travail-accident-de-travail-et-maladies-professionnelles/indemnites-d-incapacite-de-travail>.

[120] Family benefits are entitled *allocations familiales / kinderbijslag* <https://www.socialsecurity.be/citizen/fr/famille/allocations-familiales-ordinaires>.

[121] Paid leave is called *congé payé / betaald verlof* <https://www.socialsecurity.be/citizen/fr/conges-credit-temps-et-interruption-de-carriere>.

[122] Regulation 883/2004 on the coordination of social security in the EU [2004] OJ L 166/1 and Regulation 987/2009 implementing the rules on the coordination of social security [2009] OJ L 284/1.

[123] For an overview, see European Commission, 'Your social security rights in Belgium' (2017) <http://ec.europa.eu/social/BlobServlet?docId=13740&langId=en>.

[124] For example, regarding unemployment benefit, see arts 43 §1 and 69 §1 of the Royal decree of 25 November 1991 regulating unemployment (*Arrêté royal du 25 novembre 1991 portant réglementation en matière de chômage (MB 31-12-1991, p 29888)*).

As a result, an EU citizen whose right of residence has been terminated or withdrawn for whatever reason[125] will be unable to continue receiving social security benefits. In practice this occurs because the decision terminating or withdrawing a right of residence leads to the person being struck off from the population register[126], which leads to the suspension of the person's identification number that also functions as their social security number. A deactivated social security number effectively prevents the continued payment of social security benefits.

It is unclear whether such a "right to reside" condition would be considered unlawful in view of the Court of Justice's recent case law on equal treatment and access to benefits in which it has held that "there is nothing to prevent, in principle, the grant of social benefits to Union citizens who are not economically active being made subject to the requirement that those citizens fulfil the conditions for possessing a right to reside lawfully in the host Member State"[127].

However, it could be argued that such case law is not directed at contributory benefits. This proposition would need to be tested and could therefore form the subject of strategic litigation before the Belgian courts with a view to seeking a request for a preliminary ruling on the issue from the EU Court of Justice. This would require identifying cases in which an EU worker had worked for less than twelve months in Belgium and where the Belgian Immigration Office proceeded to withdraw the person's right of residence on the basis that the person had remained unemployed for more than six months (thereby leading to his unemployed benefits being withdrawn because the unemployed person concerned would no longer have a right to reside in Belgium). In practice, however, such cases may prove difficult to identify because the person concerned may be reticent to embark on legal proceedings that may last several years and whose outcome may not be favourable.

For the sake of completeness, it should also be added that contributory social security benefits constitute "social advantages" for the purposes of the right to equal treatment enshrined by Article 7(2) of Regulation 492/2011[128] and therefore accrue to the benefit of migrant workers and members of their family benefit irrespective of a residence requirement[129].

4.3 Residence conditions governing access to non-contributory social assistance

The Belgian welfare system provides for various benefits that are payable to persons who have no income, who are ineligible for social security benefits and who are unable to provide for their essential needs. Such benefits comprise 1) disability

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[125] Belgian Immigration Law, art 42bis, §1. See further sections 5.2 and 5.3.
[126] Royal decree of 16 July 1992 relating to population registers and the register of foreigners, art 12, 5° (*Arrêté royal du 16 juillet 1992 relatif aux registres de la population et au registre des étrangers (MB 15-08-1992, p 18028)*).
[127] Case C-308/14 *Commission v United Kingdom* EU:C:2016:436, para 68.
[128] Regulation 492/2011 on the free movement of workers [2011] OJ L 141/1.
[129] Case 157-84 *Frascogna* EU:C:1985:243, paras 24 and 25; .

benefits[130], 2) social integration income[131], 3) old-age income guarantee[132] and 4) guaranteed family allowances[133] for those who are ineligible for family benefits under the social security system.

These benefits constitute social advantages for the purposes of Regulation 492/2011 on the free movement of workers[134]. Social assistance in the form of income replacement allowance for the disabled[135] and old-age income guarantee is also considered by the Belgian authorities as consisting in "special non-contributory benefits" falling within the scope of the EU rules on the coordination of social security[136].

4.3.1 Disability benefits

Belgian legislation provides that any person – including an EU citizen – who is seeking to claim disability benefits must be resident in Belgium[137]. A residence condition is permitted by the EU rules on the coordination of social security as regards special non-contributory benefits[138], which explicitly include income replacement allowance for the disabled[139].

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[130] These refer to income replacement allowance (*allocation de remplacement de revenus / inkomensvervangende tegemoetkoming*), integration allowance (*allocation d'intégration / integratie tegemoetkoming*) and old-age mobility allowance (*allocation pour l'aide aux personnes âgée*s / *tegemoetkoming voor hulp aan bejaarden*) awarded under the Law of 27 February 1987 relating to allowances for disabled persons (*Loi du 27 février 1987 relative aux allocations aux personnes handicapées (MB 01-04-1987, page 4832*); see also <https://www.socialsecurity.be/citizen/fr/aide-cpas/aide-financiere/allocation-de-remplacement-de-revenus> and <https://www.socialsecurity.be/citizen/fr/aide-cpas/aide-financiere/allocation-d-integration>.

[131] This refers to the *revenu d'intégration sociale / leefloon* formerly known as the "minimex" awarded under the Law of 26 May 2002 on the right to social integration (*Loi du 26 mai 2002 concernant le droit à l'intégration sociale (MB 31-07-2002, p 33610)*); see also <https://www.socialsecurity.be/citizen/fr/aide-cpas/aide-financiere/droit-a-l-integration-sociale>.

[132] These refer to *garantie de revenu aux personnes âgées (Grapa) / Inkomensgarantie voor ouderen (IGO)* granted under the Law of 22 March 2001 instituting an income guarantee for persons in old age (*Loi du 22 mars 2001 instituant la garantie de revenus aux personnes âgées (MB 29-03.2001, p 10244)*); see also <https://www.socialsecurity.be/citizen/fr/aide-cpas/aide-financiere/grapa>.

[133] These refer to *prestations familiales guaranties / gewaarborgde gezinsbijslag* payable under Law of 20 July 1971 instituting guaranteed family allowances (*Loi du 20 juillet 1971 instituant des prestations familiales guaranties (MB 07-08-1971, p* 9302*)*) <https://www.socialsecurity.be/citizen/fr/aide-cpas/allocation-familiale>.

[134] Case 122/84 *Scrivner* EU:C:1985:145, paras 26 and 27 as regards the "minimex" (now social integration income); Case 261/83 *Castelli* EU:C:1985:145, para 11 as regards old-age income guarantee.

[135] This refers to *allocation de remplacement de revenus / inkomensvervangende tegemoetkoming* which is awarded under Law of 27 February 1987 relating to allowances for disabled persons (n 130), art 2, 1°.

[136] Regulation 883/2004 (n 122), Annex X, specifically lists old-age pension guarantee and income replacement allowance as special non-contributory benefits.

[137] Law of 27 February 1987 relating to allowances for disabled persons (n 130), art 4, §1.

[138] Regulation 883/2004 (n 122), art 70(4) which provides that special non-contributory benefits listed in Annex X are to "be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation". Belgian disability benefits have been held to fall within the scope of the EU rules on the coordination of social security in Case 187/73 *Callemeyn* EU:C:1974:57, para 15.

[139] This refers to *allocation de remplacement de revenus / inkomensvervangende tegemoetkoming* which is awarded under the Law of 27 February 1987 (n 130), art 2, 1°, to persons aged 21 -64 years who have a disability which reduces their capacity for earning an income by a third or less compared to a fully-abled person.

In respect of the other two forms of disability benefits – integration allowance[140] and old-age mobility allowance[141] – these are not listed as special non-contributory benefits[142] Nonetheless, it would appear that the integration allowance and old-age mobility allowance are currently considered long-term care benefits for the purposes of the EU rules on social security.[143] As a result such benefits should be "exportable"[144] meaning that any residence condition must be waived[145] in respect of a person who is in receipt of such disability benefits subsequently moves to another EEA State while remaining covered by the Belgian social security system.

4.3.2 Social integration income

Following amendments to legislation made in 2013[146], EU citizens and their family members seeking to claim social integration income need to demonstrate that they have a right to reside in excess of three months in Belgium, in addition to meeting the eligibility requirements for such benefits.

This means that EU citizens and their family members are effectively excluded from the possibility of claiming social integration income in the first three months of their residence in Belgium[147]. This complies with EU law as regards EU migrants who are not in work[148].

However, given that this legislative provision[149] does not contain a carve out for workers and the self-employed and members of their family, this provision constitutes a breach of Article 24(2) of Directive 2004/38[150]. Although a Ministerial Circular[151] has sought to clarify that, in line with a previous ruling of the Belgian Constitutional

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[140] This refers to *allocation d'intégration / integratie tegemoetkoming* awarded under the Law of 27 February 1987 (n 130), art 2, 2°, to persons aged 21-64 who have reduced mobility.
[141] This refers to *allocation pour l'aide aux personnes âgées / tegemoetkoming voor hulp aan bejaarden* under the Law of 27 February 1987 (n 130), art 2, 3°, to persons aged 65 or more who have reduced mobility.
[142] It should be noted that disability benefits intended to assist disabled persons compensate for their reduced autonomy have previously been considered by the Court of Justice to constitute special non-contributory benefits; see to that effect, Case C-537/09 *Bartlett* EU:C:2011:278, paras 23-30 in which the Court confirmed that the mobility component of UK's disability living allowance is a special non-contributory benefit.
[143] See European Commission, 'Your social security rights in Belgium' (n 123), 15, which suggests such benefits are long-term sickness benefits; Mutual Information System on Social Protection, 'Comparative Tables Database' (Belgium > XII Long-Term Care) <http://www.missoc.org/MISSOC/INFORMATIONBASE/COMPARATIVETABLES/MISSOCDATABASE/comparativeTableSearch.jsp>.
[144] Regulation 883/2004 (n 122), arts 21 and 34.
[145] Ibid, art.
[146] Framework law of 28 June 2013 (*Loi-programme du 28 juin 2013 (MB 01-07-2013, p 41480)*), art 21, which amended Law of 26 May 2002 on the right to social integration (n 131), art 3, 3°.
[147] Law of 26 May 2002 on the right to social integration (n 131), art 3, 3°.
[148] Article 24(2) of Directive 2004/38; Case C-299/14 *Garcia-Nieto* EU:C:2016:114, para 52.
[149] Law of 26 May 2002 on the right to social integration (n 131), art 3, 3°.
[150] Article 24(2) of Directive 2004/38 provides that the "host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence … to persons other than workers, self-employed persons, persons who retain such status and members of their families".
[151] Circular of 5 August 2014 relating to the interpretation of article 3, 3°, second paragraph of Law of 26 May 2002 on the right to social integration and article 57quinquies of Law of 8 July 1978 on public social assistance centres (*Circulaire du 5 août 2014 relative à l'interprétation de l'article 3, 3°, 2e tiret, de la loi du 26 mai 2002 concernant le droit à l'intégration sociale et de l'article 57quinquies de la loi du 8 juillet 1976 organique des centres publics d'action sociale (MB (08-08-2014, p 58165)*).

Court[152], workers and the self-employed and members of their family cannot be excluded from claiming residual social assistance[153] within the first three months of residence[154], the Circular goes on to maintain such a restriction on the ability of EU workers to claim social integration income[155].

In addition, the Court of Justice has previously held that social integration income constitutes a "social advantage" for the purposes of what is now Article 7(2) of Regulation 492/2011 on the free movement of workers[156]. Such a restriction on claiming social integration income within the first three months of residence would therefore also breach the right to equal treatment of migrant EU workers or those who have retained that status along with their family members.

As a result, Belgian legislation on social integration income[157] does not comply with EU law because it excludes the ability of workers, the self-employed and their family members to claim social integration income in the first three months of their residence in Belgium. Such a condition creates a risk of destitution among EU migrants because it would exclude workers who have become unemployed during the first three months of their residence from the possibility of claiming social integration income.

This instance of legislative non-compliance by the Belgian authorities could therefore form the subject of strategic litigation by way of a complaint to the European Commission seeking the initiation of infringement proceedings.

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[152] Belgian Constitutional Court, judgment of 30 June 2014 (*CC, arrêt nº 95/2014 du 30 juin 2014*); see discussion in next section 4.4.

[153] This is called *droit à l'intégration sociale* / recht op maatschappelijke integratie <https://www.socialsecurity.be/citizen/fr/aide-cpas/aide-financiere/droit-a-l-integration-sociale>.

[154] Circular of 5 August 2014 (n 151), para 3.2.1.

[155] ibid, para 2.2.1 on workers and their family members states as follows:

> "*The person concerned has a right to claim social integration income provided he has a right to reside in excess of three months (E card or F card). If the person concerned does not yet have or no longer has such a right of residence, he does not have a right to claim social integration income. This means in practice that the person concerned who has been issued an annex 19 [certificate of application for a registration certificate], annex 19ter [certificate of application for a residence card for family members], annex 20 [decision refusing recognition of a right to reside of more than three months], annex 21 [decision withdrawing a right to reside of more than three months], or annex 35 [certificate of suspension of decision pending an appeal] have no right to claim social integration income" (author's own translation; emphasis added).*

Note that some commentators consider, incorrectly it would appear, that this Circular allows workers and the self-employed to clain social integration income, see for example Nathalie Meurens et al, *Obstacles to the right of free movement and residence for EU citizens and their family members: Country report for Belgium* (PE 559.969, European Parliament 2016) 20; Julia Heneffe, 'Le droit des citoyens européens aux prestations d'assistance sociales' in Bernadette Renauld et al, *Questions actuelles en droit des étrangers* (Anthemis 2016) 131-138, 134.

[156] Case 122/84 *Scrivner* (n 134), paras 26 and 27 as regards the "minimex" (precursor to social integration income) under Reg 1612/68 [1968] OJ English special edition, 475, art 7(2) as replaced by Reg 492/2011 (n 128), art 7(2).

[157] Law of 26 May 2002 on the right to social integration (n 131), art 3, 3°.

4.3.3 *Old-age income guarantee*

As part of the requirements concerning eligibility for an old-age pension guarantee, EU citizens and their family member claiming an old-age income guarantee must either fall within the scope of the EU rules on the coordination of social security[158] or have a right to claim a Belgian pension[159].

Following legislative amendments made in 2017[160], all claimants must now also demonstrate that they have resided in Belgium for at least ten years, including an uninterrupted period of five years of residence[161].

Although a residence condition is permitted by the EU rules on the coordination of social security[162], such a residence condition appears excessive. While a residence condition is likely not to be considered as consisting in direct discrimination because it applies to Belgian claimants as well as EU citizens – as previously noted by the Belgian Council of State[163] – it is likely to be considered indirectly discriminatory because it is likely that Belgian nationals will find it easier to fulfill such a residence condition compared to EU migrants[164]. In addition, such a condition is unlikely to be objectively justified[165] because the imposition of a ten-year residence requirement[166]

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[158] Regulation 883/2004 and Regulation 987/2009 (n 122).

[159] Law of 22 March 2001 instituting an income guarantee for persons in old age (n 132), art 4, para 1, 2° and 6 ° respectively.

[160] Law of 27 January 2017 amending the law of 22 March 2001 instituting an income guarantee for persons in old age (*Loi du 27 janvier 2017 modifiant la loi du 22 mars 2001 instituant la garantie de revenus aux personnes âgées (MB 06-02-2017, p 17416)*), art 3.

[161] ibid, art 4, para 2.

[162] Regulation 883/2004 (n 122), art 70(4) which provides that special non-contributory benefits listed in Annex X are to "be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation".

[163] Council of State, opinion of 16 August 2016 (*CE, avis n° 59.786/1/V du 16 août 2016*). The Council of State did emit a reservation as regards how such a condition would affect current recipients of the old-age income guarantee, but the Parliamentary bill indicated that current recipients who are unable to demonstrate ten years of residence would be able to apply for residual social assistance; see House of Representatives, 'Bill to amend the law of 22 March 2001 instituting an income guarantee for persons in old age' (8 November 2016) (*Chambre des Représentants, 'Projet de loi modifiant la loi du 22 mars 2001 instituant la garantie de revenus aux personnes âgées', Doc 54-2141, 8 novembre 2016*), 4-6.

[164] The EU Court of Justice has consistently held that conditions imposed by national law must be regarded as indirectly discriminatory where they are indistinctly applicable but can more easily be satisfied by a Member State's own nationals than by EU citizens from other Member States; see to this effect, Case C-237/94 *O'Flynn* ECLI:EU:C:1996:206, para 18; Case C-111/91 *Commission v Luxembourg* EU:C:1993:92, para 10; Case C-279/89 *Commission v United Kingdom* EU:C:1992:439, para 42; Case C-349/87 *Paraschi* EU:C:1991:372, para 23; Case 1/78 *Kenny* EU:C:1978:140, para 17.

[165] See to that effect, Case C-20/12 *Giersch* EU:C:2013:411, paras 72-82. While the Parliamentary bill (n 163) seeks to justify the proposal on the basis of budgetary considerations, the Court held in *Giersch* that budgetary considerations may not justify a difference in treatment between nationals and EU citizens from other Member States (para 52); see also Case C-542/09 *Commission v Netherlands* EU:C:2012:346, para 58.

[166] Law of 22 March 2001 instituting an income guarantee for persons in old age (n 132), art 4, paras 2 and 3 provide as follows:

> "*A beneficiary of old-age income guarantee must also have their principal residence in Belgium and must have had their effective residence in Belgium for at least ten years, of which five years must have been uninterrupted.*"
> *For the purposes of this law, effective residence in Belgium is determined on the basis of the information concerning the beneficiary which is registered and kept on the national register pursuant to Article 3, paragraph 1, 5° of the abovementioned law of 8 August 1983 [relating to the organisation of the national population register].*"

is arguably disproportionate, given that it would automatically exclude EU citizens who, despite having attained permanent residence, have not resided in Belgium for a period of ten years. As a result, the residence condition relating to old-age income guarantee is likely to breach Article 24 of Directive 2004/38.

This further instance of non-compliance in Belgian legislation could also form the subject of a complaint to the European Commission seeking the initiation of infringement proceedings.

Such a residence condition would also likely infringe Article 7(2) of Regulation 492/2011 in respect of EU migrants who are workers or have retained that status, and their family members, in line with a prior ruling of the EU Court of Justice concerning the imposition of a five-year residence condition in connection with guaranteed minimum income in Luxembourg[167]. This proposition would, however, need to be tested and could therefore form the subject of strategic litigation before the Belgian courts with a view to seeking a request for a preliminary ruling on the issue from the EU Court of Justice.

4.3.4 Guaranteed family allowances

The conditions relating to guaranteed family allowances provides that EU citizen are entitled to obtain family benefits if they can demonstrate that they fall within the scope of the EU rules[168] on the coordination of social security[169] or the claim is being made in respect of a child who is an EEA or Swiss national[170].

This condition will be met whenever there is a cross-border element[171], including the situation of EU citizens who do not hold Belgian citizenship who are residing in Belgium[172]. Otherwise, should a claimant's situation not fall within the scope of the EU rules on social security, claimants who do not hold Belgian nationality must demonstrate residence of at least five years in Belgium[173].

In addition, the claimant must demonstrate that they comply with the applicable Belgian immigration rules[174] which, in the case of claimants who are EU citizens, means that they have a right of residence in Belgium. Such a condition appears legitimate in view of the Court's recent case law on the lawful imposition of a "right to reside" condition as part of the eligibility conditions for family benefits[175].

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[167] Case C-299/01 *Commission v Luxembourg* EU:C:2002:394, para 12.
[168] Law of 20 July 1971 instituting guaranteed family allowances (n 133), art 1, para 7, 1°.
[169] Regulation 883/2004 and Regulation 987/2009 (n 122).
[170] Law of 20 July 1971 instituting guaranteed family allowances (n 133), art 1, para 7, 5°.
[171] See to that effect Case C-153/91 *Petit* EU:C:1992:354, paras 8-10; Case C-212/06 *Flemish care insurance* EU:C:2008:1683, para 33.
[172] See for example, Case C-346/05 *Chateigner* EU:C:2006:711, para 29.
[173] Law of 20 July 1971 instituting guaranteed family allowances (n 133), art 1, para 6.
[174] For example, regarding unemployment benefit, see arts 43 §1 and 69 §1 of the Royal decree of 25 November 1991 regulating unemployment (*Arrêté royal du 25 novembre 1991 portant réglemantation en matière de chômage (MB 31-12-1991, p 29888)*).
[175] Case C-308/14 *Commission v United Kingdom* (n 127), para 68

4.4 Residence conditions governing access to residual social assistance

Belgian law imposes a duty on public social assistance centres to provide residual social assistance to persons who are unable to meet their essential needs and who are not eligible for social security or social assistance[176].

Such residual social assistance can take various forms including 1) financial assistance equivalent to integration income[177], 2) measures to provide employment[178], 3) medical assistance[179] 4) housing benefits[180] among others.

Since 2012[181], EU citizens and their family members have been unable to claim residual social assistance in the first three months of their residence in Belgium, because access to such assistance is conditional upon having a right to reside in excess of three months, as well as meeting the other eligibility conditions.

However, these legislative changes did not comply fully with Article 24(2) of Directive 2004/38[182] as regards those in work. The Belgian Constitutional Court subsequently annulled the amending legislative provision insofar as it excluded the possibility for EU workers, the self-employed and those who retained worker status, together with members of their family to claim residual social assistance[183].

A Ministerial Circular[184] was subsequently issued to confirm that, in line with a ruling of the Belgian Constitutional Court, the exclusion of the right to claim social integration income within the first three months of residence only applies to persons other than workers and the self-employed[185].

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[176] Law of 8 July 1978 on public social assistance centres (*Loi organique des centres publics d'action sociale du 8 juillet 1978 (MB 05-08-1976, p 9876)*).

[177] This is called the équivalent du revenu d'intégration / equivalent leefloon, see <https://www.socialsecurity.be/citizen/fr/aide-cpas/aide-financiere>.

[178] This is termed *activation professionnelle / professionele activering* <https://www.mi-is.be/fr/themes/activation-sociale-professionnelle/activation-professionnelle>.

[179] This is referred to as *aide médicale / medische hulp* <https://www.socialsecurity.be/citizen/fr/aide-cpas/aide-pour-les-frais-medicaux>.

[180] This is known as *aide au logement / hulp bij huisvesting* <https://www.socialsecurity.be/citizen/fr/aide-cpas/aide-au-logement>.

[181] Law of 19 January 2012 amending the legislation concerning the reception of asylum seekers (*Loi du 19 janvier 2012 modifiant la legislation concernant l'accueil des demandeurs d'asile* (MB 17-02-2012, p 11422), art 12, which inserted a new article 57quinquies into Law of 8 July 1978 on public social assistance centres (n 176).

[182] For a discussion see, Jean-Yves Carlier, Report on the Free Movement of Workers in Belgium in 2012-2013 (Centre for Migration Law, Radboud University Nijmegen 2013) 9-11; Julia Heneffe, 'Le droit des citoyens européens aux prestations d'assistance sociales' in Bernadette Renauld et al, Questions actuelles en droit des étrangers (Anthemis 2016) 131-138.

[183] Belgian Constitutional Court, judgment of 30 June 2014 (*CC, arrêt nº 95/2014 du 30 juin 2014*), paras B.41-B44.

[184] Circular of 5 August 2014 relating to the interpretation of article 3, 3º, second paragraph of Law of 26 May 2002 on the right to social integration and article 57quinquies of Law of 8 July 1978 on public social assistance centres (n 151).

[185] Circular of 5 August 2014 (n 151), para 3.2.1.

4.5 Social assistance for EU citizens without the right to reside

EU citizens and their family members who do not have a right to reside are not entitled to any form of social security benefits or social assistance, save for emergency medical assistance[186]. This follows a ruling from the Constitutional Court overturning legislation seeking to withdraw emergency medical assistance for EU citizens and their family members.[187]

A Ministerial Circular now confirms that emergency medical assistance is available to EU citizens and their family members without a right of residence exceeding three months[188]. In practice this means that the local public social assistance centre will issue a certificate to EU citizens confirming their entitlement to emergency medical assistance which will then enable them to obtain treatment free of charge at public healthcare facilities.

In theory, in circumstances in which EU citizens, who do not have a right of residence and who are unable to provide for the needs of the children in their care, should be eligible to apply for emergency material aid on behalf of their children[189]. Such emergency material aid includes food, clothing and shelter[190], which is provided by Fedasil[191], the Belgian federal agency with responsibility for the reception of persons seeking international protection in Belgium at the request of the local public assistance centre[192]. It has not been possible to determine whether EU citizens and their family members have been able to avail themselves of this emergency material aid in practice.

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[186] This is called *aide médicale d'urgence / dringende medische hulp* provided under Law of 8 July 1978 on public social assistance centres (n 176), art 57, §2, as supplemented by Royal decree of 12 December 1996 relating to emergency medical assistance granted by public social assistance centres to foreigners who are illegally present in the Kingdom (*Arrêté royal du 12 décenbre 1996 relatif à l'aide médicale urgente octroyée par les centres publics d'aide sociale aux étrangers qui séjournent illégalement dans le Royaume (MB 31-12-1996, p 32518)*); see <https://www.socialsecurity.be/citizen/fr/aide-cpas/aide-financiere/laide-medicale-urgente>. For a discussion, see Jean-Yves Carlier, *Report on the Free Movement of Workers in Belgium in 2011-2012* (Centre for Migration Law, Radboud University Nijmegen 2012) 8-9.

[187] Belgian Constitutional Court, judgment of 30 June 2014 (n 183), at paras B.55.1-B.55.12.

[188] Circular of 5 August 2014 (n 151), paras 4.1-4.2

[189] This is called aide matérielle provided under Law of 8 July 1978 on public social assistance centres (n 176), art 57, §2, as supplemented by Royal decree of 24 June 2004 laying down the conditions and procedures for the provision of emergency material aid to a foreign minor who unlawfully resides with his parents in the Kingdom (*Arrêté royal du 24 juin 2004 visant à fixer les conditions et modalités pour l'octroi d'une aide matérielle à un étranger mineur qui séjourne avec ses parents illégalement dans le Royaume (MB 01-07-2004, p 53369)*).

[190] See Association of Brussels Municipalities (section on public social assistance centres), 'Material aid for the benefit of unlawfully residing children' (2008) (*Aide matérielle en faveur des enfants en séjour illegal*) published on the website of the : <http://www.ocmw-info-cpas.be/images/uploads_x/FT_aide_materielle_en_faveur_des_enfants_en_sejour_illegal__Fr__2.pdf>.

[191] Further information on Fedasil can be found on its website <https://www.fedasil.be/>.

[192] Circular of 21 November 2001 concerning the Royal decree of 24 June 2004 laying down the conditions and procedures for the provision of emergency material aid to a foreign minor who unlawfully resides with his parents in the Kingdom (*Circulaire du 21 novembre 2006 remplaçant la circulaire du 16 août 2004 concernant l'arrêté royal du 24 juin 2004 visant à fixer les conditions et modalités pour l'octroi d'une aide matérielle à un étranger mineur qui séjourne avec ses parents illégalement dans le Royaume*).

5. The expulsion of EU mobile citizens from Belgium

In line with Directive 2004/38, an EU citizen or their family member can be refused entry into Belgium on grounds of public policy, public security, public health, fraud or abuse[193].

Following their entry into the national territory, an EU citizen who has taken up residence in Belgium may face expulsion or removal from the country in four distinct circumstances:

- when an EU citizen ceases to meet the conditions governing the right of residence of more than three months[194];
- when an EU citizen becomes an unreasonable burden on social assistance[195];
- when an EU citizen engages in conduct contrary to public policy or public security[196];
- when an EU citizen commits fraud or abuse[197].

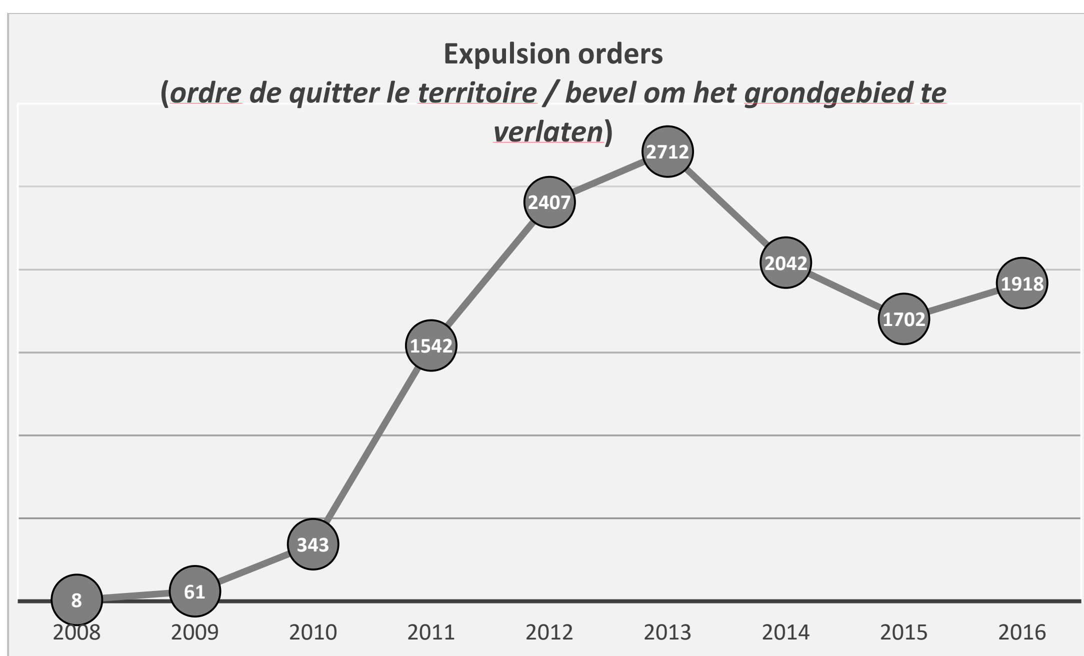
These provisions will be examined after a brief discussion of the available statistical data on expulsions.

5.1 Statistics on expulsion orders

The Belgian Immigration Office publishes statistical information on the number of expulsion orders served on EU citizens on an annual basis[198]. These statistics relate to decisions consisting in a refusal to issue a registration certificate to an EU citizen[199], or a withdrawal of residence rights when an EU citizen no longer meet the conditions governing the right of residence beyond three months[200] or when an EU citizen becomes an unreasonable burden on social assistance.[201]

As the graph below shows, the number of EU citizens and their family members who were ordered to leave the Belgian territory by the Immigration Office rose quite swiftly from 2008, when Directive 2004/38 was transposed into Belgian law.

[193] Belgian Immigration Law, art 43, §1. This is in line with Articles 27-29 and 35 of Directive 2004/38.
[194] Belgian Immigration Law, art 42bis, §1. This is in line with Article 14(2) of the Directive read in combination with Article 7 of Directive 2004/38.
[195] Belgian Immigration Law, art 42bis, §1. This is in line with Directive 2004/38, based on a joint reading of Article 14 and recital 16.
[196] Belgian Immigration Law, art 44bis. This is in line with Articles 27 and 28 of Directive 2004/38.
[197] Belgian Immigration Law, art 44. This is in line with Article 35 of Directive 2004/38, read in conjunction recital 28, which allows the host Member State to take necessary measures to refuse, terminate or withdraw any right conferred by the Directive.
[198] The statistics reported here are drawn from the Belgian Immigration Office's Annual Report for the years 2008 to 2016.
[199] Royal Decree, art 51, §2, para 2.
[200] Belgian Immigration Law, art 42bis, §1, and Royal Decree, art 54.
[201] Belgian Immigration Law, art 42bis, §1, and Royal Decree, art 54.



The sharp increase in expulsions in 2011 compared to the previous year can be attributed to the fact that the Belgian authorities started having recourse to computer-assisted verification of the right of residence of EU citizens and their family members using data collated from the Belgian social security institutions.[202]

The fall in expulsion orders in 2014 and 2015 are partly attributable to a change in practice of the Belgian authorities in April 2014. Before then, the Immigration Office refused to recognise the status of a "worker" under Article 45 TFEU to EU citizens working in Belgium under cover of a measure intended to facilitate access to employment, the so-called "Article 60 contracts"[203] whereby a person is employed by a public social assistance centre in order to accumulate work experience.[204] Following

[202] Belgian Immigration Office, Annual Report 2011, 92.
[203] Article 60(7) of the Law of 8 July 1978 on public social assistance centres (*Loi organique des centres publics d'action sociale du 8 juillet 1978 (MB 05-08-1976, p 9876)*) provides as follows:

> *"§7. Where a person must demonstrate having been employed for a certain period of time in order to obtain the full benefit of certain social assistance benefits or in order to promote the professional experience of the person concerned, the public social assistance centre shall take all necessary measures to procure employment for this person. Where appropriate, it shall provide this form of social assistance by acting as an employer for the required period."*

[204] The Belgian Immigration Office used to refuse to recognise the status of a 'worker' to EU citizens working in Belgium under cover of an Article 60 contract on the basis that such work created a 'burden on social assistance'. This approach was upheld by the courts, see for example, Immigration Appeals Council, judgments of 30 January 2014, 3 July 2013 and 5 December 2012 (*RVV arrest 118 038 van 30 januari 2014*; *RVV arrest 106 290 van 3 juli 2013; RVV arrest 92 955 van 5 december 2012*).

a change of policy[205], such contracts should now be accepted as constituting work for the purposes of establishing "worker" status under the Belgian Immigration Law[206].

Note that these statistics, although identified as expulsion orders, do not relate to enforced removals, for which statistical information is less readily available. However, in addition to the expulsion orders which relate to decisions in which a right of residence has been refused or withdrawn, the Belgian authorities also forcibly remove approximately 400-500 EU citizens every year who are considered a threat to public policy or public security or because they have engaged in fraudulent measures to claim a right of residence[207].

5.2 Ceasing to fulfil the conditions governing residence

The Belgian Immigration Office is entitled to withdraw residence right when an EU citizen no longer fulfils the conditions governing the right of residence of more than three months[208].

There is a specific procedure for withdrawing a right of residence. Where the Belgian Immigration Office has doubts as to whether a person continues to fulfil the conditions for having a right of residence, it will use its powers of verification[209] to write to the individual concerned to request that the person furnish all information that relates to their current situation. The person then has 30 days to respond. The Belgian Immigration Office must have due regard to the person's circumstances[210]. In the event the Belgian Immigration Office decides to withdraw the person's right of residence it will then issue a written decision, which will then be notified to the person concerned[211].

A decision withdrawing the right of residence will usually be accompanied by an "order to leave the territory"[212]. In practice, such expulsion orders are not usually

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[205] Following the opening of an investigation by the Commission, the Belgian authorities amended their practice from the end of April 2014 so that persons working under such a measure are now considered workers under the Directive, see 'General Policy Note – Asylum and Migration' (House of Representatives, 28 November 2014) 27-28 (*'Note de Politique Générale – Asile et Migration', Doc. Parl., Ch. 2014-2015, 54, 0588/026)* <http://www.lachambre.be/flwb/pdf/54/0588/54K0588026.pdf>. For background, see Marco Martiniello et al, 'Les expulsions de citoyens et citoyennes européens. Un phénomène qui nous alarme, et nous mobilise' (*Université de Liège*, 26 May 2014) <http://blogs.ulg.ac.be/marcomartiniello/2014/05/26/les-expulsions-citoyens-citoyennes-europeens/>.

[206] Immigration Appeals Council, judgment of 13 March 2015 (*RVV, arrest 148 740 van 29 juni 2015*); see also Meurens et al (n 77), 44-45. However, the policy has taken a while before leading to a change in case law as case law suggest the former policy was still being upheld after April 2014; see Immigration Appeals Council, judgments of 14 August 2014 and 25 June 2014 (*CCE, arrêt 127 817 du 4 août 2014; CCE, arrêt 126 187 du 25 juin 2014*).

[207] Belgian Immigration Office, Annual Reports 2011 to 2016.

[208] Belgian Immigration Law, art 42bis, §1. This is in line with Article 14(2) of the Directive read in combination with Article 7 of Directive 2004/38.

[209] Belgian Immigration Law, art 42bis, §1.

[210] Belgian Immigration Law, art 42bis, para 3, which lists the factors listed in recital 23 of Directive 2004/38, namely "the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin".

[211] Belgian Immigration Law, art 46, and Royal Decree, art 54.

[212] Royal Decree, art 54.

enforced against EU citizens who no longer fulfil the conditions for having a right of residence exceeding three months[213].

Failure to continue to meet the conditions governing residence is the most common reason for withdrawing the rights of residence of EU citizens and it mostly affects self-employed persons, workers and jobseekers[214]. This is surprising given that Article 14(4) of Directive 2004/38 is intended to prevent the expulsion of such categories of EU citizens[215].

As a result of Belgium's questionable expulsion policy, a complaint was submitted to the Commission[216] and a related petition was also lodged before the European Parliament[217]. Although the Commission subsequently opened an EU Pilot procedure[218] against Belgium, this has since been closed due to the Commission's view that there was insufficient evidence to launch formal infringement proceedings[219]. The petition remains open[220].

5.3 Unreasonable burden to the social assistance system

Residence rights may also be withdrawn where a person becomes an unreasonable burden on social assistance. The Belgian Immigration Office has a significant amount of discretion when making this assessment[221].

Although a Member State is entitled to take action against EU citizens and their family members in the event they become an unreasonable burden on social assistance[222], the Belgian Immigration Law was originally silent on the factors that should be taken into account to determine if a person has become an unreasonable burden on the Belgian social assistance system[223]

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[213] Secretary of State for Asylum and Migration 'Withdrawal of residence rights of EU citizens in Belgium: evolution from 2008 to 2013' (*'Retrait du droit de séjour des ressortissants EU en Belgique : évolution de 2008 à 2013'*) (25 February 2014) <http://countries.diplomatie.belgium.be/fr/binaries/retrait_droit_sejour_tcm425-243893.pdf>.
[214] Anthony Valcke, 'Expulsion and the Implementation Gap: Lessons from Belgium' in Sandra Mantu (ed), *Expulsion and EU citizenship*, Nijmegen Migration Law Working Papers Series 2017/02 (Centre for Migration Law, Radboud University Nijmegen 2017) 15
[215] This provision reads as follows:

> "*... an expulsion measure may in no case be adopted against Union citizens or their family members if:*
> *(a) the Union citizens are workers or self-employed persons, or*
> *(b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.*"

[216] Complaint submitted by INCA-CGIL, ABVV-FGTB, the EU Rights Clinic and Bruxelles Laïque on 4 November 2014 registered under CHAP(2014)3546.
[217] European Parliament, Notice to Members 'Petition No 0884/2014 by Sara Lafuente Hernández (Spanish) with five signatures, on the Belgian Government's violation of the right to move and reside freely within the territory of the Member States', 29 September 2015.
[218] EU PILOT 7316/15/EMPL — Belgium: Expulsion of EU citizens having become unemployed in Belgium (*Belgique : Expulsion des citoyens européens ayant perdu leur emploi en Belgique*).
[219] Letter from the European Commission (DG EMPL) dated 11 July 2016.
[220] Information retrieved from <https://petiport.secure.europarl.europa.eu>.
[221] Immigration Appeals Council, judgment of 30 September 2013 (*CCE, arrêt 111 076 du 30 septembre 2013*).
[222] Directive 2004/38, Article 14(2) read in combination with recital 16.
[223] Directive 2004/38, recital 16.

Following the infringement proceedings initiated by the Commission in 2011[224], this has now been rectified[225] and the Belgian Immigration Office must give due consideration to the temporary nature of the citizen's difficulties, the duration of residence, the personal circumstances and the amount of social assistance granted.[226]

However, the Immigration Law[227] still does not explicitly provide that 'expulsion ... shall not be the automatic consequence of ... recourse to the social assistance system'.[228] In practice, the Belgian Immigration Office does not always comply with this provision[229]. While the Immigration Appeals Council has recognised the existence of this safeguard[230] by reference to the underlying case law of the Court of Justice[231], the case law is far from consistent. Some cases appear to allow the Belgian Immigration Office significant discretion in this respect[232], while others require more rigorous reasoning by the Office as to why a person can be considered an unreasonable burden on social assistance[233].

It should also be recalled that the law provides that proof of sufficient resources can be established through an award of an invalidity pension, pre-retirement pension, retirement pension or work injury benefit[234], which are contributory social security benefits. This would therefore suggest that such benefits are not considered as constituting social assistance when determining whether a person constitutes an unreasonable burden. This interpretation appears to be supported by the approach of the Immigration Appeals Council, which considers that receipt of unemployment benefit does not constitute social assistance[235]. On the other hand, non-contributory social protection benefits[236] – such as certain disability benefits[237] or social integration

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[224] Commission, Reasoned Opinion concerning Belgium's incorrect transposition of Directive 2004/38, Case 2011/2033 (21 February 2013).

[225] Belgian Immigration Law, art 42bis, paras 2 and 3, as amended by the Law of 19 March 2014 amending the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners (*Loi du 19 mars 2014 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (MB 05-05-2014, p 36137)*). The amendments made reflect the factors listed in recital 16 of Directive 2004/38.

[226] Belgian Immigration Law, art 42bis, para 2.

[227] Gutwirth, de Hert and Paepe, Conformity Study for Belgium (n 55) 39 and Correspondence Table for Belgium (n 55) 74. Although this requirement is contained in the Circular of 23 May 2008 (n 77), para E.2, this cannot be considered compliant because a circular is not legally binding.

[228] Directive 2004/38, Article 14(3). See further, Gutwirth, de Hert and Paepe, Conformity Study for Belgium (n 55) 39 and Correspondence Table for Belgium (n 55) 75.

[229] Julia Heneffe, 'Le droit des citoyens européens aux prestations d'assistance sociales' in Bernadette Renauld (ed), *Questions actuelles en droit des étrangers* (Anthemis 2016) 137-138.

[230] Immigration Appeals Council, judgment of 30 September 2013 (*CCE, arrêt 111 076 du 30 septembre 2013*).

[231] Case C- 184/99, *Grzelczyk* EU:C:2001:458.

[232] Immigration Appeals Council, judgments of 4 September 2014, 30 April 2014 and 25 February 2014 (*CCE, arrêt 128 716 du 4 septembre 2014; CCE, arrêt 123 447 du 30 avril 2014; CCE, arrêt 119 420 du 25 février 2014*).

[233] Immigration Appeals Council, judgments of 31 July 2014, 30 May 2013 and 30 July 2013 (*CCE, arrêt 127 723 du 31 juillet 2014; CCE, arrêt 103 879 du 30 mai 2013; RVV, arrest 107 617 van 30 juli 2013*).

[234] Royal Decree, art 50, §2, 4°.

[235] Immigration Appeals Council, judgments of 3 December 2015 and 10 September 2014 (*RVV, arrest 157 895 van 8 december 2015; RVV, arrest 129 028 van 10 september 2014*). As regards the distinction between social assistance and social security, see further Council of State, judgment of 12 August 2015 (*CE, arrêt 232 033 du 12 août 2015*).

[236] See further section 4.3 above.

[237] These refer to income replacement allowance (*allocation de remplacement de revenus / inkomensvervangende tegemoetkoming*) and integration allowance (*allocation d'intégration /*

income[238] – will be taken into account when assessing whether a person has become an unreasonable burden on social assistance.

It should also be emphasised that the rules for EU citizens differ from those that relate to the concept of "stable, regular and sufficient resources" under Articles 10 and 40ter of the Belgian Immigration Law which govern family reunification with third country nationals and Belgian citizens respectively[239].

5.4 Restrictions on grounds of public policy or public security

The provisions relating to the restrictions which Member States can take to restrict rights of entry and residence on grounds of public policy or public security[240] have for the most part been satisfactorily transposed in Belgium[241]. These provisions are examined in further detail below.

5.4.1 Genuine, present and sufficiently serious threat affecting fundamental interests of society

Member State may only restrict residence rights on grounds of public policy or public security[242] where the person represents a "represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society".[243] This provision has been literally transposed into Belgian law[244].

It should be observed here that, unlike in France, "aggressive begging" is not a criminal offence in Belgium.[245] However, since 2005, the act of coercing or forcing another person to beg or the exploitation of begging by another constitute a criminal

integratie tegemoetkoming) awarded under the Law of 27 February 1987 relating to allowances for disabled persons (*Loi du 27 février 1987 relative aux allocations aux personnes handicapées (MB 01-04-1987, page 4832*); see Immigration Appeals Council, judgments of 29 November 2016 and 15 June 2016 (*CCE, arrêt* 178 693 du 29 novembre 2016; *CCE, arrêt* 169 839 du 15 juin 2016).

[238] This refers to the *revenu d'intégration / leefloon* formerly known as the "minimex" awarded under the Law of 26 May 2002 on the right to social integration (*Loi du 26 mai 2002 concernant le droit à l'intégration sociale (MB 31-07-2002, p 33610)*); see Immigration Appeals Council, judgment of 18 March 2014 (*CCE, arrêt 120 792 du 18 mars 2014*).

[239] See further, Jean-Yves Carlier and Sylvie Saroléa, *Droit des Etrangers* (Larcier 2016), 376-384.

[240] Directive 2004/38, Articles 27-33.

[241] Belgian Immigration Law, arts 44bis-46. Note that compatibility problems concerning Article 28(1) of Directive 2004/38 were identified by Gutwirth, de Hert and Paepe, Conformity Study for Belgium (n 55), 52 and Correspondence Table for Belgium (n 55), 118; see also Meurens et al (n 77), 46. However, these problems have now been addressed following amendment of Article 45 of the Belgian Immigration Law by the Law of 24 February 2017 amending the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners (*Loi du 24 février 2017 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers afin de renforcer la protection de l'ordre public et de la sécurité nationale (MB 19-04-2017, page 51890)*).

[242] Directive 2004/38, Article 27(1)

[243] Directive 2004/38, Article 27(2).

[244] Belgian Immigration Law, arts 44bis, §1, and 45, §2, respectively.

[245] Federal Migration Centre Myria, 'Annual report on human trafficking 2016' (2017) (*Centre Fédéral Migration Myria, 'Rapport annuel traite et trafic des êtres humains 2016 : Des mendiants aux mains de trafiquants' (2017)*') 46 <http://www.myria.be/fr/publications/rapport-annuel-traite-et-trafic-des-etres-humains-2016-des-mendiants-aux-mains-de-trafiquants>.

offence under Belgian law[246]. It has not been possible to verify whether the prosecution of EU citizens under this provision has led to their expulsion.

5.4.2 *Previous criminal convictions*

Directive 2004/38 also prohibits the ability of Member States to take restrictive measures against EU citizens solely because of the existence of a previous criminal conviction[247] and must be based exclusively on the personal conduct of the citizen[248]. This prohibition has also been literally transposed into Belgian law[249].

When taking measures on grounds of public policy, a sole reference to the fact that the EU citizen concerned is a repeat offender is not sufficient to establish that the Belgian Immigration Office has fully assessed the personal conduct of the individual concerned and demonstrated the existence of a present threat[250]. In such cases, the Office should also examine the gravity of the offences committed and the repetitive nature of the person's conduct[251]. Where an EU citizen has been sentenced to several periods of imprisonment, it appears that the Office will benefit from a relatively greater amount of latitude when faced with a pattern of serious offences which will justify the decision to consider that the person concerned still represents a threat to public policy following their release from prison[252].

5.4.3 *'Serious' and 'imperative' grounds justifying the expulsion of permanent residents and minors*

The reinforced protections against expulsion for permanent residents and minors contained in Directive 2004/38 have been transposed into Belgian law[253].

In respect of the existence of 'serious grounds of public policy or public security' justifying the expulsion of permanent residents[254], this can potentially cover a wide variety of conduct, including participation or support for terrorism, drug trafficking

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[246] Belgian Criminal Code, art 433ter provides as follows:

"The following offences are punishable by a term of imprisonment of six months to three years and a fine of five hundred Euros to twenty-five thousand Euros:
1° whosoever recruits, trains, coerces or restrains a person with the aim of making them beg, or incites them to beg or to continue to so, or makes that person available to a beggar for the purposes of being used to incite public commiseration;
2 ° whosoever, in any way whatsoever, exploits begging by another.
An attempt to commit any of the offences mentioned in the first paragraph shall be punished by a term of imprisonment of one month to two years and a fine of one hundred Euros to two thousand Euros.
The fine shall be applied in respect of each victim."

[247] Directive 2004/38, Article 27(2), para 2.

[248] ibid.

[249] Belgian Immigration Law, art 45, §2, paras 2 and 3.

[250] Immigration Appeals Council, judgments of 31 July 2013, 26 October 2012 and 27 June 2012 (*CCE, arrêt 107.819 du 31 juillet 2013; CCE, arrêt 90.510 du 26 octobre 2012; CCE, arrêt 83.750 du 27 juin 2012).*

[251] Immigration Appeals Council, judgment of 21 November 2013 (*CCE, arrêt 114.099 du 21 novembre 2013)* which concerned serious offences including attempted murder.

[252] Immigration Appeals Council, judgment of 25 June 2013 (*CCE, arrêt 105.770 du 25 juin 2013)*, which concerned drugs-related offences.

[253] Belgian Immigration Law, arts 44bis, §§2-3.

[254] Belgian Immigration Law, arts 44bis, §2, corresponding to Article 28(2) of Directive 2004/38.

itself and criminality linked to it, human trafficking, sexual exploitation of women or minors, illicit arms trade, money-laundering, counterfeit of means of payment, cybercrime and organised crime as well as tax fraud[255] in line with EU case law[256].

As regards 'imperative grounds'[257], the notion of "national security" under Belgian law corresponds to that of "public security" under EU law.[258] The courts have confirmed this can encompass serious criminal offences related to drug trafficking [259].

5.5 Fraud and abuse

The Belgian Immigration Office has the power to take action against EU citizens who engage in fraud. The Office can take action to refuse or withdraw residence rights where an EU citizens makes use of fraudulent documentation or makes false declarations to the authorities[260]. In such cases, the Office may also take action to withdraw residence rights of related family members[261].

There are about 50 reported cases that involve fraudulent travel documents every year[262]. In addition, these powers can also be used to take action against marriages of convenience[263].

5.6 Re-entry bans

Under the Belgian immigration law, a re-entry ban may only be imposed on EU citizens in two situations[264], namely where an expulsion order has been imposed on grounds of public policy or public security[265] or where an expulsion order is issued against EU citizens who engage in fraud[266].

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[255] Immigration Appeals Council, judgment of 8 December 2017 (*CCE, arrêt 196 353 du 8 décembre 2017),* citing the bill to amend the Belgian Immigration Law (House of Representatives, 12 December 2016) 24 and 37 (*'Projet de loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers afin de renforcer la protection de l'ordre public et de la sécurité nationale', Doc. Parl., Ch. 2016-2017, 54, 2215/001)*
<http://www.dekamer.be/FLWB/pdf/54/2215/54K2215001.pdf>.

[256] See for example, Case C-373/13 *H.T.* ECLI:EU:C:2015:413, regarding involvement in terrorism; Case C-145/09 *Tsakouridis* EU:C:2010:708, Case C-348/96 *Calfa* EU:C:1999:6 and Joined Cases C-482/01 & C-493/01 *Orfanopoulos et Oliveri* EU:C:2004:262 as regards drug trafficking and related criminality; Case C-348/09, *P.I.* EU:C:2012:300 as regards sexual offences against minors, as well as other areas of crime cited in Article 83(1) TFEU, namely terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime; Case C-434/10 *Aladzhov* EU:C:2011:750 as regards tax fraud.

[257] Belgian Immigration Law, arts 44bis, §3, corresponding to Article 28(3) of Directive 2004/38.

[258] Immigration Appeals Council, judgment of 8 December 2017 (*CCE, arrêt 196 353 du 8 décembre 2017),* which concerned the expulsion of a French citizen born in Belgium following his conviction for a series of offences relating to drug trafficking, involvement in a criminal organisation and physical violence causing harm to a person.

[259] ibid, which discusses at length the Court of Justice's ruling in C-145/09 *Tsakouridis* EU:C:2010:708.

[260] Belgian Immigration Law, arts 43 and 44.

[261] Belgian Immigration Law, arts 42ter and 42quater.

[262] Belgian Immigration Office's Annual Report for the years 2014 to 2016.

[263] See for example, Immigration Appeals Council, judgments of 30 April 2015 and 19 May 2014 (*CCE, arrêt 144 542 du 30 avril 2015; CCE, arrêt 124 172 du 19 mai 2014*) as regards the former art 42septies replaced by art 44.

[264] Belgian Immigration Law, art 44nonies, para 1.

[265] This would be a decision taken under art 43, § 1, para 1, 2°, of the Belgian Immigration Law.

[266] This would be a decision taken in accordance with art 44 of the Belgian Immigration Law.

However, it is not clear whether Directive 2004/38 allows for the imposition of a re-entry ban on grounds of fraud,[267] which casts doubt upon the lawfulness of the relevant provision of Belgian immigration law[268].

The duration of the re-entry ban should be no longer than five years, unless the persons concerned represents a serious threat to public policy or public security[269]. The affected person has a right to ask for a review of the re-entry ban no later than three years after the ban was enforced[270].

5.7 Removal of EU citizens

Following the amendments of the Belgian Immigration Law made in 2017[271], the Belgian authorities have aligned the procedures for the removal of EU citizens[272] with those that implement the Return Directive 2008/115[273]. This appears to be acceptable according to the recent case law of the Court of Justice[274].

5.8 Procedural safeguards

The obligation contained in Directive 2004/38 which require the Belgian authorities to give full and precise reasons in any decision that is taken against EU citizens and their family members has not been explicitly transposed.[275] However, as a matter of Belgian law, decisions of the administrative authorities must be reasoned[276]. According to established case law, the Immigration Office's decision

[267] On the one hand, Article 35 of Directive 2004/38 specifies that "Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience", while on the other hand Article 15(3) provides that "The host Member State may not impose a ban on entry in the context of an expulsion decision to which paragraph 1 applies" namely, decisions taken on grounds other than public policy, public security or public health. Therefore, it would appear that a Member State may only impose an entry-ban on an EU citizens on grounds of fraud if this conduct is also found to constitute conduct that represents "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" for the purposes of Article 27(2) of the Directive.

[268] Belgian Immigration Law, art 44.

[269] Belgian Immigration Law, art 44nonies, para 2.

[270] Belgian Immigration Law, art 44decies.

[271] Belgian Immigration Law, art 44ter to 44octies. These provisions were inserted by the Law of 24 February 2017 amending the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners (*Loi du 24 février 2017 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers afin de renforcer la protection de l'ordre public et de la sécurité nationale (MB 19-04-2017, page 51890)*).

[272] Bill to amend the Belgian Immigration Law (House of Representatives, 12 December 2016) 37-40 (*'Projet de loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers afin de renforcer la protection de l'ordre public et de la sécurité nationale', Doc. Parl., Ch. 2016-2017, 54, 2215/001)* <http://www.dekamer.be/FLWB/pdf/54/2215/54K2215001.pdf>. The bill refers to Case C-85/03 *Mavrona* EU:C:2004:83, para 20, as authority for the possibility to extent the scope of national measures that transpose a directive in order to cover situations which are excluded from its scope.

[273] Directive 2008/115 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98.

[274] Case C-184/16 *Petrea* EU:C:2017:684.

[275] Article 30(2). See further Gutwirth, de Hert and Paepe, Conformity Study for Belgium (n 55) 55, and Correspondence Table for Belgium (n 55) 120. This also affects the transposition of Art 15(1).

[276] Belgian Immigration Law, art 62, §2, provides that "all administrative decisions shall contain a statement of reasons"; Law of 29 July 1991 relating to the formal reasoning of administrative measures (*Loi du 29 juillet relative à la motivation formelle des actes administratifs (MB 12-09-1991, page 19976)*), art 3 provides that "the provision of a statement of reasons consists in the indication, in the

must contain a clear and unambiguous statement of reasons that enable the addressee to discover the factors that justify the measure taken and to permit the court to exercise its judicial oversight[277].

The Immigration Law[278] still does not provide protection against systematic verification of the right of residence.[279] These omissions appear deliberate. The Belgian authorities have put in place an automated system to check residence entitlements of EU citizens and their family members who claim benefits in Belgium.

For example, details of EU citizens who have claimed unemployment benefits are routinely passed on by the Belgian National Employment Office to the Immigration Office[280], which then proceeds to determine if action can be taken to put an end to their right of residence. Likewise, similar arrangements are in place with the Federal Public Planning Service on Social Integration as regards EU citizens who receive social assistance[281].

Serious concerns have been expressed from a variety of quarters as to whether such systematic data transfer arrangements are compatible with Directive 2004/38[282].

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measure, of the considerations of facts and law upon which the decision taken is based. It must be adequate."

[277] Immigration Appeals Council, judgments of 27 October 2016, 26 February 2016 and 27 February 2014 (*CCE, arrêt 177 049 du 27 octobre 2016; CCE, arrêt 162 920 du 26 février 2016; CCE, arrêt 119 702 du 27 février 2014*).

[278] Gutwirth, de Hert and Paepe, Conformity Study for Belgium (n 55) 39, and Correspondence Table for Belgium (n 55) 74. Although this requirement is contained in the Circular of 23 May 2008 (n 77), para E.2, this cannot be considered complaint because a circular is not legally binding; see further Chapter 3, Section 3.1 (Obligations Relating to the Form of Transposition).

[279] Article 14(2) provides that 'where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.'

[280] Sectoral Committee for Social Security and Healthcare, 'Deliberation No 13/051 of 7 May 2013 concerning the transmission of personal data relating to EU citizens from the National Employment Office to the Immigration Office' (*Comité sectoriel de la sécurité sociale et de la santé, 'Délibération n° 13/051 du 7 mai 2013 concernant la communication de données à caractère personnel relatives à des citoyens de l'Union européenne par L'Office national de l'emploi à l'Office des Étrangers' CSSS/13/117*) <https://www.privacycommission.be/sites/privacycommission/files/documents/d%C3%A9lib%C3%A9ration_SSS_051_2013.pdf>.

[281] Sectoral Committee for Social Security and Healthcare, 'Deliberation No 11/044 of 7 June 2011 concerning the transmission of personal data by the Federal Public Planning Service on Social Integration, Fight against Poverty and Social Economy to the Immigration Office to enable it to determine on the existence of the status invoked (sufficient resources) as the basis for a right of residence of more than three months and on the criteria of unreasonable burden on social assistance system of the Kingdom' (*Comité sectoriel de la sécurité sociale et de la santé, 'Déliberation n° 11/044 du 7 juin 2011 relative à la communication de données à caractère personnel par le Service Public de Programmation Intégration Sociale, Lutte contre la Pauvreté et Economie Sociale à l'Office des Etrangers en vue de lui permettre de statuer sur l'existence ou non de la qualité invoquée (ressources suffisantes) à la base de son droit de séjour de plus de trois mois et sur le critère de la charge déraisonnable pour le système d'aide sociale du Royaume' CSSS/11/070*) <https://ksz-bcss.fgov.be/sites/default/files/assets/securite_et_vie_privee/deliberation/11_044_f070.pdf>.

[282] Federal Migration Centre Myria, '2015 Migration in figures and rights' (2016) (*Centre Fédéral Migration Myria, '2015 La Migration en chiffres et droits' (2016)*) 127-129 <http://www.myria.be/files/Migration-rapport_2015-LR.pdf>; Antoine Bailleux et al, 'Libre circulation des citoyens européens: du mauvais usage par la Belgique de ses banques de données sociales', *La Libre Belgique* (Brussels, 5 February 2015) <http://www.lalibre.be/debats/opinions/libre-circulation-des-citoyens-europeens-du-mauvais-usage-par-la-belgique-de-ses-banques-de-donnees-sociales-54d36df135701001a18fe98b>; complaint

5.9 Appeal rights

Any decision taken against EU citizens and their family members may be appealed[283].

It is arguable that the Belgian Immigration Law does not meet the standards of Directive 2004/38 as regards the right of appeal. The Immigration Appeals Council only has the power to review the legality of decisions taken by the Immigration Office.[284] However, it has no power to remake decisions unlike, for example, the case of decisions relating to international protection.[285]

However, the Directive requires that judicial review should extend to 'an examination of the legality of the decision, as well as the facts and circumstances on which [a] measure [to restrict free movement rights] is based'.[286] Moreover, it will also be recalled that principle of effective judicial protection under EU law requires that judicial review of administrative decisions relating to individual EU rights must address both the facts and the law.[287]

Even though the Belgian Council of State has ruled that Belgian law complies in this respect,[288] the Immigration Appeals Council's practice does not appear to meet the standards of judicial review required by EU law in this respect. For example, in reviewing the legality of administrative decisions of the Immigration office, the Immigration Appeals Council bases its review as at the date when the decision was taken[289] and does not take into account any pertinent facts that may have arisen after a decision was taken.[290] As a result, no new evidence can be presented that was not already submitted to the Immigration Office prior to making its decision.

There is therefore lingering doubt as to whether the Immigration Law complies with the provisions of the Directive and the principle of effective judicial protection in EU law.

It is also regrettable that the right to request an administrative review of decisions[291] was removed in 2006 as part of wider reforms in the field of

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submitted to the European Commission by INCA-CGIL, ABVV-FGTB, the EU Rights Clinic and Bruxelles Laïque on 4 November 2014 registered under CHAP(2014)3546.

[283] Belgian Immigration Law, arts 39/2 and 39/79.

[284] Belgian Immigration Law, arts 39/2, § 2, and 39/81.

[285] Belgian Immigration Law, art 39/2, § 1.

[286] Directive 2004/38, Article 31(3).

[287] See to that effect, Joined Case C-65/95 and 111/95 *Shingara and Radiom* EU:C:1997:300, paras 34-35; Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* EU:C:2004:262, para 82; Case C-136/03 *Dörr and Ünal* EU:C:2005:340, paras 47 and 57.

[288] Council of State, judgment of 23 November 2011 (*Conseil d'État, arrêt no 216.419 du 23 novembre 2011*).

[289] See for example, Immigration Appeals Council, judgment of 24 June 2013 (*CCE arrêt 105.657 du 24 juin 2013*), citing Council of State, judgment of 23 September 2002 (*Conseil d'État, arrêt 110 548 du 23 septembre 2002*); Immigration Appeals Council, judgment of 13 March 2015 (*CCE 140 965 du 13 mars 2015*).

[290] This is arguably contrary to Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* EU:C:2004:262, para 82.

[291] Belgian Immigration Law, arts 64-66 (repealed).

immigration[292], which was replaced by a specialised court - the Immigration Appeals Council[293] - to judicially review decisions of the Immigration Office.

6. Suggested strategies to overcome obstacles to free movement in Belgium

Based on the findings made above in connection with the state of implementation of the residence rights of EU citizens and their family members in Belgium, a number of recommendations can be formulated to address the shortcomings identified.

6.1 Commission (DG EMPL) should be encouraged to issue a Communication on the concept of "worker" under Article 45 TFEU

There is evidence that the Belgian authorities do not necessarily have due regard to the notion of a "worker" as interpreted by the extensive case law of the EU Court of Justice, particularly as regards the concept of jobseeker[294] and the retention of worker status[295]. This appears to be part of a wider problem with several Member States having adopted a restrictive interpretation of the concept of "worker"[296] and the circumstances in which a person retains the status of a worker or a self-employed person[297]. The Commission should therefore issue an interpretative communication on the concept of "worker" under Article 45 TFEU that summarises the Court's extensive case law.

6.2 There is a need for more statistical information on measures withdrawing residence rights and expulsion of EU citizens

There is an absence of reliable data on the application of the free movement rules which could otherwise be used to inform policy decisions. Member States are already obliged to collate data on the migration of non-EU citizens[298]. A similar obligation to collate data on EU citizens and non-EU family members should likewise be imposed on the Member States to allow for better monitoring of Member States' compliance with Directive 2004/38. The EU institutions should therefore be

[292] Law of 15 September 2006 amending the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners (*Loi du 15 septembre 2006 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (MB 06-10-2006, p 53533)*).
[293] Immigration Appeals Council (*Conseil du Contentieux des Étrangers / Raad voor Vreemdelingenbetwistingen*) established by arts 39/1-39/85 of the Belgian Immigration Law.
[294] See further section 3.2.2 (residence beyond three months for jobseekers) above.
[295] See further section 3.2.3 (retention of workers status) above.
[296] For example, the UK limits recognition of worker status to persons who earn less than £157 per week (the primary earnings threshold for the payment of national insurance contributions in 2017/18). In France, the authorities have also imposed earnings requirements on workers, a policy so far endorsed by the national courts (Administrative Tribunal (Poitiers), judgment of 24 November 2011, Case 1108178).
[297] Under regulation 6(7) of the Immigration (EEA) Regulations 2016, which purports to give effect to Article 7(3) of Directive 2004/38, the UK refuses to recognise that a worker who has worked over a year retains the status of a worker for an indefinite period, unless they can demonstrate "compelling evidence" of continuing to seek employment and having a genuine chance of being engaged, in practice requiring the former worker to demonstrate they have a firm job offer.
[298] Regulation 862/2007 on Community statistics on migration and international protection [2007] OJ L 199/23.

encouraged to amend the EU rules on statistics to ensure that the underlying regulation is amended in future.

6.3 There is scope for strategic litigation on the restrictive interpretation of the EU rules by the Belgian authorities

This report has identified administrative practices that arguably run contrary to the intent underlying the EU rules on residence, as well as legislative measures that contain restrictions on the ability of EU citizens to claim social assistance under the same conditions as Belgian nationals.

These provide opportunities for engaging in strategic litigation to seek to overturn such practices and legislation either by way of action before the Belgian courts and by lodging official complaints before the EU institutions. The instances of non-compliance identified in this report include:

- the restrictive interpretation of the concept of "genuine chance of being engaged" by the Belgian immigration authorities, as regards the residence rights of EU jobseekers[299];
- delays in the issuance of residence cards and visas to family members[300];
- legislation on social integration income[301] does not comply with EU law because it excludes the ability of workers, the self-employed and their family members to claim social integration income in the first three months of their residence in Belgium[302]; and
- legislation on the conditions for the award of old-age income guarantee[303], which excludes permanent residents who have not yet resided in Belgium for ten years[304], and also prevents its award to EU migrants who are workers or have retained that status and their family members[305].

6.4 There should be further recourse to national institutions including the Federal Centre for Migration (Myria)

Civil society organisations should be encouraged to engage further with Belgian national institutions as part of their advocacy efforts. The most relevant is the Federal Centre for Migration Myria[306], which has identified several problems in respect of Belgium's compliance with the EU free movement rules in its annual reports on migration issues. Consideration should be given to holding an annual roundtable on free movement in Belgium bringing together civil society groups to discuss recent developments. Other institutions would include the specialized committees dealing with immigration and social welfare in the Belgian bar associations and Belgian parliament.

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[299] See further section 3.2.2 (residence beyond three months for jobseekers) above.
[300] See further 3.2.5 (family members) above.
[301] Law of 26 May 2002 on the right to social integration (n 131), art 3, 3°.
[302] See further section 4.3.2 (social integration income) above.
[303] Law of 22 March 2001 instituting an income guarantee for persons in old age (n 132), art 4, para 2.
[304] See further section 4.3.3 (old-age income guarantee) above.
[305] ibid.
[306] Myria is the Belgian Federal Migration Centre which is an independent public body <http://www.myria.be/en/about-myria>.

6.5 The European Commission should consider removing the ban on funding litigation in respect of grants made under the Fundamental Rights and Citizenship programme

The EU institutions should consider providing dedicated resources to support civil society groups that deliver direct assistance to EU citizens and their family members. The Commission should specifically review its opposition to funding "actions consisting in legal actions" in its grants. By supporting civil society groups to litigate strategic issues relating to free movement in the national courts will reduce the Commission's substantial enforcement burden[307].

[307] Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions under Article 25 TFEU - On progress towards effective EU Citizenship 2011-2013', COM (2013) 270 final: "*1566 individual queries on free movement and residence issues were submitted to the Commission [between 1 January 2011 and 31 March 2013], of which 581 were registered as formal complaints. The Commission also replied to 147 European Parliament questions and 137 petitions*"; Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions under Article 25 TFEU - On progress towards effective EU Citizenship 2013-2016', COM (2017) 32 final: "*In the reporting period [between 1 January 2013 to 30 June 2016], the Commission dealt with 613 complaints from citizens, 309 letters/individual queries, 75 questions and 46 petitions from the European Parliament on the exercise of the right to free movement.*"

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ANNEX 1: List of standard-form documentation issued by the Belgian authorities to EU citizens and their family members

Application forms	
Annexe 19 / Bijlage 19	Certificate of application for a registration certificate (EU citizens)
Annexe 19ter / Bijlage 19ter	Certificate of application for a residence card (family members)
Annexe 22 / Bijlage 22	Certificate of application for a permanent residence document (EU citizens and family members)

Residence documentation	
Annexe 8 / Bijlage 8	Registration certificate for EU citizens (paper format)
Carte E / E kaart	Registration certificate (electronic card format)
Annexe 8bis / Bijlage 8bis	Permanent residence document for EU citizens (paper format)
Carte E+ / E+ kaart	Permanent residence document(electronic card format)
Annexe 9 / Bijlage 9	Registration certificate for family members (paper format)
Carte F / F kaart	Residence card (electronic card format)
Annexe 9bis / Bijlage 9bis	Permanent residence for family members (paper format)
Carte F+ / F+ kaart	Permanent residence card (electronic card format)

Decisions taken by Belgian authorities	
Annexe 20 / Bijlage 20	Decision to refuse recognition of right of residence
Annexe 21 / Bijlage 21	Decision to withdraw right of residence
Annexe 23 / Bijlage 23	Decision to dismiss application for permanent residence
Annexe 24 / Bijlage 24	Decision to refuse recognition of permanent right of residence