



Freedom of Movement

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Freedom of Movement

Theoretical Background

Freedom of Movement is one of the cornerstones of the EU, giving EU citizens and their family members the right to travel, live and work in any EU Member State of their choice. In 2017, 57 % of Europeans considered the free movement of people, goods and services within the EU the most positive achievement of the European Union. Several million people – 4 % of all working age EU citizens – now live in a Member State other than their own. Students and pensioners are moving in greater numbers, too (cf. FRA 2018:5).

The Court of Justice of the European Union (CJEU) has expressly interpreted the Freedom of Movement to cover all EU citizens regardless of their economic activity (cf. FRA 2018:9).

The founding treaties (in particular Article 20 TFEU), the EU Charter of Fundamental Rights and secondary EU law all recognize Freedom of Movement as a basic right for EU citizens, making it one of the four fundamental freedoms put down in title IV TFEU.

One of the main pieces of secondary EU legislation in this field is 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. This directive was designed to facilitate Union citizens in exercising their right to free movement and to cut back administrative formalities when doing so. That said, the directive has unfortunately not been transposed into national law equally in all Member States, which creates considerable administrative barriers and uncertainties. These shortcomings have been pointed out by numerous Commission reports, European Parliament studies and a FRA report from 2018.

Existing Initiatives to Facilitate Free Movement in the EU

One particularly well-known initiative to facilitate Freedom of Movement in Europe are the Schengen Agreements. Implemented since 1995, these

agreements enable any person, irrespective of nationality, to cross most internal EU borders without being subjected to border checks.¹

Right to Reside in Another EU Member State

For residence up to three months, EU Member States may not impose any requirements other than the possession of a valid identity card. If a person's stay extends for longer than three months, EU citizens have a right of residence in the host Member State if they are economically active there. Self-employed workers and family members of economically active citizens can also enjoy this right of residence. Note however that in order to be considered a worker you have to work of certain of number of hours and make a certain amount of money. This could exclude many disabled people in sheltered employment.

Students and other economically inactive EU citizens must have sufficient resources to support themselves and their family members to avoid becoming "a burden" on the social assistance system of the host Member State during their period of residence. This also includes the obligation to have a comprehensive sickness insurance cover.

Mobile EU citizens are deemed to have sufficient resources if their income is higher than the threshold above which the host Member State provides minimum subsistence benefits for its citizens who reside in the State. It must be noted, however, that Member States are prohibited from laying down a fixed amount to be regarded as 'sufficient resources' (cf. Directive 2004/38 article 8(4)). In theory, the host Member States must take into account the personal situation of the individual concerned in determining whether or not a person risks to become a "burden".

The CJEU stressed that the mere fact that a person receives social assistance is not sufficient to show that they constitute an unreasonable burden on the social assistance system of the host Member State (cf. FRA 2018:39; CJEU C-140/12).

Cross-border Healthcare

In 2013, Directive 2011/24 on patients' rights in cross-border healthcare entered into force. The goal of this directive is to promote cross-border cooperation in healthcare. Amongst other things this directive allows for a degree of patient mobility without prior authorization for emergency treatments in another EU country. You can also go to another Member

¹ https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen_en

State for planned, non-emergency or non-hospital treatments but only after the approval from your national insurance provider.

This means that, within certain limits, a person who is insured in an EU member state is entitled to the reimbursement of the cost of healthcare in another EU member State, depending on the nature of the treatment and the probable length of the stay.

One of the document which provides entitlement to emergency healthcare is the European Health Insurance Card (EHIC). The EHIC is issued by the health insurance provider of the person in their home country.

While it has certain limitations, initiatives like the EHIC enable European citizens to enjoy their right to free movement as they decrease administrative barriers.

Apart from the EHIC, there are numerous intergovernmental and interregional initiatives that aim to coordinate healthcare across borders. This results in a more efficient deployment of finances and healthcare professionals and facilitates the access to healthcare, especially in remote border regions.

One such initiative is the Franco-Belgian framework agreement on healthcare cooperation, which gave rise to the creation of organised zones for cross-border access to healthcare in France and Belgium. The patients in those health zones can receive care on both sides of the border without any administrative or financial barriers. An example of the impact of this cooperation is the fact that French disabled people have been sent to Belgian institutions in Wallonia because the waiting lists in France were too long and adequate housing and care would not have been available to them otherwise. On one hand, this is a bad example in terms of social and human rights as it forces people into institutions, which goes against the UN CRPD and other EU and national legislation. However, the example also shows that healthcare cooperation across borders can work if the Member States involved are committed to it.

Social Security Coordination in Europe

The aim of the coordination of social security systems within the EU is to ensure that each EU citizen and third-country national legally residing in the EU has fair access to social security regardless of the country where he or she resides or works. Therefore, social security coordination law has been a fundamental element of the Freedom of Movement for persons

within the EU since 1958, when a regime for the coordination of national social security systems was first established.

These coordination rules do not aim to remove differences between national systems, nor do they compensate for all potential negative effects of moving between countries. According to Article 153 of the Treaty of the Functioning of the European Union (TFEU), EU rules 'shall not affect the right of Member States to define the fundamental principles of their social security systems.' Nevertheless, the same article 153 allows the Council of the European Union to encourage cooperation in the social field and also allows the European Union with the support of the Parliament and the Council, which is composed of representatives of Member States, to (unanimously) adopt minimum requirements around social security and the protection of workers.

The legal framework around social security coordination has evolved in tune with the deepening of the European integration process. Currently, the two main pieces of EU legislation around social security coordination are Regulation (EC) 883/2004 and its Implementing Regulation (EC) 987/2009.-That said, each Member State remains free to determine, for example, what benefits should be paid and under what conditions or who should have access to automatic (social) insurance.

According to Regulation (EC) 883/2004, EU citizens should as a general rule receive social security benefits from the state of employment when they are economically active, and from the state of residence if they are economically inactive. Note that Below we will explore the impact these rules have on different types of mobile EU citizens.

In European legislation around social security, there is a distinction between social security benefits and social assistance:

- **Social security benefits:** include sickness and unemployment benefits. To access these benefits, you need to have contributed to a social security system in a Member State. This will allow you to export cash benefits from your home Member State to another Member State.
- **Social assistance:** include financial support for students, access to social housing, and, in most cases, access to assistive technology like a screen reader or wheelchair. Access to social assistance is based on an individual assessment of personal needs of each person according to the legislation in the different Member States.

This means that social security benefits in cash (but not in kind) are exportable under Reg. 883/2004 while Social assistance is not exportable. As a consequence, it is easier to export benefits if your home country's welfare system relies more heavily on social security benefits and you are entitled to receive those benefits there.

However, The European Court of Justice (CJEU) confirmed that Member States are allowed to put in place certain requirements for mobile citizens to access both social assistance AND social benefits (cf. FRA 2018:42; CJEU C-140/12).

Mobile workers and their family members have access to the host Member State's social security system, meaning the social security system in the state in which they reside, under the same conditions as nationals. While this is good for people working in a different Member State who are covered by the host state's social security system, Directive 2004/38 does not provide for equal treatment for economically inactive mobile citizens, who are not family members of mobile workers or self-employed persons. Economically inactive mobile citizens include students, pensioners, unemployed persons who are not jobseekers and jobseekers who have no genuine chance of finding a job in the host Member State. In contrast to workers, their access to benefits is based on how long they lived in the host state. This is to ensure that a person is well integrated into the host society before receiving benefits.

In general, social assistance is more difficult to access, particularly for non-working people and their family members. This is reflected in the limitations around social assistance in Directive 2004/38. According to this directive, the host Member State does not have to provide any social assistance during the first three months of residence. If the period of residence is longer than three months but less than five years, economically inactive persons must have sufficient resources of their own in order to have a right of residence. If during these five years a non-working person wants to apply for social assistance, they need to prove that they have a genuine link with the labour market (for example be a jobseeker). This is to ensure that they will not become an unreasonable burden on the public finances of the host country. This is important because the host Member State can at any time within this five-year period revoke someone's right of residence if they consider this person to be an unreasonable burden, so applying for social assistance during this time might put someone in danger of having their residence status revoked.

Jobseekers have a mixed status: They are not contributing to the productivity of the host society, but they are potential members of the labour force. This means that jobseekers cannot be discriminated against on the labour market when looking for a job. This includes equal access to benefits that support access to the labour market, for example, language classes or assisted pathways to employment. That said, jobseekers do not have a general right to social assistance during the period of seeking employment, even if it is longer than three months.

This situation may create a vicious cycle for disabled jobseekers, given that Member States are not obliged to grant social assistance to jobseekers or people who have no genuine link to the labour market. Disabled people, however, often require additional support such as personal assistance (PA) or sign language interpretation in order to seek employment on equal terms with non-disabled jobseekers. This puts disabled people who want to work abroad in a strange situation, in order to be eligible for additional support to enable them to find a job in their host country they would, in theory, already need to be working. This is a great barrier for the Freedom of Movement of disabled jobseekers and disabled people in general.

The Right to Free Movement for Disabled People: Access to Healthcare, Social Security Benefits and Social Assistance in Practice

As described above, there is a difference between ‘social security benefits’ and ‘social assistance’ in EU Law. However, often it is unclear for disabled people who want to live in a different Member State whether a specific benefit falls under ‘social security benefit’ or ‘social assistance’ according to different national laws. This makes it difficult for mobile EU citizens to access social services in their host country and as such prevents disabled Europeans from fully exercising their right to Freedom of Movement.

For example: A disabled person moves from country A to country B. This person will be able to continue accessing unemployment or retirement benefits, for example. However, it might be more difficult to receive disability benefits because the enjoyment of these benefits might depend on going through a new individual disability assessment which is different in each Member State, as you cannot rely on mutual recognition of disability status between Member States.

Similarly, it might be difficult to continue or start to use a Personal Assistance system in the host country. Even if the person could export their PA budget as a sickness benefit in cash, the host country might have different rules on when and for what PA can be used.

This example clearly shows that the main barrier for disabled persons to enjoy their right to Free Movement, other than the lack of eligibility for benefits, is the uncertainty of whether or not there will be support available in another Member State, irrespective of whether it is considered social security or social assistance. This uncertainty amplifies the usual (administrative) barriers which all mobile people face and as such puts disabled people at a clear disadvantage.

Case Examples

Case Example 1 on Disability and Freedom of Movement

(cf. CJEU 2018, C-679/16)

In a ruling of 25 July 2018, the European Court of Justice found that EU law (Articles 20 and 21 TFEU) precluded a municipality from refusing to grant a personal assistance benefit, which was intended to cover the costs incurred by a severely disabled person while studying in higher education, on the grounds that the person was studying and staying in another Member State.

In 2013, a Finnish national's claim for personal assistance was rejected by his home municipality, Espoo. He had been receiving PA to carry out daily activities before, and intended to keep using this service during a three-year period during which he'd be attending a law course in Tallinn, Estonia.

The claim was rejected on the ground that his stay outside Finland had to be regarded as other than occasional residence, even though officially his home municipality had not changed. The municipality of Espoo took the view that it was under no obligation to provide services and support outside Finland, since that type of stay approximated to the concept of 'habitual residence' outside of Finland. It was also held that personal assistance can be provided outside Finland for holiday or business travel, but costs would not be reimbursed if a person's home municipality changed because of a stay outside Finland, or in the case of other long-term or permanent residence abroad.

Following this rejection, an appeal was brought before the Korkein hallinto-oikeus (Supreme Administrative Court, Finland). The court considered that a preliminary ruling from the European Court of Justice was necessary to enable it to decide the case.

Below we paraphrase the questions that were referred to the CJEU for a preliminary ruling:

- (1) Is a benefit such as personal assistance a sickness benefit, and therefore exportable?
- (2) If the answer to Question 1 is no then:
 - Are the rights of EU citizens to move and reside freely in another Member State restricted if the home country does not provide the support

a person needs to complete a law degree keeping in mind that this support would have been provided in Finland, the home country?

(3) If the Court of Justice considers, in its answer to Question 2, that this lack of support would be a restriction of Freedom of Movement, is such a restriction justifiable because the municipality has to be able to supervise the use of personal assistance and choose the most suitable way of arranging assistance, and this supervision might be made more difficult if the personal assistance is provided abroad?

The CJEU concluded that a benefit such as personal assistance, which enables that person (who is not economically active) to study in higher education, does not fall within the concept of ‘sickness benefit’ and is therefore outside the scope of Regulation No 883/2004.” This means that PA is not automatically exportable from Finland.

It further concluded that according to articles 20 and 21 TFEU the home municipality is not allowed to refuse a benefit such as PA just because a disabled person of this municipality is studying in another Member State. Refusing access to PA would be a clear restriction of Freedom of Movement.

This is promising because it clearly states that PA should be available to people studying in another Member State.

However, the scope of this judgment is a bit unclear as one of the arguments used by the court was that the claimant in question would return to his home municipality (Espoo) every weekend. This would allow the municipality to supervise the PA arrangements. Therefore, it is not entirely sure if the judgment would still apply if the student using the PA didn’t come home every weekend.

Case Example 2 on Disability and Freedom of Movement

(testimonial by Jessica Gough)

Jessica Gough, who is from Ireland, has spent several periods of time studying and working in France, Spain and Austria.

Although she describes her experiences abroad as very rewarding, she also notes that one of the major difficulties for her was to find and employ a personal assistant to help her with day-to-day tasks. In doing so, finding out how the different support systems work in each country was a significant obstacle.

In some countries, PA is organised via the university a person attends, in others, a personal budget is provided to employ a PA the disabled person can choose themselves. In other cases, certain tasks (e.g. personal care) may only be carried out by a nurse, whereas other tasks (e.g. help when going out and about) must be provided through a PA agency.

Jessica also pointed out that on some occasions, she had to rely on the help of friends or acquaintances because the paperwork to get her PA set up took several months to be processed and her stay abroad would have already ended by then.

Furthermore, funding was a tricky issue. While she received an Erasmus+ grant to cover costs for employing a PA, travel costs for that PA were not covered by the grant. On another occasion, costs for PA were reimbursed after her stay abroad, which meant that she had to use her disposable income and savings to pay the costs upfront.

Since there is no streamlined system concerning PA provision and funding in the EU, disabled people have to spend a lot of time planning and organising their stays abroad, which makes it almost impossible to go abroad spontaneously (e.g. right after accepting a job offer).

It is not always clear if national funding for PA or other services can be used internationally when travelling abroad. Even if it is possible, it raises the question of how long a stay abroad may last until funding from the country of origin is no longer granted.

Jessica notes that having an up-to-date resource such as a website where the most important contact points (agencies, DPOs, etc.) around assistance in each country are collected would be an enormous help for disabled people when planning their time abroad, as it would make it less time-consuming to search for the right people to contact.²

² As an example on a national level, see <http://mobilitytoolkit.ie/>, a toolkit for students and staff at Irish higher education institutions created to enhance participation of disadvantaged students in outward mobility programmes.

The Way Forward

These are issues that could be addressed by EU legislators in order to facilitate Freedom of Movement for disabled people in the future:

1. The European Disability Card, a voluntary initiative taken up by eight countries, which now only covers the domains of culture and leisure activities could be a great tool to facilitate Freedom of Movement by giving people more certainty about access to services abroad.
 - The disability card could be backed up by a UN CRPD complaint definition of disability.³ This definition could then be applied for example in European programmes like Erasmus plus or the solidarity corps. This would help to solve practical issues like getting reasonable accommodations when studying abroad.
 - Disabled people have reported difficulties in accessing support due to the fact that their disability status (which is a precondition for accessing certain services) was not recognised in other Member States. The Disability Card could help to bridge the gap between leaving the home country and getting your disability recognized in the host country by assuring access to a minimal amount of service in the areas such as transport or assistive services. We invite the Council and European Parliament to renew their commitment to the card and extend its scope of application.⁴
2. A central information point, such as an up-to-date website, with information about the available assistance and eligibility criteria would be a valuable resource for disabled people wanting to organise their stay abroad.
 - National authorities could also use this database to cross-check if the recognition of a disability in another EU member State would correspond to access to support in their national system.
 - A database would also facilitate the exchange of good practices as Member States could find out how disability support systems (like PA) are organised in other countries. The database would also clarify for how long national funding for support (like for example PA) in one state can be used in

³ The most recent case law of the European Court of Justice could be a good starting point for this definition.

⁴ The European Parking Card is a good example of (voluntary) cooperation in this field.

other Member States.

3. The EU can help to ensure that people do not lose all support from their home country while they wait for the paperwork in the host country to be processed.⁵
 - On the one hand, the period during which support from the home country can be exported to the host country should be prolonged. Now a person can use support from their home country for up to a few weeks or in some cases a few months. This does not provide people with enough time to get an approval for support in the host country.
 - On the other hand, it should be possible to apply for support/recognition of disability status in the host Member State before actually moving there. This would give people the certainty to know which support they will get in the host country without risking to lose the support they get in their home country
4. The European Parliament could collect examples and raise awareness on the barriers disabled people across Europe face when exercising their right to Free Movement. This could encourage Member States to take common actions to tackle these challenges and so create a level playing field for all EU citizens

⁵ See ANED report in further reading, Waddington, Lisa (2010)

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Further Reading

- CJEU (2018). Judgment of the Court in Case C-679/16. See: <http://curia.europa.eu/juris/document/document.jsf?docid=204403&text=&dir=&doclang=EN&part=1&occ=first&mode=DOC&pageIndex=0&cid=8258369> (last accessed on 19/08/2019)
- Directorate General for Internal Policies (2017). Coordination of Social Security Systems in Europe. See: [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/614185/IPOL_STU\(2017\)614185_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/614185/IPOL_STU(2017)614185_EN.pdf) (last accessed on 19/08/2019)
- Directorate General for Regional and Urban Policy (2017). European Cross-Border Cooperation on Health: Theory and Practice. See: https://ec.europa.eu/regional_policy/en/information/publications/brochures/2017/european-cross-border-cooperation-on-health-theory-and-practice (last accessed on 19/08/2019)
- FRA - European Union Agency for Fundamental Rights (2018). Making EU citizens' rights a reality: national courts enforcing freedom of movement and related rights. See: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-making-rights-a-reality-freedom-of-movement_en.pdf (last accessed on 19/08/2019)
- Waddington, Lisa (2010). Disability Benefits and Entitlements in European Countries: Mutual Recognition and Exportability of Benefits. See: <http://www.disability-europe.net/content/aned/media/ANED%202010%20Task%207%20-%20Disability%20Benefits%20and%20Entitlements%20-%20Report%20-%20FINAL%20%282%29.pdf> (last accessed on 26/08/2019)

About the European Network on Independent Living

The European Network on Independent Living (ENIL) is a Europe-wide network of people with disabilities. It represents a forum intended for all disabled people, Independent Living organisations and their non-disabled allies on the issues of independent living. ENIL's mission is to advocate and lobby for Independent Living values, principles and practices, namely for a barrier-free environment, deinstitutionalisation, provision of personal assistance support and adequate technical aids, together making full citizenship of disabled people possible.

ENIL has Participatory Status with the Council of Europe, Consultative Status with ECOSOC, is represented on the Advisory Panel to the EU Fundamental Rights Agency's Fundamental Rights Platform, and on the Advisory Council on Youth at the Council of Europe.

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