



EU Free Movement Fitness Check Reports for Belgium, Germany and United Kingdom

Summary

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

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1. Introduction and main findings

Within the framework of FEANTSA's project [*PRODEC - Protecting the Rights of Destitute Mobile EU Citizens*](#) – three legal fitness checks were conducted in Belgium, Germany and United Kingdom. These reports, drafted by Anthony Valcke (Belgium), Andreas Halatschew (Germany) and Matthew Evans (United Kingdom), focused on how EU free movement rules are transposed into Belgian, British and German law. The purpose of the national fitness checks is to provide an overview of the rules regulating the residence rights of EU citizens and their family members, access to social benefits, expulsions and removals. Each report also presents national immigration law and related regulations, that implement into national law Directive 2004/38 (the Directive) and associated case law¹.

Destitute mobile EU citizens face significant difficulties in exercising the right to free movement. FEANTSA commissioned the fitness checks to determine what these difficulties are and to establish what actions must be taken to protect destitute mobile EU citizens' rights. This report presents the main findings of the fitness checks, including the main breaches of EU free movement law, which are essentially the following:

- The genuine and effective nature of economic activities is interpreted narrowly so to exclude from residence rights mobile EU citizens engaged in low-wage jobs or working only a few hours a week. See par. 2.1 - [*The notion of worker*](#)
- In Belgium and UK, there are obstacles to the retention of the status of workers for mobile EU citizens who have worked for at least twelve months and who should therefore retain the status of worker. See par. 2.2 - [*Retention of the status of worker*](#)
- British and Belgian authorities have been limiting the recognition of residence rights and restrict access to social welfare for first-time jobseekers. See par. 2.3 - [*Residence beyond three months for jobseekers*](#)
- Belgium has set a fixed minimum amount of what must be considered as sufficient resources. In the UK, relying on the National Health Service is not considered as satisfying the requirement of a comprehensive sickness insurance for economically inactive mobile EU citizens. See par. 2.4 - [*Residence beyond three months for self-sufficient citizens*](#)
- It has been reported that in Germany homeless mobile EU citizens encounter obstacles to be recognised as permanent residents See par. 2.5 [*Permanent Residence*](#)
- The excessive processing delays and the retention of personal documents for third-country nationals family members of mobile EU citizens who wish to enter or reside in the UK is a major issue. See par. 2.6 [*Registration formalities*](#)
- In Germany, primary carers of children holding EU citizenship are excluded from subsistence benefits. In Belgium, mobile EU citizens are excluded from the possibility of claiming the social integration income in the first three months of their residence even when they are economically active. Chapter 3 – [*Access to social benefits for mobile EU citizens*](#)
- A wide interpretation of the notion of public policy has been adopted with the aim of targeting living in encampments and rough sleeping with anti-social behaviour measures. See par. 4.1 - [*Expulsions on grounds of public policy and security*](#)
- Expulsions based on a lack of sufficient economic resources, following a systematic check of residence rights, are a recurrent issue in Belgium and the United Kingdom. In Germany, EU citizens who claim social benefits risk to be expelled by the immigration office. See par. 4.2 - [*Expulsions for non-fulfilment of residence conditions*](#)
- In the UK, the Home Office introduced the concept of rough sleeping as constituting an abuse of rights in February 2017. In December 2017, that policy was found to be unlawful by the UK High Court. See Par. 4.3 – [*Expulsions on grounds of abuse of rights or fraud*](#)
- The UK made re-entry bans also possible in the context of expulsions adopted on grounds of loss of residence rights. See par. 4.4 - [*Re-entry bans*](#)

¹ Please bear in mind that the national fitness checks have been finalised in June 2018.

2. Residence conditions in the host Member State

2.1 *The notion of worker*

The interpretation of the notion of worker seems to be a major concern. There is evidence of a general trend to interpret narrowly the genuine and effective nature of the activity in order to exclude from residence rights, and consequently from access to social benefits, mobile EU citizens engaged in low-wage jobs or working only a few hours a week. This approach is not consistent with EU case law, which does not set any requirements as to the minimum number of hours, the duration of the working relationship, or the level of compensation in order to be considered as a worker.

Such a narrow interpretation clearly targets mobile EU citizens with precarious working conditions who are also more likely to be homeless. Therefore, this approach jeopardises the possibility for destitute mobile EU citizens to access social benefits and to find a way out of destitution.

In **Belgium** municipalities have reportedly refused to register as workers mobile EU citizens on short-term contracts and with atypical work². The burden of proof is on the EU citizen who must prove her/his status of worker to the municipality.

In 2015 the **UK** introduced a *minimum earning threshold* test as part of its assessment as to whether work activities of mobile EU citizens constitute genuine and effective employment. The test requires public authorities to make further enquiries into whether the activity is genuine and effective when the mobile EU citizen is earning below the threshold, which is currently set at £162 per week for the 2018/19 tax year. Those who earn more than the threshold are automatically workers, while those earning less will have their work assessed.

This, in practice, means that low-wage and part time workers, and, in general, precarious workers, may be suspected of not carrying out genuine activities and therefore need to prepare their residence application and evidence carefully. The proliferation of low-wage and zero hours work contracts makes the attainment of this threshold even more problematic.

In **Germany**, the authorities tend to consider activities with a low number of weekly working hours as not qualifying the individual concerned as a worker.

This trend has been confirmed by the *Instructions of the Federal Labour Office*³. According to these guidelines, working less than eight hours per week or the sporadic nature of the activity are an indication that the requirements to be considered as a worker are not met.

Multiple rulings have also been handed down by the courts regarding activities frequently carried out by destitute mobile EU citizens, i.e. collecting bottles and selling newspapers for the homeless. This was not considered sufficient for obtaining self-employed status because “no participation in the economic exchange of goods” takes place.

2.2 *Retention of the status of worker*

The **UK** refuses to recognise that workers who have worked for more than a year retain the status of worker for an indefinite period, unless they can demonstrate “compelling evidence” of continuing to seek employment and that they have a genuine chance of being engaged. In practice, this requires the former worker to demonstrate they have a firm job offer.

In **Belgium**, there is some evidence to suggest that the Immigration Office has refrained from applying this provision for the benefit of EU citizens who should otherwise be entitled to its protection.

² <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/atypical-work>

³ The *specialist instructions* are binding instructions issued by the Federal Labour Office to be applied by the staff of the social welfare authorities.

2.3 Residence beyond three months for jobseekers

According to EU case law, EU mobile citizens moving to another EU member state with the sole purpose of finding a job, during their first 6 months of residence, should only need to prove they are looking for a job. However, British and Belgian authorities generally try to limit the recognition of residence rights and restrict access to social welfare for first-time jobseekers.

In **Belgium** jobseekers need to prove registration with the employment office and to demonstrate a genuine chance of being engaged already after three months of residence in Belgium, while under EU law these requirements should only be imposed after six months of residence. It has been reported that Belgian authorities often refuse to recognise 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. So far, the Belgian courts have not considered this practice to be problematic, although an appeal has recently been brought before the Belgian Council of State.

Moreover, Belgium generally adopted a restrictive interpretation of the concept of *a genuine chance of being engaged*. For instance, jobseekers who have never worked in Belgium or having a long-recorded period of inactivity, and highly-skilled jobseekers who turn down low skilled jobs, have sometimes automatically been considered as not having a genuine chance of finding work. Along the same line, taking language classes or engaging in vocational training was not considered as sufficient to demonstrate as enhancing the chances of finding work.

Similarly, in the **UK** jobseekers have a right to reside for only 91 days rather than 6 months. This period is calculated including any period spent in the UK as a jobseeker. The effect is that first entry jobseekers cannot 'restart the clock' by leaving the UK and returning and must count all previous time spent in the UK as a jobseeker, unless they have been outside the UK for 12 months. In addition, the *compelling evidence* test to prove the prospect of employment, requiring for instance a recent job offer or the completion of vocational course, seems to be a higher standard than the actual notion of having *a genuine chance of being engaged* that applies under EU law.

2.4 Residence beyond three months for self-sufficient citizens

According to EU law, a self-sufficient person is defined as a person who has enough financial resources not to become a burden on the host Member state and has comprehensive sickness insurance cover.

a) Proof of sufficient resources

Establishing a fixed amount of what must be considered as sufficient resources is in breach of EU law.

Belgium has referred to means threshold applicable to social assistance in Belgium (currently €892,70 per month) as the correspondent level of minimum resources which a person needs to possess in order to be considered as self-sufficient.

The practical application of these provisions is rendered problematic by the ambiguity contained in a circular issued by the Belgian Immigration Office, which suggests that the level of resources indicated therein is a fixed amount which must be met in all cases, even though article 8(4) of the Directive provides that no fixed amount can be imposed in this regard.

This has been considered, in the opinion of the Belgian Immigration Appeals Council, as a fixed amount which must be met in all cases. 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.

b) Proof of comprehensive sickness insurance

In the **UK**, relying on the National Health Service (NHS) is not considered as satisfying the requirement of a comprehensive sickness insurance for economically inactive mobile EU citizens. UK authorities and British Tribunals require inactive EU citizens to have additional cover i.e. private medical insurance or a European Health Insurance Card. This interpretation is the object of an infringement procedure launched by the European Commission in 2012⁴. The UK continues to refuse to recognise that reliance on NHS meets the requirements for having comprehensive sickness insurance. In practice, EU citizens and their family members are often unable to afford private insurance which is being required by the UK authorities.

2.5 *Permanent Residence*

In **Germany** it has been reported that the immigration office refuses to examine or verify permanent residence and to issue a permanent residence certificate for homeless EU citizens.

2.6 *Registration formalities*

The Directive gives Member States the power, but not the obligation, to impose a requirement on nationals from other Member States who are residing in their territory for more than three months to apply for a registration certificate.

In **Belgium** registration is compulsory for both EU citizens and their non-EU family members. They must register in the municipality where they reside within three months of their arrival in Belgium. Following a residence check by the local police, the municipality registers the applicant and issues a unique identification number that is also used as a social security number. Non-EU family members will be issued a temporary residence card. The applicant then has three months to provide the documents corresponding to his status, otherwise the application will be refused.

Municipalities and the Immigration Office share responsibilities for the application of Belgian Immigration Law. Municipalities handles straightforward cases involving EU citizens who can show proof of work, self-employment or enrolment in a course of study. Cases which are considered more complicated, such as jobseekers, self-sufficient persons who rely on third parties for their means of support, will be handled by the Immigration Office, as well as applications made by non-EU family members.

The Belgian rules do not provide for EU citizens to be issued a registration certificate immediately upon application contrary to what is required by the Directive. Instead, the Immigration Law requires a registration certificate to be issued within six months of an application being submitted. In case of refusal, the municipality issues a written reasoned decision that is also usually accompanied by an order to leave the territory.

In Belgium it is also possible for persons without fixed abode, to use an “address of reference” - the address of a relative, a social welfare centre or a homeless service - where official correspondence may be sent. However, the possibility to use an address of reference by mobile EU citizens is conditioned upon an existing previous registration. In no case can newly-arrived mobile EU citizens use the address of reference for the purposes of registering their residence. In addition, the use of an address of reference may also be considered by immigration authorities as an indication of lacking sufficient resources and might therefore lead to a decision to withdraw their right of residence.

In the **UK**, registration is not compulsory though EU nationals can apply for a registration certificate. This certificate must be issued immediately upon application, which requires the possession of a valid passport or national identity card and proof of having a right to reside. Since EU nationals can enter and exit the UK without restriction, there is often no need for them to apply for a registration certificate.

⁴ See http://europa.eu/rapid/press-release_IP-12-417_en.htm?locale=en

The excessive processing delays and the consequent retention of personal documents for third-country nationals family members of mobile EU citizens who wish to enter or reside in the UK have become a major issue and has been the subject of a petition to the European Parliament.⁵

In **Germany** the obligation for EU citizens staying more than three months to register was abolished in 2013. Public authorities do not adopt anymore the practice of issuing (declaratory) certificates confirming the right to residence of EU citizens.

3. Access to social benefits for mobile EU citizens

Recent EU case law confirmed that Member States may impose conditions on access to social benefits depending on mobile EU citizens' economic contribution and their legal residence in the host Country. Many Member States consolidated this case law by adopting national legislations that restrict access to social benefits for mobile EU citizens, and especially for those who are economically inactive.

For instance, in 2016, **Germany** adopted new rules that limit access to social benefits during the first five years of residence for mobile EU citizens who do not have the right to reside.

In Germany it has also been reported that primary carers of children holding EU citizenship are excluded from subsistence benefits. German rules introduced in 2016 contain grounds for exclusion insofar as the right of residence of an EU citizen is derived only from their children attending school. This exclusionary provision is in breach of EU law. The right of the child would be deprived of any useful effect if the right of residence was not accompanied by a right to obtain minimum social security benefits for the child and their parent exercising the right of custody.

In **Belgium**, complying with immigration rules is a condition to access social benefits. Loss of the right to reside precludes EU mobile citizens from continuing to receive social security benefits because the person's identification number will be suspended as a consequence. A deactivated social security number prevents the continued payment of benefits. This means that 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 in Belgium, save for emergency medical assistance.

A main issue in Belgium is the right to claim social integration income (a benefit payable to persons who have no income, who are ineligible for social security benefits and who are unable to provide for their essential needs). EU citizens seeking to claim social integration income need to demonstrate that they have been residing for more than three months in Belgium, in addition to meeting the eligibility requirements for such benefit (that are applicable also to Belgian nationals). In practice, mobile EU citizens are excluded from the possibility of claiming this benefit in the first three months of their residence in Belgium. This complies with EU law regarding mobile EU citizens who are not in work. However, excluding workers and the self-employed and members of their family from access to social assistance during their first three months of residence constitutes a breach of the Directive.

Other concerns in Belgium have been reported regarding old-age income guarantee. To access this benefit EU citizens must demonstrate that they have resided in Belgium for at least ten years, including an uninterrupted period of five years of residence. Although a residence condition is permitted by the EU rules on the coordination of social security, such a condition is likely to be considered indirectly discriminatory because Belgian nationals will find it easier to fulfil it compared to mobile EU citizens.

The **United Kingdom** is currently undergoing a social welfare reform with the introduction of 'universal credit' which will replace various social benefits depending on personal resources

⁵ Petition No 1340/2013 to the European Parliament

and integration income for workers on relatively low wages. This universal credit has been classified as 'social assistance' in order to prevent economically inactive EU mobile citizens from accessing this social benefit. In addition, British authorities have the power to consider that a claim for universal credit means that resources are not sufficient (and therefore that the person has no right to reside based on self-sufficiency).

Access to social benefits in the UK is usually conditional upon fulfilling a right-to-reside test. UK nationals automatically have a right to reside, whilst EU mobile citizens need to demonstrate they are regularly residing under the Directive.

4. The expulsion of EU citizens

Data concerning expulsions of EU mobile citizens at national level are rarely available. Grounds for expelling EU citizens from the host Member State are essentially in line with the grounds admitted by the directive.

4.1 *Expulsions on grounds of public policy and security*

The EU rules that permit a host Member State to limit EU residence rights for reasons related to public policy and security are generally correctly transposed and implemented. However, a wide interpretation of the notion of public policy has been adopted in isolated cases with the aim of targeting living in encampments and rough sleeping with anti-social behaviour measures⁶.

In **Belgium** aggressive begging is not a criminal offence. However, since 2005, the act of coercing or forcing another person to beg or the exploitation of begging by another both constitute a criminal offence under Belgian law. It has not been possible to verify whether the prosecution of EU citizens under this provision has led to their expulsion.

In **Germany**, it has been reported that in 2017 Hamburg police officers started distributing official letters to rough sleepers EU citizens requesting them to attend interviews at the immigration office. During these meetings, they were urged to provide documents proving their right of residence. This policy may amount to a systematic verification of residence rights that is forbidden under EU law.

If the people sleeping rough who were served with the letters failed to attend interviews within the deadline provided, they were served with a notice communicating the loss of their right of residence, followed by the obligation to leave the country. It is not clear on which legal ground these deportation orders were adopted, but references to criminal offences and violation of laws and social norms may suggest that public policy is being used as a ground for expulsion.

The use of foreign languages in the letters show that this policy directly targets homeless EU citizens and thus clearly discriminates against this vulnerable category of EU citizens.

4.2 *Expulsions for non-fulfilment of residence conditions*

Art 14 (2) of the Directive allows Member States, where there is a reasonable doubt around the lawful exercise of Treaty rights, to verify whether the conditions for lawful residence are fulfilled. This verification cannot be carried out systematically. However, expulsions based on a lack of sufficient economic resources, following a systematic check of residence rights, are a recurrent issue in Belgium and the United Kingdom.

⁶ This was the case of **France** that, to target Roma EU citizens, defined a threat to public policy as the fact of being liable to prosecution for certain offences such as trafficking in drugs, human trafficking, pimping, and robbery, exploitation of begging and illegal occupation of land. This is today the case of **Denmark** that is enforcing expulsions of EU citizens following prosecutions for offences to social order (essentially for rough sleeping, begging and camping).

It has been reported that in **Belgium**, the personal details of mobile EU citizens claiming social benefits are systematically passed on by the Employment Office and welfare authorities to the Immigration Office, which then proceeds to determine if action can be taken to put an end to their right of residence.

A decision withdrawing the right of residence is usually accompanied by an “order to leave the territory”. In practice, such expulsion orders are not usually enforced, but EU citizens who lose the right to reside also lose the access to social security.

Similarly, in **Germany**, EU citizens who claim social benefits risk to be expelled by the immigration office. The *instructions* issued by the Federal Labour Office expressly point out that the social welfare authorities must inform the Immigration Office when mobile EU citizens apply for benefits, especially when they do not have a right of residence or if they are jobseekers.

In the **UK**, in case of doubt on the existence of residence rights, the Home Office can invite the person to provide evidence or attend an interview to determine their status. If the person fails without good reason to provide the requested information or does not attend the interview on at least two occasions, the immigration authorities may take a negative decision on their residing right, leading to possible removal. This verification can be requested either in the context of a family permit (visa) or residence document application. In UK law, it is clearly stated that this verification should not be invoked systematically.

The evidence and interview provisions are not, per se, likely to be in breach of EU law. However, the problem is more likely to lie in the application of this power, specifically in the inferences that can be drawn from a failure to comply with it. Arguably, any policy that targets particular groups, such as Roma or homeless people, would amount to systematic verification of residence rights and would be unlawful.

4.3 *Expulsions on grounds of abuse of rights or fraud*

In the **UK**, the Home Office introduced the concept of rough sleeping as constituting an abuse of rights in February 2017. Homeless charities have reported a vast increase in the numbers of mobile EU citizens, often legally residing in UK, being removed on grounds of misuse of right because they were found to be rough sleeping. That policy was recently found to be unlawful by the UK High Court⁷. The Home Office have confirmed that no further action was being taken against EU citizens for rough sleeping, and their most recent guidance has removed all references to rough sleeping as a misuse of rights.

4.4 *Re-entry bans*

Under EU law a re-entry ban is admissible only where an expulsion order has been adopted on grounds of public policy or public security. However, **Germany, Belgium and the UK** have all interpreted extensively the notion of *necessary measures* provided under the Directive as also entitling the national authorities to expel EU citizens in case of abuse of rights and fraud.

In addition, in **Germany**, EU citizens are denied the right to re-enter if they are considered to have repeatedly misled the authorities into believing that they meet the requirements for residence.

The **UK** made re-entry bans also possible in the context of expulsions adopted on grounds of loss of residence rights. Those removed for having no right of residence, or ceasing to have such a right, are barred from returning to UK for 12 months unless they are able to establish that they have a right to reside.

⁷ In R (Gureckis) v Secretary of State for Home Department, on 14 December 2017. On the same issue a complaint to the EU Commission was filed by FEANTSA, the Migrants’ Rights Network and Praxis.