

POLICY BRIEF

ANALYSIS OF THE COMMISSION'S GUIDANCE IN ADDRESSING THE OBSTACLES TO FREE MOVEMENT (DIRECTIVE 2004/38/ EC)



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This Policy Brief, developed by ECAS¹ and FEANTSA², provides a summary of the main takeaways from an analysis of the European Commission's Guidance³ on the right of free movement⁴ of EU citizens and their families, issued in December 2023. The Policy Brief outlines the areas successfully clarified by the Guidance, the areas which remain problematic with regard to freedom of movement in the EU legal framework, and how these challenges can be addressed.

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³ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023XC01392>

⁴ [Directive 2004/38/EC](#)

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1. INTRODUCTION - MAIN TAKEAWAYS

FROM AN ANALYSIS OF THE GUIDANCE

Free movement is one of the rights most appreciated by EU citizens, being rated very positively in various Eurobarometer surveys over the years. Several articles of the Treaty on the Functioning of the European Union (TFEU) protect this right, including Article 20 on EU citizenship, Article 21 on free movement of persons; Article 45 on the free movement of workers and Article 18 prohibiting discrimination on the grounds of nationality. The fundamental right to free movement is also guaranteed by Article 45 of the EU Charter of Fundamental Rights⁵.

In the last Eurobarometer on Citizenship and Democracy, conducted between April and May of 2023, a large majority (89%) of respondents agreed that free movement personally benefited them while 83% acknowledged that free movement also benefited the economy. This number has increased or remained static across all Member States when compared with the results from 2020. The only exception is Czechia, where the number of positive respondents decreased from 83% to 78%. The significant support for free movement over the years illustrates how highly this right is valued by EU citizens.⁶

Nonetheless, citizens who exercise their freedom of movement rights can encounter serious obstacles when moving from one EU Member State to another. This may be the result of misinterpretation by Member States of Directive 2004/38/EC and its incorrect transposition in national legislation or by reason of insufficient capacity on the part of Member States to correctly implement the Directive.

Complications were previously identified by the signatories of this paper, as part of the Civic Observatory on the Rights of EU Citizens⁷ (CORE). An analysis of the obstacles to freedom of movement and political participation published by CORE in 2020⁸ identified the following impediments, often encountered by EU citizens and their family members:

- ✚ long waiting periods in issuing residence documents;
- ✚ arbitrary requirements to prove possession of sufficient resources;
- ✚ problems in access to healthcare;
- ✚ excessive requirements to obtain permanent residence;

⁵ [C_2012326EN.01039101.xml \(europa.eu\)](#)

⁶ European Commission and Ipsos European Public Affairs (2023) "Flash Eurobarometer 528 Citizenship and democracy - Report". Available here: <https://europa.eu/eurobarometer/surveys/detail/2971>

⁷ [CORE - ECAS](#)

⁸ CORE (2020) [Policy Paper: Analysis of the obstacles to freedom of movement and political participation](#)

- ✚ narrow interpretation of the concept of *'worker'* or a restrictive interpretation of who can be considered as a family member and therefore a beneficiary of Directive 2004/38/EC.

Some of these obstacles contribute to destitution or homelessness of mobile EU citizens in Northern and Western Member States, or prevent them to access rights which may lead to exiting such situations.⁹

Both ECAS and FEANTSA have long advocated for a more pro-active approach by the EU, especially the European Commission, in addressing the problems related to the exercise of free movement.

By way of illustration, in late 2017, as a member of the Stakeholder Group of the REFIT Platform for Better Regulation, ECAS proposed the development of a new guidance document on Directive 2004/38/EC for Member States, with the aim to provide an understanding of concepts subject to differing interpretations and to facilitate uniform implementation of Directive 2004/38/EC across the EU. The REFIT Platform Opinion¹⁰ contains 10 Recommendations in this respect. On its side, FEANTSA has strengthened efforts to collect data on the situation of mobile EU citizens experiencing destitution and homelessness. With this data, FEANTSA has raised awareness at the level of the EU institutions on the need for clarification of several concepts in the Directive 2004/38, as well as the need to improve access to rights for destitute mobile EU citizens.

In December 2023, after almost five years in the making, the European Commission published its "Guidance on the right of free movement of EU citizens and their families" to "contribute to a more effective and uniform application of the free movement legislation across the EU and to thereby provide greater legal certainty to EU citizens exercising their free movement rights."¹¹ The purpose is to provide clearer interpretation of Directive 2004/38/EC and incorporate relevant case-law since 2009,¹² when the previous Guidelines were published.

Both FEANTSA and ECAS welcome this new 2023 Guidance, since it addresses many of the issues previously identified as requiring clarification.

Out of ten recommendations put forward by ECAS and adopted as the REFIT Platform Opinion, nine have been at least partially addressed by the Guidance.¹³ Clarifications and practical examples included in the Guidance on the specific obstacles to free movement identified, are generally useful.

⁹ See, for example, the reports published by FEANTSA in "[Homelessness among mobile EU citizens: new data from four European cities](#)"

¹⁰ <https://ecas.org/refit-opinion-citizenship-directive/>

¹¹ https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202301392

¹² [LexUriServ.do \(europa.eu\)](#)

¹³ REFIT Platform Calls for Communication on Citizenship Directive - ECAS

Recommendation	Included in Guidance?
How the “comprehensive sickness insurance” requirement should be interpreted?	Partially
Confirm the right of non-EU family members to stay in the host Member State beyond the expiry of their entry visa term, if a residence application is pending	Yes
Clarifying the concept of “sufficient resources” and their origin	Partially
Clarifying the application of Directive 2004/38 to returning nationals	Yes
Clarifying the application of Directive 2004/38 to dual nationals	Yes
Determining what happens to dependent non-EU children after they cease being dependants	Yes
Explaining when the “continuous period of five years” begins for the purposes of permanent residence	Yes
Confirming when the initial three months of unconditional residence begins and ends for citizens who intend to come and go	Partially
Clarifying the right of permanent EU residents to have their family members join them if they are no longer self sufficient	Yes
Define the “envisaged period of residence” to determine the length of the residence card issues to family members of EU citizens	No

In addition, most of the comments provided by ECAS as part of the last citizenship report consultation¹⁴, such as clarifying the application of Directive 2004/38/EC to rainbow families or further defining the notion of durable partnership, have been taken into consideration in the Guidance, even though further elucidation might be beneficial.

While the considerable efforts by the Commission in providing clarification on grey areas in interpretation of the Directive are very welcome, there remain areas of concern where further explanation is required.

First, while the Guidance aims to reflect the case-law of the Court of Justice of the EU (CJEU), it falls short in doing so in several respects. For example, the Guidance does not reflect the case-

¹⁴ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13699-EU-Citizenship-Report-2023/feedback_en?p_id=32187116

law dealing with nationals not exercising free movement or problems relating to comprehensive sickness insurance.

Second, the Guidance creates some ambiguity, leaving space for restrictive interpretation by the national authorities of the Member States responsible for the application and interpretation of EU law at local level (e.g., durable partnerships, supporting documents required to apply for permanent residence and the rights of EU citizens returning to their home State).

Third, the Guidance does not address other key issues which have been the source of divergent national practices, e.g., residence rights of posted workers and service providers. Likewise, it fails to address the particular situation of mobile EU citizens at risk of destitution or homelessness, omitting reference to CJEU case law bringing clarifications about social benefits for vulnerable mobile EU citizens.

The summary below of the legal analysis outlines the areas that remain problematic and proposes policy recommendations to address these. The full text of the legal analysis of the Guidance is provided in the document accompanying this policy brief.

2. SUMMARY OF THE LEGAL ANALYSIS OF THE GUIDANCE

2.1 Definition of freedom of movement beneficiaries

In principle, EU citizens and their family members should benefit from Directive 2004/38/EC when moving from one Member State to another. However, some Member States have a more restrictive approach towards who should be considered as a family member. Moreover, Directive 2004/38/EC applies only to family members of EU citizens who have exercised their rights to free movement (national law typically applies to family members of static nationals), which creates ambiguity for returning or dual nationals.

As we had noticed discrepancies in the interpretation of “family members” of EU nationals, especially with regard to rainbow families, we had previously urged that the new Guidance would clarify that “rainbow families” fall within the scope of Directive 2004/38/EC. Following publication of the Guidance, the Commission is to be commended for its unequivocal recognition that “Relationships such as same-sex marriages and same-sex parenthood that are duly attested by a certificate issued by a Member State must be accepted by the other Member States for the purposes of Directive 2004/38/EC and EU law, even if such relationships are not legally provided for in national law”.

Furthermore, it appears that the definition of a “durable relationship”, creating the right for non-EU unregistered partners to become family members, differs widely from one Member State to another, depriving durable partners of EU mobile citizens from benefiting fully from Directive 2004/38/EC.

Although the Guidance provides valuable support in providing a list of elements that can establish the existence of a durable relationship, it indicates that the Member States have a discretion to lay down national rules that require that a relationship should have existed for a minimum period of time, subject to the principle of proportionality. However, it would have been useful for the Guidance to have provided a list of documents which may be required, or to mention a minimum duration to define a durable relationship.

Although the European Commission 2009 Guidance mentioned that “EU citizens who return to their home Member State after having resided in another Member State benefit as well from the rules on free movement of persons”, the rights of “returning citizens” are not always applied correctly, and elements such as the need to have previously worked in the other Member State were not clarified. The updated Guidance has provided relevant explanations and examples that will allow Member States to have a better understanding of the right of returning and dual citizens to benefit from Directive 2004/38/EC. However, it would have been useful to have confirmed that family members of returning nationals can benefit from accelerated visa procedures.

2.2 Entry and residence rights of family members of EU nationals

We had previously noticed that some Member State authorities wrongly advise that non-EU family members of EU nationals whose entry visas have expired and whose residence card applications are still pending, are required to return to their home country until their residence cards are approved. We welcome the efforts made in the Guidance to confirm that non-EU family members cannot be expelled following the expiry of their visas while awaiting issue of their residence cards. However, the Guidance could have completed this clarification by adding that Member States should not make the grant of a residence card conditional upon possession of an entry visa.

With regard to the right of non-EU children of EU nationals who cease to be dependants (e.g. because children reached majority and ceased to be considered as dependants), we welcome the mention by the Guidance that family members who derived a right of residence on the basis of dependence at the time of their application do not lose their rights under Directive 2004/38/EC.

2.3 Calculation of the initial three-months period

As part of REFIT, we recommended that the future updated Guidelines should explain what happens to EU citizens who do not stay for a continuous period of three months after they first arrive in a Member State but intend to come and go. How is the initial three months calculated?

The Guidance seems to confirm that a cumulative period of three months consists of a number of individual periods of stay, each lasting less than three months. Moreover, it states that the intention to stay of the person is a determining factor. However, it is not clear whether these periods have to fit within a specific time frame.

2.4 Right of residence of more than three months

Mobile EU citizens with difficulties in accessing the job market or with low-paid, low-hour jobs, may experience challenges in being recognised as workers in their residence application. Administrative and legal obstacles, both at local and national levels, contribute to this. While the Guidance correctly states that the concept of ‘worker’ under EU law excludes activities that are on such a small scale to be regarded as “purely marginal and ancillary”, further explanation could have been useful. For example, it might have been useful to explicitly acknowledge that imposing a minimum number of weekly working hours may not be in line with CJEU caselaw which accepted that 5.5 hours/week was not marginal or ancillary (Case C-14/09 *Genc*).

As for jobseekers, numerous problems have been identified regarding the interpretation of retained worker status. The Guidance simply states, without providing any legal authority, that “*The host Member State may also impose other requirements for jobseekers, provided these requirements are also imposed on its own nationals*”. The only requirement set out in Article 7(3) of Directive 2004/38/EC is to be registered as a jobseeker with the relevant employment office. The Guidance therefore opens the door to further restrictive national practices.

Economically non-active mobile EU citizens are more likely to experience destitution because of difficulties in accessing social services. Their rights should be further protected precisely because of this vulnerability. We regret that the Guidance omits to refer to circumstances where Member States cannot refuse to provide social benefits to vulnerable EU citizens. For example, according to the CJEU in Case C-709/20 (*CG v The Department for Communities in Northern Ireland*), “a Union citizen [...] who is in a vulnerable situation, may nevertheless live in dignified conditions” (para. 89).

In addition, the Guidance should have addressed access by mobile EU citizens to national mechanisms that aim to combat homelessness. The provision of shelter covers exceptional or unforeseen needs, and would not fall under the concept of social assistance (Case C-578/08 *Chakroun*, para. 49). In any case, Member States are under an obligation to examine whether recourse to such assistance is temporary and cannot systematically refuse access to shelters to EU citizens in homelessness, while allowing access to nationals and third-country nationals. If the refusal to grant access to shelter is based on protection of Member States’ public finances, academic evidence has long concluded that the longer and more severe the destitution is, the more expensive it will be to exit this type of situations.

The Guidance also covers the requirement for mobile EU citizens who do not work to hold “comprehensive sickness insurance” for themselves and their family members. We welcome the reference to Case C-535/19 A (para. 59), in which the CJEU ruled that Member States should ensure that it is not excessively difficult to comply with the conditions to be affiliated to the public sickness insurance system. However, the Guidance should have further emphasised that this requires

Member States to facilitate access to their public insurance schemes, for example, by adjusting affiliation fees to particular circumstances.

2.5 Right to equal treatment

We have previously underlined that the right to equal treatment in access to rights should be interpreted clearly. This would be particularly useful for mobile EU citizens experiencing destitution. The content of social assistance is of importance in this regard. Therefore, we regret that the Guidance makes no mention of Case C-578/08, *Chakroun*, in which the CJEU held that “the concept of ‘social assistance’ ... must be interpreted as referring to assistance which compensates for a lack of stable, regular and sufficient resources, and not as referring to assistance which enables exceptional or unforeseen needs to be addressed” (para. 49). As explained previously, support from homeless service providers or the use of other services addressing unforeseen needs, should not fall within the concept of ‘social assistance’, which would greatly improve the possibility for many mobile EU citizens to exit destitution.

2.6 Permanent residence

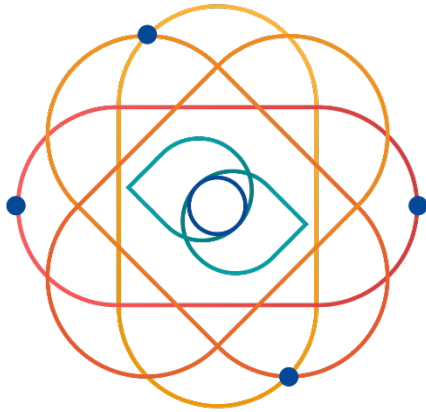
We welcome the clarification in the Guidance on calculation of the five-year period to obtain permanent residence for EU nationals of Member States which have recently acceded to the EU. Indeed, the Guidance confirms that “if there is no transitional provision limiting the application of EU rules on freedom of movement of persons in the relevant Act of Accession, residence in a host Member State by the nationals of the new Member State before accession must be taken into account for the purpose of the acquisition of the right of permanent residence”.

Based on the attached analysis, we have compiled a list of recommendations to improve implementation of Directive 2004/38/EC.

3. POLICY RECOMMENDATIONS

- ✚ **Recommendation 1:** Publish the Guidance as a living document to encourage its regular update;
- ✚ **Recommendation 2:** Update the 2010 Guidance on the free movement of workers;
- ✚ **Recommendation 3:** Update the 2013 practical guide on the applicable legislation in social security;
- ✚ **Recommendation 4:** Improve the Guidance explanations on the circumstances under which non-economically active mobile EU citizens can benefit from the right to equal treatment, especially on social assistance, following Chakroun case law¹⁵
- ✚ **Recommendation 5:** Specific recommendation on mobile EU citizens experiencing or at risk of social and economic exclusion;
- ✚ **Recommendation 6:** Update the Guidance to clarify the definition of “durable relationship” by establishing a minimum duration;
- ✚ **Recommendation 7:** Explain how to determine the initial three-month period for citizens who may not be staying for a continuous three months after they first arrive, but intend to come and go to and from the host State;
- ✚ **Recommendation 8:** Clarify the circumstances under which Directive 2004/38/EC may apply to EU “static” citizens and their family members;
- ✚ **Recommendation 9:** With regard to sickness insurance, encourage Member States to facilitate access to their public insurance schemes;
- ✚ **Recommendation 10:** Add a reference to accelerated visa procedures for family members of returning nationals.

¹⁵ [EUR-Lex - 62008CJ0578 - EN - EUR-Lex \(europa.eu\)](#)



European Philanthropic Initiative for Migration

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