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# The Freedom of Movement in the European Union and its Impact on the National Social Assistance Systems – The Case of Germany

## *I. Introduction*

*Professor László Bodnár* to whom this article is dedicated worked for a long time in the field of European law and the interrelationship between municipal law and international law. The article will give another proof that in these fields the sequence of ever new problems will never end.[1] *Professor Bodnár* worked on matters of lasting relevance.

hThe cornerstone of the European Union are the famous economic freedoms. The freedom of movement has become one of the most prominent among them due to various developments. One is the enlargement of the European Union. With a population of almost 500 millions the figure of people eligible for the privileges of the freedom of movement has increased significantly since 1957 when the EU was founded. The economic discrepancies between the Member States today are by far more marked, therefore the option of working in the wealthier areas of the EU is much more appealing. And lastly, with the introduction of the EU citizenship by the Maastricht Treaty, the freedom of movement is not linked anymore to economic aspects. EU citizens can move even if they do not pursue any economic objectives. All these factors led to the result of a remarkable growth of persons going abroad.

The main characteristic of this mobility is the principle of non-discrimination.[2] Persons who move to another EU Member State shall have the same rights and privileges as the citizens of the State where they stay. This concerns the access to the labour markets as well as the payment and the conditions of entry and stay in the

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1 In a footnote I want to add that apart from being a learned lawyer *Professor Bodnár* is one of the best cooks I ever met. In the late eighties and the early nineties long before Hungary became member of the European Union he did more for the European integration than those who had a purely theoretical approach to the matter by regularily preparing dishes for up to 35 members of the Max-Planck-Institute for Comparative Public Law and Public International Law in Heidelberg from all over Europe, breaking ground for deep discussions about variety in unity. All who had the chance to participate in these unforgettable dinners got a very deep understanding of what Europe means.

2 See Art. 18 of the Treaty on the Functioning of the European Union (TFEU) and Art. 45 para. 2 TFEU.

country. From the very beginning the freedom of movement has been supplemented by social guarantees. The famous Regulation 1612/1968 did not only include family members into the right of movement but it was the one of the first steps to extend a part of social welfare benefits of nationals to citizens of other Member States.[3] In this way these citizens were entitled to pensions, family benefits and scholarships for children in the same way as the citizens of the state of residence. This has never been discussed in „ancient times" as the freedom of movement did not play a great role and besides, the social welfare systems of the Member States did not vary to an extent that the only welfare systems as such could attract people from other States. This situation changed when the freedom of movement was segregated – by the introduction of the EU citizenship - from an economic activity and especially when countries with a by far less developed social welfare system joined the European Union. Now richer States and the electorate became aware of the risk that migrants from other – and poorer – Member States could show up interested not so much in getting integrated into the labour market of another State but to take advantage of its welfare system. Specifically in Great Britain and Germany this worry was overwhelming. It was considered to be necessary to strike a balance between the protection of the national welfare system against abuse and the principle of non-discrimination as established by the EU law, specifically by the norms on EU citizenship and on the freedom of movement. How difficult it is to find such a solution shall be shown in the following with the example of Germany. Thereby, the German national legal order, the EU rules on the matter and international treaty obligations shall be taken into consideration. In a first part the conditions of the freedom of movement shall be explained whereas in the second part the entitlements to social assistance will be focused on.

Thereby the article will concentrate on the benefits as provided for by the Book II and Book XII of the Social Security Code, i.e. benefits paid for the reintegration into the labour market and for the basic needs of living. Family benefits will be mentioned only *„en passant"*.

## *II. The Freedom of Movement under European Law*

### *1. Primary Law*

The freedom of movement in the EU is regulated on various levels. The classical concept provided for the freedom of movement for work.[4] With the introduction of the EU citizenship the Europeans got the right to enter other member States even without any economic purposes.[5] The details of this right have been regulated by secondary communitarian law, in first line by the Directive 2004/38/EC.[6]

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[3] Art. 7 of the Regulation 1612/1968.
[4] Art. 45 TFEU.
[5] Art. 18 TFEU.
[6] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF

*2. The Directive 2004/38/EC*

The European Law ruled on the freedom of movement in its secondary legislation, the most famous of them being the Directive of 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. This legislation regulates the rights of EU citizens going abroad to another EU member State differentiating the conditions of a stay with respect to the duration and the purpose of entering another State.

2.1. Residence up to three months

First it guarantees the free entry of all Union citizens to the Member States for three months for whatever reason; they just have to hold an identity card or passport. There are no further requirements.[7] However, EU citizens may be expelled when they become an unreasonable burden on the social assistance system of the host Member State.[8] What unreasonable burden means is in part qualified by the provision that expulsion shall not be the automatic consequence of recourse to the social assistance system of the host State.[9]

2.2. Job-seekers

Second, it deals with persons who move to another Member State to seek work. However, they enjoy almost the same privileges. Specifically, it is ruled out that insufficient resources are a reason for terminating their right to stay. „In this case (i.e. if the person seeks a job), 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."[10] Job-seekers are equated to workers and self-employed persons.[11]

2.3. Workers and self-employed persons

Further, Union citizens may freely reside in any Member State if they have the status as self-employed persons or workers. [12] They just must hold an identity card or passport. Here again, the European law does not require that they must prove that they have enough resources.

The concept of „worker" in the sense of the Union law, specifically according to Art. 45 TFEU must not be interpreted narrowly. The European Court of Justice held: „Any person who pursues activities which are real and genuine, to the exclusion of activities

[7] Art. 6.
[8] Art. 14 para. 1.
[9] Art. 14 para. 3.
[10] Art. 14 para. 4 lit. b.
[11] Job-seekers fall within the scope of art. 39 EC (today art. 45 TFEU), Judgment of ECJ 22/08 and 23/08 of 4 June 2009, para. 36.
[12] Art. 7 para. 1 lit. a

on such a small scale as to be purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to the Court's case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration....Neither the origin of the funds from which the remuneration is paid nor the limited amount of that remuneration, nor indeed the fact that the person in question seeks to supplement that remuneration by other means of subsistence such as financial assistance drawn from the public funds of the State in which he resides, can have any consequence in regard to whether or not the person is a 'worker' for the purposes of European Union law." [13]The ECJ stated that it is necessary that the professional activity is real and genuine. For the assessment of work it should be taken into consideration if a person – apart from the limited working hours and the low payment – has a right to paid leave and continued payment in case of sickness. The German Federal Administrative Court concluded that even 5,5 hours of work per week and a monthly salary of 175 Euro which is 25% of the minimum amount necessary to cover the needs of life is sufficient to qualify a person as a worker.[14] The same rules apply to self-employed persons. They can qualify as such even if they cannot pay their living with the income from their professional activity and if they depend therefore form social benefits from State funds.

A Union citizen shall retain his or her status of worker or self-employed person if „(a) he/she is temporarily unable to work as the result of an illness or accident; (b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office; (c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months; (d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment."[15] It means that the status is not lost if a person involuntarily loses his or her job. The directive does not establish a requirement that in such a situation the person has to find own resources to live on. Social need does not exclude a person from his or her right to freely reside in the country.

### 2.4. Others

Fourthly, all Union citizens have the right to residence in another Member State „if they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member

[13] Judgment of the European Court of Justice of 4 February 2010, C-14/09, para. 19 ss.; judgment of the ECJ 22/08 and 23/08 of 4 June 2009.

[14] Judgment of the Federal Administrative Court of 19 April 2012, 1 C 10/11, para. 16 ss. http://www.bverwg.de/entscheidungen/entscheidung.php?ent=190412U1C10.11.0

[15] Art. 7; Art. 2 para. 3 of the German Statute on Free Movement.

State."[16] Art. 14 para. 3 of the directive adds: „An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State." This means that a person can be expelled only on case by case decisions. The dependence upon State funds is no reason to expel a person, it is not the same as becoming a burden on the social assistance system. All persons falling under this category are workers or self-employed persons as soon as they take up a professional activity. This will dispense them from the necessity to have sufficient resources even if their activity does not pay their living.

2.5. Family Members

The freedom of movement extends to all family members, irrespective of their citizenship. Family members are spouses, registered partners, children up to 21 years, older children if they are dependant and direct relatives of the Union citizen claiming the right of free movement and citizenship or of his or her spouse in ascending line as far as these persons are dependant.[17]

2.6. Permanent residence of more than 5 years

A position of an EU citizen becomes stable after 5 years of residence in a Member State.[18] Thereafter he or she can only be expelled if there is risk for public order and security, especially if he or she committed grave crimes.[19] An expulsion can never be based on the reason that the person cannot pay his or her living.

## *III. Entitlement to social benefits*

### *1. German Law*

The German social benefits are regulated by the Social Security Code. With respect to workers specifically Book II and XII of this Code are relevant. Book II rules on benefits for persons seeking work. It includes financial support for the reintegration in the job market and benefits which shall cover the basic needs.[20] The character of this help is therefore twofold which will become relevant in the following. These benefits can be claimed also by foreigners, as far as they are permitted to work in Germany, as all EU citizens are. However, there are restrictions. Art. 7 para. 1(2) No.1 rules that foreigners will not get these benefits within the first three months if they are not workers or self-

[16] Art. 7 para. 1 lit. b.
[17] Art. 2 No. 2.
[18] In case of retiring persons they get the right to reside even after three years if they had worked in the host State at least twelve months when they reach the age of entitlement to a pension; in case of incapacity as a result of an accident they get the right to stay immediately if they are entitled to benefits from the host State, Art. 17.
[19] Art. 16; Art. 4 of the Federal Law on Free Movement.
[20] In Germany it is called Hartz IV or Arbeitslosengeld II.

employed persons.[21] As the Directive 2004/38/EC declared that a person will not lose his or her status of worker or self-employed person if they involuntarily lose their work or due to illness this group of persons remains entitled to the benefits as well as their family members. They will lose this status only if they voluntarily leave the German market for more than six months. Involuntary unemployment or transitional inability to work are no reasons for exclusion from the German social assistance as long as the persons maintain their status as workers or self-employed persons in the sense of the Directive 2004/38/EC.

Beyond, art. 7 para. 1(2) No. 2 of the Book II of the Social Security Code excludes all persons from social benefits who move to Germany to seek work, up to five years – the time when they get a permanent status of residency. Therefore, before getting the qualification as workers or self-employed persons they will be excluded from the German social assistance.

*2. European law – Limitations of social benefits under European law*

This corresponds to Art. 24 of the Directive 2004/38/EC. Whereas Art. 24 para. 1 underlines the equal treatment of EU citizens with nationals, which includes social benefits, Art. 24 para. 2 reads: „By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b) (i.e. as long as persons qualify as job-seekers, if they can prove that they are continuing to seek employment and that they have a genuine chance of being engaged), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families." Thereby all persons within the first three months of stay and persons seeking work even beyond this time may be excluded from these benefits. However, as far as job-seekers cannot be expelled, it is doubtful if the State really can withhold social assistance if these persons are in need. This could violate the principle of human dignity under art .1 of the Basic Law.[22]

In a recent opinion the Advocate General held that it does not constitute a violation of European law if Germany rejects claims of a Romanian woman living in Germany for a certain time who has no professional qualification and never sought a job.[23] The Advocate General declared with reference to Art. 7 para. 1 lit. b of the Directive 2004/38/EC, that this provision shall guarantee that EU citizens who do not enter the territory of another EU Member State in order to work shall be barred from taking advantage of the social security system of this State.[24]

[21] According to the Directive they will however get the benefits, if they lost their job involuntarily.

[22] See the decision of the Federal Constitutional Court on the claims of asylum-seekers of 18 July 2012, 1 BvL 10/10 und 2/11.

[23] Opinion of the Advocate General of 20 May 2014, https://sozialgerichtsbarkeit.de/sgb/esgb/show.php?modul=esgb&id=167343

[24] Para. 94.

The Directive 2004/38/EC seems to confirm that the German legislation is in line with European law. However, two questions are raised in this context. First, is the Directive 2004/38 compatible with European primary law? Art. 18 of the Treaty on the Functioning of the European Union prohibits any form of discrimination of European citizens for reason of their nationality. This also includes social benefits, which have to be distributed without discrimination to everybody. The question therefore comes up, if the exclusion of the immigrants by the directive is a violation of superior European law which would lead to the declaration of nullity of the respective provision Art. 24 para. 2 of the Directive 2004/38. This would have an impact on the application of the German norm. If the European law does not provide for an exclusion of job-seekers from the social benefits conflicting German law would be inapplicable as European law prevails over German law. In this sense the Regional Social Court of Berlin-Brandenburg decided that Art. 7 para. 1(2) Book II of the Social Security Code – the exclusion of job-seekers and persons other than workers and self-employed persons from social assistance under Book II - must be construed in line with Art. 18 TFEU, i.e. the prohibition of discrimination obliges the State to grant these persons social assistance, at least after three months of legal residence in Germany.[25]

Whereas the first objection questions the validity of the European secondary norm, i.e. Art. 24 para. 2 of the Directive 2004/38/EC the second critical observation refers to the extension of the exception established by Art. 24 para. 2 of the Directive 2004/38/EC. According to Art. 1 of the Book II of the Social Security Code, the social benefits under these provision serves two purposes. In the first place, it shall help to reintegrate into the job-market. Second, it shall cover the expenditures for the basic needs. With respect to the first purpose one may wonder if „social assistance" in the sense of Art. 24 para. 2 of the Directive 2004/38/EC includes such financial aid. If a court comes to the conclusion that the benefits of Book II of the Social Security Code do not fall under the notion of „social assistance" in the sense of Art. 24 para. 2 of the Directive 2004/38/EC and if therefore the EU law does not establish an exception of the principle of equality with respect to these benefits, job-seekers from other EU Member States will be entitled to the social assistance, as under this proposition again European law will prevail over national law. The ECJ dealt with the problems in the cases *Vatsouras and Koupatantze* in response to a preliminary question.[26] It did not see any arguments which could lead to the conclusion that Art. 24 para. 2 of the Directive 2004/38/EC is not in line with the primary law, specifically Art. 39 EC. It held however that „in view of the establishment of citizenship of the Union and the interpretation of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article 39(2) EC a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State".[27] The character of a national norm granting benefits has to be established by the national courts. The Court gave a hint to what has to be taken into consideration: „A condition such as that in Paragraph 7(1) of the SGB II, under which the person concerned must be

[25] Decision of 25 April 2007, L 19 B 116/07 AS ER.
[26] Judgment of the ECJ 22/08 and 23/08 of 4 June 2009.
[27] *Ibid.* para. 37.

capable of earning a living, could constitute an indication that the benefit is intended to facilitate access to employment."[28] However, the ECJ also underlined that a Member State may establish conditions for the access to social benefits of this type: „It is, however, legitimate for a Member State to grant such an allowance only after it has been possible to establish a real link between the job-seeker and the labor market of that State."[29] The existence of a link can be determined by requiring that a person has, for a reasonable period, in fact genuinely sought work in the Member State.

### *3. The Regulation 883/2004 on the Coordination of the Social Security Systems of 29 April 2004, entered into force in 2010*

The problem becomes even more tricky if one takes into consideration the Regulation 883/2004, which entered into force in 2010. It also includes non-contributory cash benefits. Art. 70. of the Regulation and Annex X to it where Germany expressly mentioned benefits of Book XII and Book II of the Social Security Code as falling under the category of non-contributory cash benefits, without any restriction. This has been confirmed by the opinion of the Advocate General of 20 May 2014.[30] The regulation provides for an equality in treatment of all EU citizens with respect to social benefits.[31] It does not contain special provisions excluding f.e. job-seekers and does not establish limitations in time which differentiate between nationals and other EU citizens. Therefore, beyond the question of the compatibility of the Directive 2004/38 with primary law the relationship between the directive and the Regulation 883/2004 has to be clarified. Some German courts decided that the interpretation of the Regulation and of the Directive should be harmonized as both legal acts were adopted the same day and presumably there should be no contradiction; they construe the Regulation in the sense that it does not establish an absolute non-discrimination principle, but that it has to be read in line with exceptions provided for by the directive.[32] However, the question is open, specifically due to the clear wording of Regulation 883/2004. Many German courts do not deal with the above mentioned questions if the Directive 2004/38 is in line with primary communitarian law or if the benefits of Book II of the Social Security Code fall under the exclusion by Art. 24 para. 2 of the Directive 2004/38. They meanwhile grant the respective benefits to migrant workers who seek a job in Germany relying on Regulation 2004/883 which according to them does not leave any room for interpretation.[33]

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[28] Para. 43.

[29] Para. 38.

[30] Opinion of the Advocate General of 20 May 2014, para. 75 ss.

[31] Art. 4 of the Regulation reads: „Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof."

[32] Regional Social Court of North Rhine-Westphalia of 2 October 2010, L 19 AS 1393/12 B ER nd L 19 AS 1394/12.

[33] Judgment of the Regional Social Court Berlin-Brandenburg L 25 AS 837/12 B ER of 23 May 2012; judgment of the Regional Social Court of Hessen 7 AS 107/11 B ER of 14 July 2011: „The exclusion from the social assistance under book II of the Social Security Code is not in line with the clearly defined non-

By the end of 2013, the Federal Social Court lodged a prejudicial question according to Art. 267 TFEU with the European Court of Justice which seeks an answer to this problem.[34] Should the Regulation prevail all job-seekers would be entitled to the social benefits from the very beginning of their stay in Germany. The German law would have to step back behind the European law. The case is still pending.

### *4. The European Convention on Social and Medical Assistance and Protocol Thereto*

#### 4.1. The guarantees of the Convention and the reservation made by Germany

To make things more complicated a third source of law comes into play, the European Convention on Social and Medical Assistance and Protocol Thereto. It was concluded in 1953.[35] Not all European Union Member States are parties to this treaty and not all treaty parties are members to the European Union.[36] The treaty guarantees the social benefits of a country to the citizens of another Member State on the basis of non-discrimination. Art. 1 reads: „Each of the Contracting Parties undertakes to ensure that nationals of the other Contracting Parties who are lawfully present in any part of its territory to which this Convention applies, and who are without sufficient resources, shall be entitled equally with its own nationals and on the same conditions to social and medical assistance (hereinafter referred to as „assistance") provided by the legislation in force from time to time in that part of its territory." Assistance means „ all assistance granted under the laws and regulations in force in any part of its territory under which persons without sufficient resources are granted means of subsistence"[37]. The Convention is applicable beside the EU law. This Convention also includes the classical social assistance for persons who have no income and will not have an income – according to Book XII on social benefits and also social benefits under Book II of the Social Security Code as the Federal Social Court decided in 2010.[38] After the decision of the Federal Social Court the German government made a reservation to the Convention together with the notification of the new legislation in social matters – as required by Art. 16 of the Convention - in December 2011, declaring that the social benefits under Book II of the Social Security Code will be excluded from the Convention: „The Government of the Federal Republic of Germany does not undertake to grant to nationals of the other Contracting Parties, equally and under the same conditions as to its own nationals, the benefits provided for in Book Two of the Social Code – Basic Income Support for Jobseekers – in the latest applicable version. In accordance with Article 16, paragraph b, second sentence, the Fed-

discrimination clause of art. 4 and 70 of the regulation 883/2004 which entered into force on 1 May 2010."

[34] Decision of the Federal Social Court B 4 AS 9/13 R of 12 December 2013; https://sozialgerichtsbarkeit.de/sgb/esgb/show.php?modul=esgb&id=167343

[35] http://conventions.coe.int/Treaty/en/Treaties/Html/014.htm

[36] F.e. Austria, Finland and with the exception of Estonia the Eastern European countries did not become parties to the European Social Welfare Agreement whereas Turkey, Iceland and Norway ratified it; for the list of ratification see http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=014&CM= 1&DF= &CL=ENG

[37] Art. 2 of the Convention.

[38] Judgment of the Federal Social Court B 14 AS 23/10 R of 19 October 2010.

eral Republic of Germany does not undertake to grant to nationals of the other Contracting Parties, equally and under the same conditions as to its own nationals, the benefits provided for in Book Two of the Social Code – Basic Income Support for Jobseekers – in the latest applicable version."[39] It argued that if the jurisprudence of the Federal Social Court applies extra communitarian citizens of States which ratified the Convention would be have more rights than EU citizens of States which did not ratify it.[40] Beyond there would be a different treatment of citizens of Member States which ratified and those of Member States which did not ratify. The reservation should establish an equal treatment of all EU citizens and guarantee that non EU citizens would not get more social benefits than EU citizens.

4.2. Legality of the reservation

Under the Vienna Convention on the Law of the Treaties a State may make a reservation to a treaty at the moment of signature, ratification, accession. However, Art. 19 lit. c excludes a reservation if it „is incompatible with the object and purpose of the treaty." Some German courts question if the reservation made by the German government is incompatible with Art. 19 lit. c of the Vienna Convention on the Law of the Treaties, as it limits a core provision, i.e. the equal granting of social benefits. One may wonder if this appreciation is correct, as only a limited part of the social assistance will be excluded for a limited group of persons.

More substantiated are the objections with respect to Art. 16. para. 2 of the Convention which provides: „Each Contracting Party shall notify to the Secretary General of the Council of Europe any new law or regulation not already included in Annex I. At the time of making such notification a Contracting Party may make a reservation in respect of the application of this new law or regulation to the nationals of other Contracting Parties." Germany made the reservation – together with the notification - only in 2011. The social assistance under Book II and XII was introduced in this form already in 2005; however the belated notification does not mean that Book II and XII of the Social Security Code could not be applied to citizens of the Member States to the Convention, as the notification is not a prerequisite for the application, and a Member State not fulfilling its obligations to notify shall not take advantage out of its own failure. This, however, raises the question if in 2011, 6 years after the adoption of the new legislation Germany still could make a reservation. Art. 16 para. 2 of the Convention allow for a reservation even after the entry into force of the Convention, but only with reference to a new legislation. In the given case the reservation made by the government did not refer to a new legislation but to the interpretation of the legislation by the Federal Social Court which is not the same. Therefore, many German courts came to the conclusion that the reservation is invalid.[41]

[39] http://conventions.coe.int/Treaty/en/Treaties/Html/014-II.htm

[40] Answer of the Federal Government to the question of a deputy, Bundestagsdrucksache 17/8699 33. p.

[41] F.e. Decision of the Regional Social Court of Bavaria of 14 August 2012; decision of the Regional Social Court of Berlin-Brandenburg of 9 May 2012, L 19 AS 794/12 B ER;. The research service of the Deutsche Bundestag comes to the same conclusion, Matthias Reuß, Wissenschaftlicher Dienst des deutschen Bundestags, Sachstand: Zur Zulässigkeit von Vorbehalten zum Europäischen Fürsorgeabkommen – WD 2 –

A third group of courts come to the conclusion that the reservation is valid. However, the exclusion of job-seekers from the social assistance means that persons protected by the Convention from the benefits under Book II would lead to a claim under Book XII of the Social Security Code, as it entitles a person to benefits in a subsidiary way. Art. 1 of this law reads: „It is the objective of the social aid to help the persons entitled to it to have a life in dignity." Art. 2 adds: „A person is not entitled to social aid, .....if he receives social benefits from other State organizations in charge of granting social benefits." The argumentation is that if a person is excluded from the social assistance under Book II of the Social Security Code the subsidiarity clause of art. 2 does not come into play, and the person will have a claim according to Art. 1 and Art. 17 of Book XII.[42]

Another group of courts hold that irrespective of the validity of the reservation under international law it could not come into force in German law for lack of a consent by the parliament. There is some dispute in the German scholarship on the question to what extent a reservation requires a consent by the parliament like a treaty.[43] As a rule the reservation is notified at the moment of the ratification and the parliament may include the reservation in its consent. In cases of posterior reservations an involvement of the parliament should be necessary as far as the reservation changes the application of federal law. Therefore, many courts qualify a posterior reservation as a treaty provision which requires the consent of the parliament in form of a statute according to Art. 59 para. 2 of the Basic Law.[44] In the given case the involvement of the parliament and the Federal Council seems the more necessary as the exclusion of job-seekers from the social assistance could lead to a claim on social aid under Book XII of the Social Security Code. This would have to be paid by the municipalities whereas the social assistance under Book II of the Social Security Code is financed by the Federation.

A third group declares that it is effective, however, the EU citizens who are concerned by the exclusion of the ALG II from the guarantees granted by the Convention have a right to benefits according to Book XII on social benefits which rules that persons are excluded from the benefits under this provision as far as they are in principle entitled to benefits under Book II. By the exclusion through the reservation these persons are not entitled to the benefits anymore.[45] Finally there are courts which refer to the Regulation 2004/883 which guarantees an equal treatment to all thereby setting aside to a large extent the application of the Convention with respect to EU citizens.

The Federal Social Court mentioned the Convention in its prejudicial question referred to the ECJ. It considered the reservation by the German government valid.[46]

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3000-035/12, not published.

[42] In this sense Regional Social Court of North-Rhine-Westfalia of 2 October 2012, L 19 AS 1393/12 B ER.

[43] Streinz, in: SACHS, MICHAEL *Grundgesetzkommentar* 1997, art. 59 para. 43 with further references, requires the parlamentarian consent, whereas Rojahn, in: V. MÜNCH/KUNIG vol. 2 art. 59 para. 52 denies it.

[44] Regional Social Court of Bavaria od 14 August 2012, L 16 AS 568/12 B ER, https://sozialgerichtsbarkeit.de /sgb/esgb/show.php?modul=esgb&id=154936; Regional Social Court of North Rhine-Westphalia of 2 October 2012 L 19 AS 1393/12 B ER nd L 19 AS 1394/12 https://sozialgerichtsbarkeit.de/sgb/esgb/show. php?modul=esgb&id=155779

[45] Decision of the Regional Social Court of North Rhine-Westphalia of 2 October 2012.

[46] Decision of the Federal Social Court B 4 AS 9/13 R of 12 December 2013, https://sozialgerichtsbarkeit.de/ sgb/esgb/show.php?modul=esgb&id=167343 para. 23.

*IV. Conclusion*

In recent times the European Union has been strongly criticized for being a sort of a salvation army of the private banking sector. The above standing article has shown that in the opposite field of activity, i.e. in social politics the EU is also very active with far-reaching consequences for the national social benefit system. The expenses for migrant workers are increasing. In July 2014 almost 300.000 EU citizens were entitled to social benefits under Book II of the Social Security Code, which means an increase by 17% since 2010.[47] The State paid family benefits for 660.000 children of migrants, 66.000 of them living abroad. Recently, the European Court of Justice decided that even seasonal workers are empowered to family assistance for their children who live in the country of origin of the seasonal worker.[48] This decision led to an increase of child benefits paid to children of EU citizens from other Member States by 30% or 600 million Euros per year. We observe the development of a „European social citizenship" which gives rise to some problems, as the social security systems are based on national legislation, there is no harmonization in this field, but only a coordination, mainly through the Regulation 883/2004. The funding is national, the access is more and more detached from such criteria as permanent residence or contribution to the system. This will have repercussions on the balancing of the social security systems which were not conceived for the extension to the European Union.

On the other hand it must be taken into consideration that migrant workers are important contributors to the national economy. They work in full-time jobs, pay taxes and social insurance fees. These migrants also contribute to the maintenance of the health care system, f.e. as elderly care nurses. Therefore, in order to come to a balanced evaluation of the situation all aspects have to be taken into consideration. If one looks exclusively at the expenditures for social benefits one will not grasp a full picture of the changes in the labour market in Europe. It is not only a question of costs but also of profits.

The article did not focus so much on the amount of money which is involved in the question, but it tries to point out the legal difficulties of the matter. Given the importance of social politics in a Europe which grants freedom of movement and prohibits discrimination it is indeed astonishing that the European legislature adopted directives and regulations in this field which do not produce legal security. They are open to contradictory interpretation and do not give clear guidelines to the States how to deal with questions of social welfare. It is telling that it is not the European legislature but the European Court of Justice which hopefully will bring some clarity. It will not be the last time that the judiciary will have to fill the gap which the European legislature created.

[47] Bundestagsdrucksache 18/223 p. 9, http://dip21.bundestag.de/dip21/btd/18/002/1800223.pdf
[48] ECJ of 12 June 2012, Joined Cases C-611/10 and C-612/10, para. 37 ss.